

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CHRIS SCHIMMOELLER)	
and)	
CONNIE LEMLEY)	
)	
COMPLAINANTS)	
)	
v.)	CASE NO. 2009-00096
)	
KENTUCKY-AMERICAN WATER COMPANY)	
)	
DEFENDANT)	

ORDER

Complainants have filed formal complaints against Kentucky-American Water Company ("Kentucky-American") requesting the cessation of all construction activity related to the facilities for which the Commission granted a Certificate of Public Convenience and Necessity ("Certificate") in Case No. 2007-00134.¹ Kentucky-American has moved to dismiss these complaints. At issue is whether the Commission has subject matter jurisdiction over the complaints and whether the allegations within the Complaints are sufficiently supported to require further investigation. Finding in the negative, we grant the motion and dismiss the Complaints.

On April 25, 2008, after a year-long review and the development of an evidentiary record exceeding 20,000 pages, the Commission issued a Certificate to Kentucky-American to construct, *inter alia*, a 20-million gallon per day water treatment

plant along Pool 3 of the Kentucky River and approximately 31 miles of 42-inch water transmission main to connect the proposed water treatment plant to its water distribution system. On or about June 10, 2008, Kentucky-American began construction.² Subsequently, a party to the Commission proceeding brought an action for review of the Commission's Order, which is pending in Franklin Circuit Court.³

On February 27, 2009, Ms. Schimmoeller submitted to the Commission a letter in which she requested that the Commission re-examine the need for the facilities. She alleged, *inter alia*, that changing economic conditions,⁴ the failure of the Bluegrass Water Supply Commission ("BWSC") to purchase a portion of the facilities' capacity, and the formation of a water commission to construct a water transmission main along the Interstate-64 corridor rendered the facilities' construction unreasonable.⁵ She further alleged that Kentucky-American was "failing to abide by the provisions of its [construction] permits."⁶

¹ Case No. 2007-00134, *Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of Kentucky River Station II, Associated Facilities and Transmission Main* (Ky. PSC Apr. 25, 2008) [hereinafter *Certificate Order*].

² Case No. 2007-00134, Notice of Kentucky-American Water Company (filed June 3, 2008).

³ *Citizens for Alternative Water Solutions, Inc. v. Kentucky Public Service Commission*, Civil Action No. 2008-CI-01055 (Franklin Cir. Ct. Ky. filed June 23, 2008).

⁴ [C]hanged economic circumstances nationally and internationally make your agency's assertion that KAW's project represented a least cost option no longer valid. Demand for water is certain to cool as heavy industry slows production. As an example, Toyota is producing fewer cars than expected in Georgetown. Toyota is a KAW customer.

Letter from Chris Schimmoeller to Jeff Derouen, Executive Director, Public Service Commission (Feb. 25, 2009) at 1.

⁵ *Id.*

⁶ *Id.*

In a subsequent letter,⁷ Ms. Schimmoeller alleged that Kentucky-American had substantially deviated from the facilities' approved plans and specifications. More specifically, she alleged that Kentucky-American had sought changes in its construction permits to permit the extended closure of several public roads along the path of the facilities and that these changes are contrary to the representation that the utility made in Case No. 2007-00134. At the same time, Ms. Lemley submitted a letter containing similar allegations and requested similar relief.

Considering these letters as formal complaints, the Commission established this proceeding on April 10, 2009, and directed Kentucky-American to satisfy or answer the Complaints. On April 20, 2009, Kentucky-American moved to dismiss the Complaints for lack of jurisdiction. Complainants have jointly responded to Kentucky-American's Motion to Dismiss. Ms. Schimmoeller has also submitted a request for a stay of Kentucky-American's construction activities.

In its Motion to Dismiss, Kentucky-American argues that the Commission lacks subject matter jurisdiction. It asserts that the Complainants seek to amend or modify the Commission's Order of April 25, 2008. As that Order is currently the subject of an action for review pending in Franklin Circuit Court, it argues, the Commission has lost jurisdiction to modify or amend that order. Kentucky-American further argues that its alleged failure to comply with construction permits and its extended closure of certain roads is solely within the jurisdiction of the Kentucky Transportation Cabinet.

⁷ Letter from Chris Schimmoeller to Jeff Derouen, Executive Director, Public Service Commission (Mar. 18, 2009) at 1.

As to Kentucky-American's first argument, we have previously held that the Commission lacks jurisdiction to amend or modify any Order that is currently pending judicial review:

Generally a lower tribunal loses jurisdiction to amend or modify a decision once that decision is appealed. Johnson Bonding Co. v. Ashcroft, Ky., 483 S.W.2d 118 (1972) (“[t]he general rule, with certain exceptions, is that the trial court loses jurisdiction over matters that have been appealed until mandate has issued.”); City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990) (“[a] notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court”).⁸

To the extent that the Complainants seek to reopen Case No. 2007-00134, we are without jurisdiction to act.

Two of the grounds that Complainants advance for initiating a new proceeding-- BWSC's failure to purchase a portion of the facilities' capacity and the formation of a water supply commission to construct a water transmission main along the Interstate-64 corridor from Jefferson County to Frankfort--were addressed in Case No. 2007-00134. While BWSC did not announce its decision to refrain from participating in the proposed facilities until after the Commission had issued a Certificate to Kentucky-American, we were aware of that possibility and factored it into our analysis of the economics of the approved facilities.⁹ Similarly, the Commission received testimony on the formation of a water commission during Case No. 2007-00134.¹⁰ Accordingly, we find that

⁸ Case No. 2004-00403, *The Union Light, Heat and Power Company's Motion for Extension of Filing Date and Continuation of its Current Rider AMRP Rates* (Ky. PSC Jan. 7, 2005) at 5.

⁹ *Certificate Order*, *supra* note 1, at 52.

¹⁰ See, e.g., Case No. 2007-00134, *Prefiled Supplemental Testimony of Greg C. Heitzman on Behalf of Louisville Water Company* (filed Feb. 11, 2008) at 6.

consideration of these arguments would be tantamount to reopening the prior proceeding and that the Commission lacks jurisdiction to take such action.

A proceeding that examines the continued need for approved facilities in light of drastically changed economic conditions, however, is distinguishable from merely reopening a closed proceeding. Old issues are not re-litigated. New evidence not previously in existence at the time of the original proceedings and economic conditions not reasonably foreseeable at the time of the original proceedings is considered to determine if construction of the approved, but uncompleted, facilities is still necessary, reasonable and economically prudent. The Commission has previously initiated new proceedings to examine the continued need for approved facilities.¹¹ As to this allegation, we have subject matter jurisdiction.

The Complaints on this issue, however, are devoid of any supporting evidence or analytical studies. Aside from the general statement that "changed economic circumstances" may affect the demand for water, they contain nothing to support the contention that the approved facilities are no longer necessary. Given that a lengthy proceeding on the facilities was completed less than ten months before the filing of the first Complaint and that a new investigation is likely to result in delays and the expenditure of significant resources, a new investigation should not be commenced based upon unsupported allegations and without some supporting testimonial or analytical evidence. The Commission has insisted on a similar showing in instances

¹¹ See, e.g., Case No. 9243, *An Investigation and Review of Louisville Gas and Electric Company's Expansion Capacity Study and the Need for Trimble County Unit No. 1* (Ky. PSC Oct. 14, 1985); Case No. 9934, *A Formal Review of the Current Status of Trimble County Unit No. 1* (Ky. PSC May 27, 1987); Case No. 2006-00564, *An Investigation Into East Kentucky Power Cooperative, Inc.'s Continued Need for Certificated Generation* (Ky. PSC Jan. 5, 2007).

where a complainant challenges the reasonableness of a utility's existing rates.¹² In the absence of such showing, those portions of the Complaint containing allegations that the proposed facilities are no longer needed due to changing economic circumstances should be dismissed.

The Commission finds that Kentucky-American's alleged failure to comply with the encroachment permits that the Kentucky Department of Highways has issued is outside our jurisdiction. The Commission's jurisdiction extends only to "the rates and service of utilities" and to the enforcement of the provisions of KRS Chapter 278 and regulations adopted to implement those provisions.¹³ A utility's use of state highways during the construction and installation of utility facilities does not involve "rates" or fall within the definition of "service."¹⁴ Furthermore, as the General Assembly has delegated to the Department of Highways specific authority to permit encroachments on public highways and to prescribe the conditions for such encroachments,¹⁵ any action to enforce these permits is solely within that agency's jurisdiction.

Complainants also argue that Kentucky-American has materially deviated from the approved construction by seeking the indefinite closure of certain roads in the

¹² See Case No. 1999-00082, *Kentucky Industrial Utility Customers, Inc. v. Louisville Gas and Electric Co.* (Ky. PSC Apr. 13, 1999); Case No. 9847, *Kentucky Industrial Utility Customers, Inc. v. Louisville Gas and Electric Co.* (Ky. PSC Feb. 2, 1987).

¹³ KRS 278.040(2) and (3).

¹⁴ "Service" includes any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility, but does not include Voice over Internet Protocol (VoIP) service;

KRS 278.010(13).

¹⁵ KRS 177.047.

vicinity of the construction area, that such deviation requires Commission approval, and that Kentucky-American has not obtained that approval. They further note that Kentucky-American had represented to the Commission in Case No. 2007-00134 that no road closure would exceed 15 minutes.

Our review of the record of Case No. 2007-00134 indicates a very limited discussion of road closures. In its Application, Kentucky-American presented plans and specifications that state that limited road closures would occur, but that all roads would be “fully operational after working hours.”¹⁶ We found no discussion on this subject. No party offered testimony on it or mentioned it in its written briefs. We made no reference to the subject in our Order of April 25, 2008.

Based upon our review of the record of Case No. 2007-00134, we find that, absent some unusual circumstance, a change in road closure periods would not constitute a material deviation in the approved facilities.¹⁷ Complainants do not allege

¹⁶ Case No. 2007-00134, Application of Kentucky-American and Water Company, Exhibit B, Sheets TC-1 and TC-2.

¹⁷ Complainants have attached to their Response to the Motion to Dismiss a letter from the Kentucky Transportation Cabinet addressing Kentucky-American’s request for total road closures at two points for several days. Regarding the request, the Transportation Cabinet states:

We believe this request constitutes a material change in the execution of the pipeline construction project that was approved by the PSC. We further believe the Cabinet does not unilaterally have the authority to modify how the pipeline construction is conducted. Therefore, we are requesting the KAW seek and obtain approval from the PSC to materially change how this pipeline construction project is conducted in regards to total road closures. Upon receiving approval from the PSC that total road closures are necessary to complete this project, we will work with KAW to modify the current encroachment permit.

Letter from Michael W. Hancock, State Highway Engineer, Kentucky Transportation Cabinet, to Linda C. Bridwell, Project Delivery Manager, Kentucky-American Water Company (April 10, 2009).

The Transportation Cabinet offers no explanation as to how it reached its determination that the extended road closures represented a material change in the project. In its letter, it does not indicate whether any review of the Commission’s Order of April 25, 2008 or the extensive record of Case No. (Footnote continued on next page)

that the change affects the facilities' cost, location, material compositions, or operation. Accordingly, the alleged change in road closure periods would not require Commission approval.

Having reviewed the record and being otherwise sufficiently advised, the Commission finds that:

1. While an action for review of the Commission's Order of April 25, 2008 is pending before a court of competent jurisdiction, the Commission is without jurisdiction to reopen Case No. 2007-00134 to reconsider arguments made in that proceeding or otherwise modify its Order of April 25, 2008.

2. As to Complainants' allegations related to the need for the approved facilities in light of changing economic conditions since April 25, 2008, these allegations are not supported by any accompanying evidence or analytical studies and are insufficient on their own to justify further proceedings.

3. The Commission lacks jurisdiction to address Kentucky-American's alleged failure to comply with the encroachment permits that the Kentucky Department of Highways has issued.

4. Kentucky-American's request to the Kentucky Department of Highways to lengthen the period of time that certain roads would be closed as a result of the

2007-00134 was conducted or describe the nature of its inquiry to determine the significance of the road closures to the project. While the Commission is grateful for the Transportation Cabinet's efforts to inform us of the requested road closures, we find the Transportation Cabinet's characterization of road closures as material is not binding upon us. Moreover, the Commission respectfully disagrees with the Transportation Cabinet's implication that the Commission should be the final arbiter in determining road closures. As previously noted, our jurisdiction extends only to the rates and services of public utilities. While the Commission has exclusive authority to determine whether the public convenience and necessity requires the construction of utility facilities, we have no legal authority or technical expertise to determine traffic engineering or road management matters.

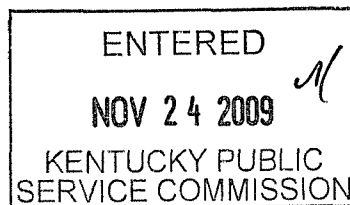
construction does not constitute a material deviation from the proposed construction presented in Case No. 2007-00134.

5. A hearing on the complaints is not necessary in the public interest or for the protection of substantial rights.

IT IS THEREFORE ORDERED that:

1. Ms. Schimmoeller's request for a stay is denied.
2. Kentucky-American's Motion to Dismiss is granted.
3. The Complaints are dismissed without prejudice.

By the Commission



ATTEST:


Executive Director

Nick O Rowe
President
Kentucky-American Water Company aka Kentucky
2300 Richmond Road
Lexington, KY 40502

Chris Schimmoeller
660 Mt Vernon Ridge
Frankfort, KY 40601