COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Application of Kentucky-American Water Company, a/k/a Kentucky American Water For Certificate of Convenience and Public Necessity Authorizing Construction of Kentucky River Station II ("KRS II"), Associated Facilities, and Transmission Line	))))))	Case No. 2007-00134

CITIZENS FOR ALTERNATIVE WATER SOLUTIONS' APPLICATION FOR REHEARING OF APRIL 25, 2008 ORDER GRANTING A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AUTHORIZING CONSTRUCTION OF KENTUCKY RIVER STATION II, ASSOCIATED FACILITIES AND TRANSMISSION LINE

Comes the Intervenor Citizens for Alternative Water Solutions (CAWS), and pursuant to K.R.S. 278.400, hereby petitions and applies for a rehearing with respect to the April 25, 2008 Commission Order granting a certificate of public convenience and necessity authorizing construction of Kentucky River Station II (Pool 3 Project) and associated facilities and transmission line by applicant Kentucky-American Water Company (KAWC).[1]

For the reasons stated below, the April 25, 2008 Order is unlawful and unreasonable, in conflict with the jurisdictional provisions of K.R.S. Chapter 278, and violative of the protection of Kentucky Constitution Article 2 against arbitrary government action. CAWS respectfully requests that the April 25, 2008 Order be vacated and that a new Order be entered upon proper application of applicable legal standards, and on that basis, that the Certificate be denied.

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[1] The April 25, 2008 Order was modified by subsequent Order of April 30 that replaced Appendix A of the April 25, 2008 Order with a new Appendix A to correct the depiction of the location of the proposed booster pumping station.

I. Jurisdictional Statement

K.R.S. 278.400 provides in pertinent part that:

> After a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty (20) days after the service of the order, apply for a hearing with respect to any of the matters determined. Service of a commission order is complete three (3) days after the date the order is mailed. The application shall specify the matters on which a rehearing is sought. The commission shall either grant or deny the application for rehearing within twenty (20) days after it is filed, and failure of the commission to act upon the application within that period shall be deemed a denial of the application.

K.R.S. 278.400.

Application is properly made in this instance, since CAWS is a "party to the proceedings," because the April 25, 2008 Order is a "determination . . . made by the commission in any hearing[,]" within the meaning of that phrase in the statute, and because this application for rehearing is filed within the twenty (20) day period and three (3) day service period prescribed by statute. The matters on which rehearing is sought are specified below.

II. Standard For Granting Application for Rehearing

As this Commission noted in *Re: Kentucky-American Water Company,* Case No. 2000-120 (February 26, 2001):

> An agency's authority to grant rehearing of a decision is discretionary and must be provided for by the legislature in the agency's grant of authority. (citations omitted). . . .
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> KRS 278.400 expressly authorizes the Commission to rehear 'any of the matters' determined in any hearing. It contains no express limitation upon the introduction at rehearing of the evidence introduced at the initial hearing. KRS 278.400 provides only that '[u]pon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing.'. . .
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> The primary purpose of rehearing in this proceeding is to reconsider our Order

> of November 27, 2000 in light of alleged errors and omissions. In Kentucky Power Company, Case No. 7489 (Ky. PSC Jun. 27, 1980), addressing the applicability and scope of KRS 278.400 in such instances, we declared:
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> > The administrative agency retains full authority to reconsider or modify its order during the time it retains control over any question under submission to it. The administrative record remains under the control of the agency under (a) the time for seeking rehearing has passed, or (b) the Commission denies an application for rehearing, or (c) having granted rehearing, the Commission issues order on rehearing.
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> The 'pendency' status of the case permits the Commission to reconsider its previous order without violating (which it has no intention of doing) the conditions of KRS 278.400 with respect to 'additional evidence.'

Re: Kentucky-American Water Company, Case No. 2000-120 (February 26, 2001).

III. Matters on Which Rehearing Of The April 25, Order Is Sought

K.R.S. 278.400 requires that a petition or application for rehearing of an order or determination "specify the matters on which a rehearing is sought."

CAWS respectfully requests rehearing on several grounds.

First, the Commission acted arbitrarily and unreasonably, and in a manner in conflict with statutory authority, in according significant weight to the proposed KAWC alternative over other alternatives, based on actions taken by KAWC to implement the KAWC preferred alternative prior to issuance of the CPCN. The Commission improperly relied on the efforts by KAWC to obtain permits and easements, and on KAWC's preliminary engineering design work, as the primary basis for rejecting other alternatives. This improper reliance on the actions taken by an applicant to advance a preferred alternative prior to Commission review and approval, has the effect of fatally skewing the evaluation of alternatives in a manner that prejudices the fair consideration of other alternatives, which will always be "more conceptual" or "less advanced."

The Commission's according of weight to the current status of the KAWC alternative relative to other alternatives, is fundamentally inconsistent with the Commission's obligation to fairly evaluate all alternatives prior to approval of any alternative.

Rehearing is necessary to correct a second error in the Commission's decision. Summarily rejecting the CAWS suggestion that incremental expansion of available water through aggressive leak detection and conservation, coupled with access to treated water from the City of Versailles, the Commission noted that Versailles' ability to deliver treated water during times of drought may be limited due to withdrawal restrictions. Yet the Commission failed to consider, or to require KAWC to engage the Division of Water in discussion as to whether and to what extent those limits could be temporarily modified, despite the Commission's acknowledgement and *reliance* on the ability of KAWC to do so as a basis for rejecting the LWC challenge to the sufficiency of the KAWC withdrawal permit at Pool 3.

Rehearing should be granted with respect to a third issue, which is the failure of the Commission, having relied on the KAWC acquisition of a fraction of the 104 needed private land easements as one of the bases for approving the KAWC request, to fully consider the infeasibility of the Pool 3 project in light of the refusal by some 15% of the remaining private landowners to grant an easement and the doubtful power of KAWC to condemn private lands in order to install a transmission line for the Pool 3 Project.

Rehearing is necessary on a fourth ground, which is the Commission assertion that the KAWC alternative constitutes a regional solution; when the evidence in the record indicates that the supposed partnership in the Pool 3 Project is illusory and that the participation of the BWSC

members in the project is unaffordable absent significant public subsidy to spend down the cost of the water.

Rehearing should be granted on a fifth basis, which is the improper weighing of the impact of the various alternatives on the Kentucky River Authority's budget, as a factor in determining whether to approve the requested Certificate.

Rehearing should be granted on a final ground, which is the unexplained and categorical dismissal of the testimony of Dr. Martin Solomon concerning future growth in demand. The Commission failed to provide any reasonable basis for summarily rejecting the use of actual data tracking the incremental growth of consumption of water under both average and peak demand conditions, and failed to independently assess and reconcile the wide divergence between historical trends and projected future demand.

1. The Commission Erred In Approving the KAWC Proposal Over Other Alternatives On The Basis Of The Current Status Of Project Implementation

The Commission, after extensive independent assessment comprising fully twenty-six (26) pages of the Order, concluded that "the proposed [Pool 3 Project] may not be the least cost solution to Kentucky-American's supply deficit. Our NPV comparison indicates that LWC's Pipeline proposal could be slightly less costly than the specific Facilities proposed by Kentucky-American." Order, p. 77.

Yet despite this conclusion, the Commission concluded that Kentucky-American's proposed facilities

> are reasonable, needed, economically feasible and will not result in wasteful investment or wasteful duplication of facilities. They represent a cost-effective approach to resolving Kentucky-American's supply deficit that can be immediately implemented

> with few regulatory or financial risks and are consistent with regional planning and use of the Kentucky River.

Order, pp. 79-80.

In so doing, the Commission relied on the efforts of the applicant to implement the proposed project, in a manner that undercuts fair and full analysis among alternatives, and which creates an unfair standard of analysis that will inevitably favor applicant's preferred approach and discount other, lower cost options, as occurred in this Order.

The Commission noted that "[t]o demonstrate that a proposed facility does not result in wasteful duplication, we have held that the applicant must demonstrate that a thorough review of all alternatives has been performed." Order, p. 30.

Yet, while embracing the concept that a thorough review of all alternatives must be performed, and that in considering whether a wasteful duplication of facilities will result, "all relevant factors must be balanced," it is clear that the Commission gave great weight to the status of development of the Pool 3 Project relative to other alternatives. In so doing, the Commission skewed the analysis of alternatives in a way that favored the KAWC project and prejudiced all other alternatives (even those that, as here, were acknowledged by the Commission to be lower-cost).

The Commission's evaluation of the reasonableness of the proposed facilities relative to other alternatives is found at pp. 77-80 of the Order. Repeatedly, the Commission credited the actions KAWC had taken towards implementation of the proposal as being reasons for approval of the alternative:

> Kentucky-American has completed the design and routing of the proposed facilities. It has received bids on all facets of the project and has obtained

> virtually all regulatory approvals necessary to commence construction. With exception of obtaining private easements, the project is ready to proceed almost immediately.

Order, pp. 78-9.[2]

The Commission contrasted this with the LWC proposal, which it dismissed as remaining "a concept that requires considerable work and is rife with uncertainty and risk."

A fair evaluation of alternatives would require that the applicant provide an equivalent and thorough assessment of the feasibility of each, yet in this case, KAWC has progressed towards implementation of only one alternative, and is rewarded by the Commission for having done so.

In light of the requirement of 807 KAR 5:001 Section 9 that permits for proposed facilities normally be obtained prior to filing for a Certificate, it will *always* be the case that the applicant's preferred alternative would have had more specific design, permitting, and routing work at the time of Commission review. If the Commission intends for a full and fair consideration of alternatives, it cannot grant controlling or indeed any weight to the relative status of design and permitting of a preferred alternative to other feasible alternatives, lest the Commission process be reduced to a rubber-stamping of a proposal presented as a *fait accompli* but for the actual construction.

In this instance, KAWC did not adequately and fairly explore all alternatives; in fact it fell to LWC to intervene in order to provide information concerning an alternative proposal that this

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[2] The Commission elsewhere noted the status of the KAWC project relative to other alternatives. On p. 42, the Commission criticizes the lack of feasibility and siting studies performed for the LWC option, and notes the obtaining by KAWC of all but one required encroachment permit. The burden is not on LWC, but on KAWC, to have performed comparable and adequate studies for all reasonable alternatives, yet failing to have done so, LWC is criticized for not having done so, and KAWC is rewarded for having done a thorough vetting, including routing, cultural resource and other studies, for only one alternative, i.e. the Pool 3 Project.

Commission has acknowledged to be lower cost.[3] That the Commission found "the LWC Pipeline proposal remains a concept that requires considerable work and is rife with un certainty and risk" is conclusive evidence that KAWC failed to "demonstrate that a thorough review of all alternatives has been performed" particularly with respect to the LWC pipeline alternative (an alternative that it repeatedly embraced as the best less than a decade ago).

Despite acknowledging the legal requirement that "[n]o utility may construct a facility to be used in providing utility service to the public until it has obtained a Certificate from this Commission[,]" the weight placed by the Commission on the relative status of implementation of the KAWC preferred alternative to other alternatives, encourages applicants to advance their preferred approach and to not to investigate other options to the same extent, since invariably that will prejudices the fair consideration of other alternatives, which will always be "more conceptual" or "less advanced." In reviewing the KAWC application, fair consideration of alternatives would require that the applicant provide comparable investigation of routing, permitting requirements, easement acquisition, and design; or that the Commission evaluate the various alternatives without giving weight to the one to which the applicant has committed resources prior to Commission review.

The Commission's approach to crediting actions taken towards implementing one alternative in advance of review and approval of the project, has a clear prejudicial effect on full and fair consideration of other alternatives, and is thus violative of K.R.S. 278.020.

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[3] The Commission noted that the Consortium and then the BWSC had examined numerous supply options and had scored the Pool 3 project the highest. What the Commission fails to acknowledge is that the BWSC Pool 3 option was not the same as the KAWC proposal, but in fact proposed a second pipeline to the Ohio River (which the Commission elsewhere in its order tacitly criticizes as being inconsistent with public policy). The KAWC proposal is not the same proposal as had been previously studied by O'Brien and Gere, any more than the LWC proposal was the same as that previously reviewed by that firm.

2. The Commission Arbitrarily Rejected The Alternative Of Combining Conservation Measures, Aggressive Leak Detection, And The Purchase of Finished Water From Versailles

CAWS argued that KAWC had focused exclusively on finding one supply-side option to meet all of its needs over the planning horizon; had selected an option that will impose significant present costs on ratepayers; and had rejected a range of options that in combination could augment and expand available supply and treatment capacity sufficient to satisfy the reasonable needs of KAWC customers in a more step-wise, flexible manner and at lower cost to ratepayers.

The Commission *agreed* that "Kentucky-American should aggressively pursue demand management and conservation" (both of which were mandated by the Commission of KAWC years ago and *neither of which* have been aggressively pursued) yet discounts the concept of a step-wise incremental approach to augmenting supply by moderating line loss, curbing demand through conservation, and use of emergency resource currently available at a fraction of the cost of the Pool 3 Project. The Commission falls into the same mode as KAWC – rejecting a combination of alternatives because no *one* of them would "alone pose[] a viable alternative to solve Kentucky-American's long-term water supply deficit." The Commission failed to adequately consider, or to require KAWC to adequately explore, the package of conservation, leak detection and mitigation, and purchase of treated water as interim solutions in order to meet incremental needs while the Dam 9 crest gates and SFWMG projects proceed.

Certainly, wasteful duplication encompasses arbitrary rejection of a package of options that could meet incremental growth in demand with incremental augmentation of supply through conservation and interconnection.

With respect to the Versailles option, the Commission states without citation to the record that "Versailles' ability to provide water during times of drought is limited due to restrictions upon its ability to withdraw from the Kentucky River in such times." Order at p. 51. Yet no testimony was presented by KAWC or by BWSC indicating that the possibility was explored with the Division of Water of temporary modifications to increase water withdrawals, despite the fact the Commission acknowledges, in rejecting the LWC challenge to the potential insufficiency of the DOW-granted withdrawal permit for Pool 3, that "DOW has historically granted temporary modifications to withdrawal permits to permit increased withdrawals". Order p. 45. The failure of KAWC to have explored the Versailles option, which could deliver treated water at a fraction of the cost of the Pool 3 project, and the acknowledgment by the Commission of the ability to seek temporary modifications to withdrawal limits on one hand but not the other, demands rehearing. On rehearing, KAWC should be required to explore more completely the possibility of acquiring water from the City of Versailles, including whether temporary modifications to the withdrawal permit allowing withdrawals to exceed Versailles permitted withdrawal, would be possible as an emergency source of water to address short-term needs for treatment water supply.

3. The Commission Erred In Failing To Give Adequate Consideration To Opposition By Landowners To Construction Of The Transmission Line Across Private Lands

As previously argued, the Commission erred as a matter of law in according any weight to the KAW preferred alternative on the basis that KAW's preferred alternative had progressed further into the permitting and land acquisition processes than had the other alternatives.

Assuming that the Commission could properly rely on the activities undertaken by KAWC to advance the Pool 3 alternative, the Commission erred in concluding that the Pool 3 project facilities "clearly have fewer financial and regulatory risks." Specifically, the Commission failed to adequately consider the inability of KAWC to acquire needed private easements to complete the transmission pipeline needed to deliver the treated water from the Pool 3 Plant.

By its own admission, KAWC will need a number of private easements in order to construct and maintain the lines, and a number of landowners have already refused to grant such easements. This refusal may render the project infeasible, since KAWC appears to lack authority under state law to condemn such lands.

In the December 10, 2007 Responses to Hearing Data Requests filed by KAWC, the question was:

> 1. In relation to the acquisition of easements from private landowners that will be necessary for the construction of the pipeline from its origin near Pool 3 to Central Kentucky, provide the total number of easements that will need to be obtained from private landowners, the number of easements that have been obtained to date, and the number of private landowners who have indicated a refusal to grant such a private easement.

The response was:

> At this time, a total of one hundred and four (104) easements are being sought from private land owners; ten (10) easement agreements have been obtained; and sixteen (16) private landowners have indicated a refusal to grant an easement; several stating a preference for no action until the PSC issues a certificate.

Response to Hearing Data Requests, Item 1 of 15 (December 10, 2007).

The acknowledged refusal of some 15% of the landowners for whom easements had not been obtained as of December 10, 2007 to grant such an easement, may make the project infeasible, since there is serious doubt that under Kentucky law, KAWC has the ability to condemn property

in Franklin or Scott Counties in order to transmit water into the Central Division system for sale at retail and wholesale to customers inside and outside of Fayette County.

It is axiomatic that a grant of the power to eminent domain is "to be strictly construed against the condemning party and in favor of the property owner[.]" 26 Am Jur 2D Eminent Domain, § 24. The power of eminent domain must be exercised in strict accordance with its essential elements to protect the constitutional right of the citizen to own and possess property against an unlawful perversion of such right." Id., § 30. It is "within the authority of the General Assembly to define the limits of the right of eminent domain and to establish the specific terms under which the condemning authority may exercise such power." *Kelly v. Thompson,* Ky., 983 S.W.2d 457, 458 (1998).

The General Assembly has provided water utilities with certain powers relative to condemnation and to use of rights-of-way. For example, the right of a company authorized under the laws of the Commonwealth to conduct the business of producing or supply water or who is engaged in the business of transmission or sale of water, to construct and maintain transmission and distribution lines "under, on, along, and over" any right-of-way used as a state, county or public way, is recognized under K.R.S. 416.140. Nonstock nonprofit water associations (of which KAWC is not one) are authorized to exercise the power of eminent domain under K.R.S. 416.130, and city utilities are granted, with an exception not applicable here, the same rights with respect to condemnation and eminent domain as given corporations and partnerships under K.R.S. 278.502 and 416.130. K.R.S. 96.547.

There appears to be **no** comparable general grant of power to privately-owned water utilities such as KAWC to condemn private lands for the purpose of construction or maintenance of such transmission or distribution lines.

KAWC, as this Commission has noted, "owns and operates facilities used to distribute water to approximately 116, 978 customers in Bourbon, Clark, Fayette, Gallatin, Grant, Harrison, Jessamine, Owen, Scott and Woodford counties. It provides wholesale water service to Midway, Nicholasville, North Middletown, Georgetown, Versailles, East Clark County Water District, Jessamine-South Elkhorn Water District, and Harrison County Water Association. It directly or indirectly provides potable water service to over 326,000 persons." Order, pp. 1-2. The Central Division, which consists of facilities and operations other than in Gallatin, Owen and Grant Counties (the Northern Division), contains "the overwhelming majority of Kentucky-American's facilities and customers" estimated at 97% of the total customers or 113,850. Order, p. 2.

There is nothing in the KAWC application, in the hearing testimony, or in the Commission's Order, that limits or dedicates the distribution or sale of the water that will be produced and transmitted from the KRS II project to residents of the Lexington-Fayette Urban County Government, or which limits the construction, maintenance or operation of the Pool 3 waterworks or transmission pipeline for the supply of water "to a municipality." Indeed, it would be reasonable to assume, in the absence of such constraints, that KAWC fully intends to utilize the water to meet the retail and wholesale needs of all customers in the Central Division through the KRS II project (and in fact, has proposed at terms requiring a 60$ million public subsidy to make them affordable, to reserve 5 mgd of production and transmission capacity for communities *other than* Fayette County). Indeed, there is nothing in the Order that prevents

KAWC from continuing to expand its wholesale water sales territory or retail system acquisitions, as it has during the previous years despite having identified a water capacity and supply deficit.

There appears to be **no** statutory authority for KAWC to condemn private lands along the approved transmission corridor in order to support installation and maintenance of the transmission lines in this circumstance. K.R.S. 96.080, the only potentially applicable grant of authority for condemnation of lands in order to facilitate maintenance or operation of waterworks or pipelines for the supply of water to a municipality, does not grant a power of condemnation to a private company in order to serve customers and water districts and customers in several counties.

K.R.S. 96.080, codified in a K.R.S. Chapter entitled "Utilities In Cities," provides that "[a]ny person constructing, maintaining or operating waterworks or pipelines for the supply of water to a municipality may condemn lands and material necessary to carry out these purposes, in the manner prescribed in the Eminent Domain Act of Kentucky." This statutory grant of authority has been construed, in a case involving the prior codification of K.R.S. 96.080 at KS 4814d-1, to provide a right of condemnation to the holder of a franchise to provide water to a municipality, of "such land or other property as may be necessary to carry into effect his franchise contract." *Thomas v. City of Horse Cave,* 61 S.W.2d 601, 604 (1933). Nothing in the *Thomas* decision or in the statute itself enables a private for-profit water company selling to multiple water districts and communities at wholesale, in addition to retail customers within and outside of Fayette County, to condemn land in furtherance of those activities.

The May 16, 1995 franchise agreement between Lexington-Fayette Urban County Government and Kentucky-American Water Company, grants Kentucky-American a nonexclusive franchise and incorporates the terms of Resolution 146-95, as adopted by LFUCG on April 27, 1995. That ordinance contains no language empowering KAWC to condemn property (nor would such a grant of the municipality's power be permissible) and is limited in scope to a twenty-year franchise to

> construct, erect, lay, relay, replace, operate and maintain a waterworks system and plant, embracing mains, pipelines, valve and valve boxes, hydrants, meters and meter boxes, service pipe and appurtenances, and any and all other facilities, appliances, apparatus and equipment necessary, used or useable, in the operation of a waterworks systems for the purposes of supplying and to supply water to the inhabitants of Fayette County for domestic, commercial, industrial and other purposes within the right-of-ways through, upon, over, along and under bridges, viaducts, sidewalks, public places and on the main public roads and highways in Fayette County, and on all streets, avenues and roads, running off from or connected therewith either directly or indirectly, and the privilege of opening and excavating the same without the payment of license or other fee as the business of the purchaser thereof may from time to time require, in constructing, erecting, laying, relaying, replacing, operating, maintaining or removing its pipelines and other works and equipment and together also with the right to transport water through its mains and pipelines to any other mains or pipelines, laid or to be laid, which are or may be connected therewith.

Lexington-Fayette Urban County Government Resolution No. 146-95, Section 1.

The franchise is limited, by its terms and by the jurisdictional limitations of the powers of LFUCG, to lands inside Fayette County.

As a company engaged in delivery and sale of waters to numerous entities *other* than to customers in Fayette County under the LFUCG ordinance, KAWC does not fall within the ambit of K.R.S. 96.080 as "person constructing, maintaining or operating waterworks or pipelines for the supply of water to a municipality[.]" Assuming, *arguendo,* that KAWC did fall within that

description, under the *Thomas* decision, the power to condemn would extend only so far as necessary to enable the company to meet the franchise terms. *Thomas v. City of Horse Cave,* 61 S.W.2d 601, 604 (1933). Nothing in the *Thomas* decision nor in the statute itself enables a private for-profit water company selling to multiple water districts and communities at wholesale, in addition to retail customers within and outside of Fayette County, to condemn land in northern Franklin or Scott Counties in order to serve retail and wholesale customers in counties other than Fayette.

As noted above, CAWS believes it was inappropriate and unlawful for the Commission to have given **any** weight to the KWC preferred alternative based on the acquisition by KAWC of permits and easements. To the extent that the Commission could lawfully do so, it acted arbitrarily and unreasonably in failing to accord as much weight to the inability of KAWC to secure the easements of those who refuse to voluntarily grant one, as it apparently did to the acquisition by KAWC of a fraction of the needed easements.

4. Rehearing Is Necessary Since The Commission Erred In Concluding That The KAWC Project Is Consistent With Regional Planning Goals

The Commission grounded the decision to approve the KAWC proposal in part on the supposed "consistency" of the project with "regional planning goals." It represents a significant effort to resolve not just a single water utility's supply problem, but to address central Kentucky's water supply problems. Kentucky-American's and BWSC's efforts toward joint ownership of the proposed facilities are a major advance in the regional planning that will insure better coordination among the region's water providers and a more orderly and effective development and use of the region's water resources." Order at p. 79.

The administrative record in no fashion supports the conclusion that this is a regional planning effort that will address central Kentucky's water supply problems." The reality is that the KAWC Project was "hijacked" from the BWSC,[4] and that BWSC was seeking a $60 million dollar public subsidy in order to make the BWSC investment in the project affordable. The record in this case reflects that it is the partnership of the Louisville Water Company, Frankfort Electric and Water Plant Board, North Shelby County Water District, West Shelby County Water District, U.S. 60 Water District, and Shelbyville Water and Sewer Commission, acting in partnership as the Shelby-Franklin Water Management Group (SFWMG) that will provide a real regional partnership. With the decisions by Frankfort and the City of Winchester[5] from the BWSC members that would potentially purchase an interest in the KAWC project, it is clear that there is *nothing* in the KAWC project of a regional or "partnership" nature.

5. The Commission Erred In Considering The Impact Of Using The Ohio River On The Kentucky River Authority As "Policy Support" For Its Decision

While asserting that "it does not enter into our consideration of 'need' and 'wasteful duplication," the Commission then determined that "we find broader policy support for authorizing construction of the facilities" in the potential deprivation of water withdrawal fees from using "the Ohio River as a supplemental source of supply to Central Kentucky's supply deficit[.]" April 25, 2008, Order p. 82. The Commission's reliance on this "broader policy support" renders the April 25 Order arbitrary and unreasonable as a matter of law.

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[4] Linda Bridwell acknowledged that while she wouldn't use the term "hijack," "it was something along that effect." T. Vol. P. 308.

[5] Which by formal action decided to pursue building its own water treatment plan.

The PSC is a creature of statute, and must find within the statute warrant for the exercise of any authority that it claims. *Boone County Water v. Public Service Commission,* Ky., 949 S.W.2d 588, 591 (1997). The powers of the Commission are purely statutory, and it has only such powers as are conferred expressly by the General Assembly or by necessity or fair implication. *Croke v. Public Service Commission of Kentucky,* Ky., 573 S.W.2d 927 (1978). As a statutory agency of limited authority, the PSC cannot add to its enumerated powers. *Boone County, supra,* at 591.

The considerations to be evaluated by the Commission in determining whether to issue a Certificate of Public Convenience and Necessity are two, as noted by the Commission. "To obtain such Certificate, the utility must demonstrate a need for such facilities and an absence of wasteful duplication." April 25 Order, p. 29. Yet inexplicably, while *acknowledging* that the issue "does not enter into our consideration of "need" and "wasteful duplication," the Commission relies on "broader policy support" in a statute charging the Kentucky River Authority with "proper maintenance" of the "system of locks and dams" to support the conclusion that the KAWC proposal should be approved.

This reliance on the "broader policy support" in the KRA enabling statute is wholly inappropriate, since the Commission cannot utilize criteria *other* than "need" and "wasteful duplication" in deciding whether to issue a Certificate. K.R.S. 151.700(2), which is the declaration of policy for the Kentucky River Authority, entrusts *that* agency, not the Commission, with the responsibility to provide for the proper maintenance of the Kentucky River locks and dams.

The Commission cannot create new grounds for approval or disapproval of Certificates, but is limited to consideration of whether the applicant has demonstrated need and an absence of wasteful duplication of facilities. The Commission "can neither add to the requirements established by the legislature for the issuance of a permit nor can it exercise authority not vested in it." *Department for Natural Resources and Environmental Protection v. Stearns Coal and Lumber Co.,* Ky., 563 S.W. 2d 471, 473 (1978).

Factually, it is inaccurate for the Commission to ground its decision approving the CPCN on the assumption of a negative impact on fee receipts to the Kentucky River Authority. In the first instance, there is no evidence of record that such loss of fee receipts would "necessarily" occur. Instead, while KRA chose to call no witnesses in the proceeding (despite the significance of its future plans for renovation of the dams, and of installation of crest gates, *to* the proceeding), the only evidence of record indicates a willingness by LWC testified under oath that it would consider making a payment to KRA for any lost revenue (as the Commission notes on p. 83 of the Order).

Further, the 2004 BWSC Study cited by the Commission, contemplated a pipeline north from the Pool 3 plant to the Ohio River, and, according to the testimony of Ms. Bridwell at hearing, using the Ohio River as a supplemental source of supply to the Pool 3 treatment plant has been contemplated by KAWC as well.

Finally, the concern with the inability of the KRA to fulfill its mandate seems somewhat selective, since despite the admission of the KAWC that it has not considered partnering with the KRA to fund necessary improvements in Dam 9, or installation of crest gates, they have not been

required to consider such a partnership in augmenting supply from the current pool as an alternative to constructing a new plant at Pool 3.

6. The Commission Erred In Failing To Properly Consider And To Resolve The Differences In Past Trends In Water Consumption And Future Projections Of Demand, And In Summarily Rejecting The Testimony of Dr. Solomon

Rehearing should be granted on a final ground, which is the categorical dismissal of the testimony of Dr. Martin Solomon concerning future growth in demand and the failure to reconcile significant discrepancies between projected future growth and historical growth based on actual data. The Commission failed to provide any reasonable basis for summarily rejecting the use of actual data tracking the incremental growth of consumption of water under both average and peak demand conditions.

CAWS argued in its post-hearing brief that KAWC's projections of future demand were much larger than past and current trends would indicate. As CAWS noted, in a CPCN proceeding, there is no penalty for overestimation of demand; in fact, there is a reward in terms of return on investment. Unfortunately, for the ratepayer, there is the penalty of rate increases to fund capacity development that might be better served through more realistic assumptions and more reasonably scaled improvements in system management and supply augmentation.

The prefiled direct testimony of Dr. Martin Solomon used six (6) years of actual data generated by KAWC showing that from 2000 to 2006, Kentucky American's maximum daily demand in normal weather increased by 140,000 gallons per day, or 0.14 mgd each year. Yet for 2006 to 2030, KAWC projected normal daily demand to increase much more dramatically, with a projected increase over the 24-year period of .58 mgd per year.

Rather than addressing on the merits Dr. Solomon's observation that the demand increase numbers for 2006-2030 are not in line with historic trends, and that using (and even *doubling* the historical annual increase in maximum daily demand from .14 mgd/year to .28 mgd/year,) the value is still substantially lower (in fact slightly less that *half*) than the estimated maximum daily demand increase projected by KAWC, the Commission summarily dismissed Dr. Solomon's methodology as "overly simplistic" and failing "to consider many of the factors that affect customer usage."

It is remarkable that the Commission would reject out of hand the use of **actual, historical data** to predict a reasonable range of incremental growth. Presumably, all of the "variables" that the Commission praises as having been considered in other studies, to wit, population growth, historical demand, weather, leakage, non-revenue usage, and conservation measures", Order at p. 35, have been in place through the historical period used by Dr. Solomon, and during that period, a **measured, documented** steady increase of only approximately .14 mgd in demand has occurred. KAWC has identified no factor or set of factors among the variables identified by the Commission that will dramatically change during the 2006-2030 period, yet for each year going forward, KAWC assumes an incremental annual growth in demand fours time higher than any historical trend would support. Rather than requiring KAWC to respond in a meaningful manner and to demonstrate the reasonableness of projected increases in light of historical trends, and rather than attempting to resolve this significant discrepancy in projected demand versus historical and current demand increases, the Commission sidesteps the issue by dismissing the analysis of historical data as "simple" and "overly simplistic." The

Commission owes it to the residents of central Kentucky, prior to approving a plant proposal that will saddle customers on day one with rate increases for capacity that will not be needed for 20 years (and which, if Dr. Solomon is correct, may not be needed well beyond that time) to independently scrutinize the assumptions made by KAWC and to explain and resolve the discrepancy between **projected** future growth in demand and the actual historical growth.

The Commission made clear in closing Case No. 2001-00117 that both "the extent of Kentucky-American's current supply deficit and the feasibility and adequacy of the potential solutions to such deficit will be examined in the new docket (i.e. in this case). Case No. 2001-00117, April 19, 2007 Order, p. 1. Such an independent assessment is certainly warranted to assure that the actual "need" has not been overstated, since unrealistic demand projections will result in construction of excess capacity and wasteful duplication.

CONCLUSION

For the reasons outlined above, CAWS respectfully requests that the Commission grant rehearing in this case, withdraw the April 25, 2008 Order, reconsider the case using the appropriate legal standards, and enter an Order on Rehearing denying the application of KAWC for a certificate of public convenience and necessity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of this brief have been filed with the Commission and that a true and correct copy has been served by first-class mail (and electronically) upon the following individuals this 16th day of May, 2008:

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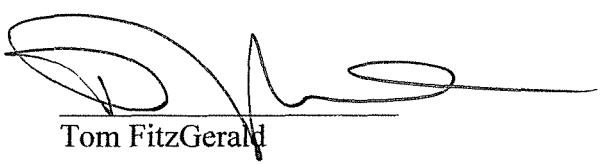

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