



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 790813

CITY OF MARTINSVILLE, VIRGINIA,
a municipal corporation,
and
CITY COUNCIL OF MARTINSVILLE,

Appellants

v.

BOARD OF SUPERVISORS FOR HENRY
COUNTY
and
HENRY COUNTY PUBLIC SERVICE
AUTHORITY,

Appellees.

APPENDIX

David B. Worthy
City Attorney
46 West Main Street
Martinsville, Virginia 24112
Counsel for Appellants

L. Dale McGhee
County Attorney
P. O. Drawer C
Bassett, Virginia 24055
Counsel for Appellee Henry County
Board of Supervisors

Edwin A. Gendron, Jr.
6 East Main Street
Martinsville, Virginia 24112
Counsel for Appellee Henry
County Public Service
Authority

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MOTION FOR DECLARATORY JUDGMENT FILED DECEMBER 5, 1978

The plaintiff respectfully represents as follows:

1. The Henry County Public Service Authority is a duly established authority for the service area of Henry County under "Virginia Water and Sewer Authorities Act." The entire area of Henry County has been designated to it by the Henry County Board of Supervisors for the purposes of water service.

3. The City Council of the City of Martinsville has authorized water service to Frith Construction Company for service outside the city of Martinsville and within the county of Henry in the area of specified water project area of the Henry County Public Service Authority.

4. That such connection and service would be outside jurisdiction of the city of Martinsville and in violation of jurisdiction of Henry County and the Henry County Public Service Authority.

5. That such connection would cause irreparable harm to the county of Henry.

6. That a temporary injunction would not cause irreparable harm to the city of Martinsville.

WHEREFORE, plaintiff doth move the Court to issue a temporary injunction restraining defendant from connecting water service to Frith Construction Company in Henry County and the Court determine the jurisdiction and rights of the parties for providing water service within Henry County.

DECREE ENTERED ON DECEMBER 5, 1978

Upon the Motion for Declaratory Judgment filed herein and the motion for temporary injunction, it is

ORDERED the city of Martinsville be enjoined and restrained for a period of 30 days from connecting water service to Frith Construction Company in Henry County, Virginia, or until dissolved, modified, enlarged or extended.

It is further ORDERED a copy of this order be served upon the members of the governing body of the city of Martinsville, the city manager, the city attorney, and Frith Construction Company, a corporation.

ANSWER OF DEFENDANT
FILED DECEMBER 13, 1978

Now comes defendant, by counsel, and for its answer to plaintiff's motion, states as follows:

1. Defendant is not advised as to the correctness of the allegations of numbered paragraph one of said motion, and they are accordingly denied.

2. The allegations of numbered paragraph three of said motion are admitted insofar as they state that defendant has authorized water service to Frith Construction Company for service outside the City of Martinsville; all other allegations of said paragraph are denied.

3. The allegations of numbered paragraphs four and five of said motion are denied.

4. It is not denied that a temporary injunction would cause irreparable harm to the City of Martinsville, but defendant denies that plaintiff is entitled to any injunction, either temporary or permanent, and avers that the temporary injunction heretofore granted in this cause violates defendant's rights and should be dissolved.

For further answer to plaintiff's motion, defendant alleges as follows:

5. The right of "municipal corporations in Virginia to furnish water to those who live beyond their limits" was established by the Supreme Court of Virginia in the case of Mt. Jackson v. Nelson, 151 Va. 396 (1928). The only

limitation upon this right was imposed by the legislature in 1976 in §15.1-875 of the 1950 Code of Virginia, as amended, which now provides that no municipal corporation shall extend its water supply system outside of its boundaries prior to obtaining the consent of the county in which such system is to be located; however, said section provides further that no consent shall be required for the operation of any such water supply system in existence prior to July 1, 1976, nor shall any consent be required for the orderly expansion of any such water system in existence prior to July 1, 1976.

6. Defendant, in regular session held on or about November 28, 1978, granted the petition of Frith Construction Company to connect a warehouse being constructed by Frith Construction Company to a water main of the City of Martinsville located approximately ten (10) feet from the boundary line of the property of Frith Construction Company upon which said warehouse is being constructed; that said property of Frith Construction Company and said water main of the City of Martinsville are located in Henry County, Virginia; that said water main is part of a water supply system operated by the City of Martinsville in Henry County; that said water supply system and said main were in existence prior to July 1, 1976.

7. In order for Frith Construction Company to connect said warehouse to said water main, it will not be necessary for said water main to be extended, enlarged, or expanded in

any manner whatsoever; that all that will be necessary to effect said connection will be for Frith Construction Company to lay pipe for the short distance between said warehouse and said main; that if the foregoing constitutes an expansion of the water supply system of the City of Martinsville and Henry County, it is alleged that any such expansion is certainly an orderly expansion of said system for which no consent from Henry County should be required, especially in view of the fact that the nearest main of Henry County Public Service Authority is several hundred feet away from the aforesaid warehouse.

WHEREFORE, having fully answered, defendant prays that the temporary injunction heretofore granted plaintiff be dissolved, that the Court adjudicate defendant's right to provide water to Frith Construction Co., as aforesaid, and that this suit be dismissed at the cost of plaintiff.

NOTICE OF MOTION
TO
ENLARGE INJUNCTION
FILED DECEMBER 19, 1978

TAKE NOTICE that on January 3, 1979, at 10:00 o'clock
a.m. in the Circuit Courtroom, Henry County Courthouse,
Martinsville, Virginia, I shall move the Court to make
permanent the temporary injunction issued herein and to
further enlarge and enjoin the defendant from contracting
for or connecting any additional water service within the
county.

PETITION TO INTERVENE AND COMPLAINT IN INTERVENTION
FILED DECEMBER 29, 1978

Comes now the Henry County Public Service Authority, by counsel, and represents unto the Court as follows:

1. That a motion for declaratory judgment and an injunction has been filed, abovementioned, which alleges that the City of Martinsville seeks to provide water service to a private customer located in Henry County, Virginia, within the jurisdictional area of the Henry County Public Service Authority as established by the Henry County Board of Supervisors.

2. That the Henry County Public Service Authority possesses a sufficient interest related to the abovementioned litigation to justify intervention therein.

3. That a copy of the complaint in intervention, which petitioner asks leave to file, is attached hereto, marked Exhibit "A", and incorporated herein by reference.

WHEREFORE, petitioner prays for leave to intervene in this action against defendant, and for leave to file the proposed complaint in intervention, and for such other and further relief as the Court may deem proper.

COMPLAINT IN INTERVENTION

The Henry County Public Service Authority respectfully represents as follows:

1. That the Henry County Public Service Authority is a duly established water and sewer authority created under Section 15.1-1239, et. seq., of the Code of Virginia, 1950, as amended.

2. That the Henry County Board of Supervisors has designated all of Henry County as the service area for the Henry County Public Service Authority pursuant to "Virginia Water and Sewer Authorities Act".

3. That pursuant to the authority vested in the Henry County Public Service Authority by virtue of the above, the Henry County Public Service Authority did construct and does operate a water supply system in Henry County, Virginia, known and designated as "U. S. 220 South Water Project".

4. That said project was financed and paid for by the issuance of revenue bonds pursuant to Section 15.1-1252 of the Code of Virginia and that said bonds are currently outstanding and have not be satisfied.

5. That the City Council of the City of Martinsville has authorized water service to a certain property owner located in Henry County, Virginia, to-wit, Frith Construction Company, Inc., for service of water provided by the City of Martinsville to Frith Construction Company,

Inc. in the County of Henry, Virginia, within the area designated as the jurisdictional service area of the Henry County Public Service Authority and served by the "U. S. 220 South Water Project".

6. That the Henry County Public Service Authority is in the process of construction of another water supply system wholly independent from the "U. S. 220 South Water Project" and has taken steps to finance said project through the issuance of revenue bonds.

7. That such water service by the City of Martinsville to Frith Construction Company, Inc. is in derogation of the rights of the Henry County Public Service Authority to serve customers in its service area; it impairs the obligations of the Henry County Public Service Authority to bondholders; and it will prevent further issuance of revenue bonds to prospective purchasers due to the fact that no guaranteed service area could be established.

WHEREFORE, the Henry County Public Service Authority does move that this Court enlarge the temporary injunction heretofore issued and make it permanent and determine that the Henry County Public Service Authority has sole and exclusive jurisdiction for providing water services in Henry County, Virginia, and such other remedies as may seem proper.

Testimony of R. W. (BOB) GRANT:

(Tr. 2) Q. What is your name please?

A. R. W. Grant.

Q. Mr. Grant, are you connected with the Henry County Public Service Authority?

A. I am.

Q. In what capacity?

A. The executive director.

Q. As the executive director, is one of your responsibilities the keeping of the minutes and records and resolutions of the Authority?

A. That's true.

Q. You've had an opportunity to examine this (handing paper writing to witness)?

MR. WORTHY: Which one is that (looking at document) . . . no objection.

Q. Mr. Grant, did you examine those documents?

A. (Examining documents) Yes sir.

Q. And what do those documents indicate or what are those documents?

A. One document is the resolution of the Board of Supervisors . . . the governing body of Henry County, establishing the Public Service Authority, back in 1964, and another one is the charter of the State Corporation

(TR. 3)

Commission, giving the charter to the Public Service Authority, to operate and maintain water and sewer systems in Henry County. Another is a resolution of the Board of Supervisors wherein they established the Public Service Authority, and another resolution is the Board of Supervisors establishing the jurisdictional area of the Public Service Authority. Another one expands the jurisdictional area of the Authority, to include all areas of Henry County. Another is from the State Corporation Commission, which acknowledges the resolution of the Board, establishing the jurisdictional area of the Authority, to include Henry County?

Q. The Henry County Public Service Authority was chartered and issued a charter under Chapter 28, known as the "Virginia Water and Sewer Authorities Act", is that correct?

A. That is correct.

Q. Now, in the issuing of a charter, was any particular project specified?

A. Initially, the project was the Collinsville Sewer Project . . . the Collinsville service area.

Q. Did the charter indicate jurisdictional areas for service of the Henry County PSA?

A. The charter initially was the service area of the Collinsville area.

(Tr. 4) Q. What does the term "jurisdictional area" refer to or mean?

MR. WORTHY: I think that would speak for itself, if it please Your Honor.

THE COURT: Let him make a try at it.

MR. WORTHY: All right.

A. As I know it, counselor, that's the area in which the governing body of the county has indicated to the Authority that they would be their area of operation.

Q. What area has been designated by the Henry County Board of Supervisors as the jurisdictional area of the PSA?

A. All of Henry County.

Q. Since the incorporation and the original specified projects, have additional projects or undertakings been specified by the governing body of Henry County?

A. Yes. The initial, as I indicated earlier, was the Collinsville area. Later on, in 1967, the Board of Supervisors directed the Public Service Authority to study the

feasibility of installing a water and sewer system in the upper regions of the Smith River in the 220 south area of Henry County. In 1974, I believe my date is correct, the Board then established and specified additional projects that they wanted the Authority to undertake. One of those was the upper regions of Smith River, and the other was the 220 south area of Henry County.

- (Tr. 5) Q. (Showing document to Mr. Worthy, prior to furnishing it to witness) Would you examine the document please?
- A. (Examined by witness) All right.
- Q. What does that document relate to, or what is that document?
- A. This is a resolution of the governing body of Henry County . . . the Board of Supervisors signifying the intention of the Board to specify additional projects to be undertaken by the Public Service Authority.
- Q. And what were they?
- A. Project No. 1 was the upper Smith River Sewer Project, and No. 2 is the upper Smith River Water Project, and No. 3 was the 220 South Water Project.

Q. Has that . . . with particular reference to the 220 south water project . . . has that project been undertaken?

A. Yes . . . after the Board of Supervisors specified the additional projects to be undertaken by the Authority, then it is the Authority's responsibility to seek out the proper financing for the project. The Authority proceeded with a method of financing, and acquired the required financing for that particular project. They received a federal grant for a portion of it, and then the remainder of the financing was acquired by the Authority. The project on the 220 south area has been completed.

(Tr. 6) Q. Would you briefly describe what the project involved, and what was constructed?

A. The project involves the construction of a water filtration plant, and the storage facility, which is a million gallon storage facility, and the water mains necessary to connect to the plant and storage facilities along Route 220, and tying into the water transmission mains in the existing subdivisions adjacent to the water main.

(Tr. 9) Q. Mr. Grant, did you have any correspondence with the City of Martinsville, in regard to a particular service for a particular customer known as Frith Construction Company?

A. I wrote to the city manager, indicating that there was . . .

MR. WORTHY: Objection . . . let's get the letter.

Q. Do you know where this particular property is located?

A. Yes, I do.

(Tr. 10) Q. Where is it located?

A. The building is located . . . may I use the map to . . .

MR. WORTHY: No objection.

THE COURT: It's within the area . . . no question about that . . . within this project area?

MR. WORTHY: I think that's correct. I can't tell from looking at the map, really.

(Tr. 11) Q. Now. you are indicating the building, which carries the caption "under construction"?

A. Yes.

Q. Is this property within the service area of this 220 South Water Project?

A. Yes.

Q. Do you have or are you serving customers in that area?

A. May I refer to the map?

Q. Yes sir.

A. This is Route 220 . . .

THE COURT: For the record, you better indicate what you are pointing to there, so the record will be accurate.

A. All right, sir . . . we . . .

Q. This indicates . . . 220 indicates U. S. Highway 220, does it not?

A. Yes . . . Highway 220 . . . we have a water transmission main down U. S. Route 220, and also have a . . .

(Tr. 12) Q. All right . . . let's indicate now, where that main extends . . . at what point?

MR. WORTHY: Let him outline it on there in ink or something.

Q. All right . . . just draw a line.

THE COURT: Is it within the right-of-way?

A. Yes sir . . . in the highway right-of-way . .

THE COURT: On the median strip?

A. No sir . . . it's on the east margin of the right-of-way. Our transmission main follows generally along Route 220 in that manner (indicating), and it also branches off of 220 onto Route . . . that doesn't have a route number on it . . . in this manner here,

and comes to this point, and then from there,
our transmission main follows this street
. . . then it serves the subdivision here
known as Arlington Heights, and it also
follows this west margin of Fontaine Street
down to this intersection.

Q. Mr. Grant, you have indicated that your line
follows along the east side of 220, from the
Industrial Park Road, up to an unnamed street,
which generally follows the outside boundary
line of what is known as the Industrial Park
. . . is that correct?

A. That's correct . . . as I know it, this is not
in the Industrial Park, and neither is this
in the Industrial Park (illustrating on map).

(Tr. 13) Q. All right . . . the area you have indicated,
shown on the map as "Office Building and
Supplies for Operational Center of Frith
Construction Company", is that correct?

A. State that again.

Q. These two buildings designated as "Office
Supplies . . . Office Center of Frith
Construction, Incorporated" . . . is that
inside or outside of what is known as the
Industrial Park?

A. As I know it, it's outside the Industrial

Park.

Q. Now, you have indicated your line follows Fontaine Road, over to the area of Smith River?

A. It goes to a street known as West Avenue, and Arlington Heights.

Q. Now, the various buildings indicated along the two streets running off of Fontaine . . . what type buildings are they?

A. Residential units.

Q. Is this the area you refer to as Fontaine Park?

A. It's Arlington Heights.

Q. Arlington Heights . . . I'm sorry . . . are you furnishing a supply of water to those residential units?

A. Yes.

Q. Do you have a water supply line in the area of the Frith Construction, or Frith warehouse now under construction, shown here as "under construction", in green?

A. We have a line on Fontaine Street, which is adjacent to the property that the warehouse under construction is on.

(Tr. 14)

Q. Mr. Grant, did you indicate to the defendant that you were prepared to provide water

service to this particular connection?

A. That's true.

Q. How was that indicated, and to whom?

A. A letter was written to Mr. Noland, the city manager.

Q. Do you have a copy of that letter?

A. Yes sir.

Q. I believe that's indicated as Exhibit D?

Q. Mr. Grant, what was the method of financing this particular project?

(Tr. 15) A. We applied for and received a commitment from HUD . . . Housing and Urban Development, for a million and a half dollars, and we also borrowed from Farmers' Home Administration, two million dollars.

Q. Mr. Grant, the financing of two million dollars from Farmers' Home Administration . . . how is that debt evidenced?

A. How is the debt what?

Q. Evidenced?

A. That's in the form of a bond we have with Farmers' Home Administration, that we have . . . and our covenant with Farmers' Home Administration is that we will repay the debt through service and connection charges, from the users of the system, within that service

area.

Q. Does the bond agreement and covenants indicate the project service area?

A. Yes. The bond resolution is all-inclusive of those . . . and it also includes the various exhibits that you have here.

Q. Mr. Grant, does the project have what is referred to as a mandatory connection fee?

A. The resolution identified here as Exhibit B, indicates that, and our covenant with the lenders has as a part of the resolution . . . this resolution of the Board of Supervisors, which indicates that it is a mandatory requirement.

(Tr. 16) Q. Mr. Grant, when were those bonds issued?

A. I'm sorry . . . I don't recall the date.

Q. Could you give us approximately the date?

THE COURT: It will be in the minutes of the Authority, won't it?

A. Yes sir. I have that information . . . I just don't recall it.

THE COURT: I assume there's no controversy about it. Give him the date.

MR. WORTHY: No problem.

Q. Mr. Grant . . . you have a copy of the bond agreement?

- A. I do.
- Q. Do you have it with you?
- A. No sir.
- Q. Can you have it here this morning?
- A. Yes . . . I could get it.
- Q. All right. Would that instrument indicate the date the bonds were issued?
- A. Yes sir.
- Q. This particular connection in question here today . . . Frith Construction Company warehouse . . . is that in the area that you are required to service, under your bond agreement?
- A. Yes.
- Q. Do the exhibits we have introduced, indicate the rules and regulations insofar as the mandatory connections and the fee for the connections?
- A. In the resolution of the Board of Supervisors, dated July 22nd, of 1974, under Section F, "Enforcement of Charges and Fees", it is also indicated.
- Q. That's contained in Exhibit B?
- A. Exhibit B . . . yes sir.
- Q. Mr. Grant, would you answer for Mr. Worthy?

CROSS EXAMINATION BY MR. WORTHY:

Q. Mr. Grant, you have testified that Henry County PSA has jurisdiction to operate throughout Henry County, but the Henry County Board of Supervisors saw fit, did they not, to place certain limitations upon that jurisdiction?

A. Not to my knowledge . . . from the jurisdiction.

(Tr. 21) Q. Well, I'm asking you to assume that the scale of the map is one inch to two hundred feet . . . just from looking at it with the naked eye, it would be a fair statement that it is over four hundred feet, wouldn't it?

MR. MCGHEE: I object to that . . . he has testified . . . whether scaled or not, is not in evidence. Whether it is or not, you can't expect a witness, not knowing what the scale is, to sit there and eyeball it, and say. I think he will have to prove that.

Q. I'm asking the witness if he can, by looking at the map, ascertain . . . assuming he has some knowledge of what an inch represents . . . if you can ascertain if it's more than four hundred feet away . . . your nearest

main is more than four hundred feet away from the nearest point of the warehouse, that's under construction?

THE COURT: Can you tell that, Mr. Grant, just by looking at the map . . . either you can or not?

A. Well, it would appear to me, Your Honor, that that's approximately two inches, from the nearest point of the building, to the highway right-of-way, and I don't know the scale there.

Q. Well, assuming, if you will, Mr. Grant, that
(Tr. 22) the scale is one inch equals two hundred feet, that it would put the warehouse approximately four hundred feet away from the nearest main, would it not?

A. I would say that there's approximately two inches between the two points there.

Q. And that exceeds your mandatory hookup distance, does it not?

A. We have a mandatory within three hundred feet.

Q. So the warehouse in question is not within the distance that you can require mandatory hookup, is it?

MR. GENDRON: I object. Mr. Grant said approximately two inches . . . he can't answer it.

Q. Well, assuming it's four hundred feet away, it's outside of your mandatory hookup

requirements, is it not, Mr. Grant?

A. It would be within the jurisdictional area, but we require mandatory connection within three hundred feet.

Q. And it's beyond three hundred feet, assuming this map is correct, is it not?

THE COURT: Assuming the scale is correct.

A. And assuming also that my interpretation of that being two hundred feet . . . yes sir, or two inches.

(Tr. 24) Q. Now, Mr. Worthy has asked you about a number of buildings on that map, which were served by the City of Martinsville. I believe that the orange boundary indicates the boundary of the Industrial Park. Are most of those buildings he asked you about, inside or outside of the Industrial Park?

A. As I know it, the majority of the warehouses, or the buildings rather, are outside the Industrial Park.

Q. Are outside of the Industrial Park?

A. As I would know it . . . yes.

Q. Do you know when those buildings began to receive services from the City of Danville?

(Tr. 25) A. Water service?

Q. Yes.

A. At the time they were constructed, but I don't know those dates.

Q. When did the Public Service Authority complete construction of the U. S. 220 South Water project?

A. I believe it was in the fall of '76.

Q. All right, sir, could you say of your own knowledge whether those buildings served by the City of Martinsville, have been served prior to the fall of 1976, or have began receiving service since that time?

A. The majority of the buildings were served prior to . . . at the completion of our plant.

(Tr. 58) Q. Mr. Grant, there was one question that I meant to ask that I overlooked when you were on direct. You have indicated that this project that we are referring to here is a one million gallon per day capacity. I don't believe I asked you what your present rate of consumption is?

(Tr. 59) A. About twelve per cent.

Q. At the present time you are only utilizing about twelve per cent capacity of that plant?

A. Yes sir.

Q. Is that rate of consumption sufficient to pay the indebtedness that you are obligated for?

MR. WORTHY: Your Honor, that's immaterial to this proceeding, and I object to it. We're here on the question of whether or not the City of Martinsville has the right to serve water in the area in question, and whether or not PSA has exclusive jurisdiction . . . whether or not they have enough customers to pay their bills is not germane to the scope of this proceeding.

MR. MCGHEE: If it please the Court, we have set forth in our Motion for Judgment as one of the reasons for the request for this injunction, that the failure to enjoin the city from providing this type service and similar type service in this jurisdiction, would cause irreparable harm to the county. The purpose of that is set forth in the allegations of the Motion for Declaratory Judgment. The purpose of the question is to establish that without additional customers, that the Public Service Authority cannot meet their financial obligations. Now, the relevancy of it . . . I'm not sure, but I will put it in . . .

THE COURT: I think you've gone far enough . . .
let's stop where we are.

Testimony of JOHN RICHARDSON:

(Tr. 26) Q. State your name please?

A. John Richardson.

Q. By whom are you employed?

A. By the Board of Supervisors of Henry County.

Q. In what capacity?

A. County Administrator.

Q. As County Administrator, is one of your
responsibilities to serve as the clerk of the
Board of Supervisors?

A. That is correct.

Q. As Clerk of the Board of Supervisors, is it
your responsibility to keep the minutes and
records and resolutions and ordinances approved
or adopted by the Board of Supervisors?

A. That's correct.

Q. Have you had occasion, at my request, to
examine the records of the minutes of the
Board of Supervisors, since 1961?

A. Yes, I have.

Q. Has the Henry County Board of Supervisors
approved at any time, and to any extent, by
resolution or ordinance, the service of water

(Tr. 27) in the confines of Henry County, by the City of Martinsville?

MR. WORTHY: Objection . . . that calls for a conclusion. If he has any documents or any resolutions to offer on that point, that would be in line, but to allow the witness to state his conclusion as to what they may or may not have done, I would submit is invading the province of the Court.

Q. If it please the Court, if we had the resolutions . . . if they had been adopted, we would have them here. The question is, are there any. If there are any, they would speak for themselves and should be introduced. If the answer, on the other hand, is no, there aren't any, then there's nothing to bring here.

THE COURT: All right. I will overrule your objection then.

Q. Answer the question please. Do you recall the question?

A. Right . . . I have gone back through the record books of the Board of Supervisors, and at no time have I been able to find any resolution passed by the Board of Supervisors . . . in regards to the question you asked me.

Q. Authorizing . . .

A. Authorizing the city to go outside the

confines of the city limits.

(Tr. 28) Q. Mr. Richardson, are you familiar with the document in regard to the regional planning for water and waste water service . . . a comprehensive plan?

A. Pretty much so.

Q. What is a proper styling of that document? What is the name of it?

A. It would be the "Metropolitan Regional Water and Waste Water Plan", by the West Piedmont Planning District Commission.

Q. Has that plan been adopted by Henry County?

A. It has.

Q. Are you aware of the requirements for adoption for that particular plan . . . when it becomes effective?

A. Well, basically when the regional plan becomes effective for all localities within the planning district, four localities must adopt the plan.

Q. Do you know of your knowledge whether that plan has been adopted by four localities?

A. It has been.

Q. Has the original plan been updated?

A. It has been.

Q. Has that been duly adopted by four localities?

A. Yes.

Q. Do you have the plan, and the update in your possession?

A. Not with me today.

Q. Do you have it in your possession as County Administrator?

(Tr. 29) A. That's correct . . . it's in my office..

Q. Could you have that available for the Court today?

A. Yes.

Q. What action, if any, did the Henry County Board of Supervisors take in regard to instituting this legal action, seeking to enjoin the City of Martinsville from connecting to water customers within Henry County, and particular with reference to this particular Frith Construction Company warehouse?

MR. WORTHY: We will stipulate you have authority to bring the suit, and I assume you stipulate we have authority to defend it.

Q. Would you answer, please?

A. What was the reason they brought the suit?

Q. What action did they take, if any . . . was there a resolution or ordinance or any action by the Board, to bring this action?

A. It was a resolution by the Board of Supervisors to bring this action.

THE COURT: He stipulated that.

Q. Do you have the vote?

A. Unanimous.

Testimony of GEORGE BROWN:

(Tr. 33) Q. Now, you are Director of Public Works?

A. Yes sir.

Q. For how long have you been Director of Public Works?

A. Since '56.

Q. Would the water treatment plant and water supply system of the City of Martinsville, be under your jurisdiction?

A. Yes sir.

(Tr. 34) Q. Inviting your attention to Defendant's Exhibit A, there are, are there not, a number of buildings outlined in blue thereon, which are being served by the City of Martinsville?

A. That is correct.

Q. And outlined in dark blue are mains extending out into the Industrial Park, and surrounding territory?

A. Yes . . . that's the city's water system.

Q. How long have those mains been in existence in Henry County, in the Industrial Park area, approximately?

A. Well, the contract was let September 26, 1962. One hundred eighty days was allowed, maximum, for the completion of the tank and water lines.

Q. Now, step down from the witness stand, if you will, and point out to the Court on Defendant's Exhibit A, the number of properties owned by Frith Construction Company, which are now being served by the City of Martinsville?

A. First, this is the water system going into the area through here, and here, and this being 220, and Frith Construction Company office is located here in this area here, and a warehouse located here, and Martin Processing and DuPont Warehouse No. 1, and this building is located here is Central Storage, for Frith Construction, and the large DuPont Warehouse No. 2 was built by Frith Construction, and all of the buildings that you see down on the Hedgecock property, number one, two and three here . . . Martinsville Glaze Products in this area . . . I'm not sure which other buildings Frith was involved with, but these were the ones that we dealt with him on.

(Tr. 35)

Q. Are these still owned by Frith Construction Company and leased to the various firms, that are using them for storage purposes?

A. That's my understanding, and our agreement was with Frith Construction, for the water service.

Q. You may resume your seat on the witness stand . . . an existing main for the City of Martinsville is shown going by the warehouse outlined in green, which is presently being constructed . . . approximately how far away from that warehouse in terms of feet would that main be?

A. At present we have checked it . . . it's within thirty feet of the building.

Q. Now, in order for the City of Martinsville to furnish . . . what kind of water service has Frith Construction Company requested?

A. They have requested a connection to lines of sufficient quantity to provide for fire protection, and also domestic connections which is to provide services to the bath facilities in the warehouse, and the use of the water in that warehouse would be very, very low.

Q. All right . . . in order to provide the type of service that they have requested, what . . . would it be necessary to extend any existing main?

(Tr. 36) A. No.

Q. Would it be necessary to enlarge any existing main?

- A. No. sir.
- Q. Would it be necessary to construct any new main?
- A. No sir.
- Q. How much water per month, based upon the consumption by other warehouses in the area, would this warehouse require?
- A. In talking to a member of the Frith Construction firm, it is estimated to be 8,000 gallons per month.
- Q. All right. What is the present capacity of the Martinsville water treatment plant and water supply system?
- A. We have a treatment capacity of six million gallons per day.
- Q. What is the present consumption?
- A. Based on the records at the water treatment plant, 4.3 million gallons per day.
- Q. And approximately how many gallons per day would this warehouse be using?
- A. A very minimum of 8,000 per month, divided by thirty days . . . a very low rate.
- Q. Approximately how long has the City of Martinsville served Frith Construction Company, in this area?
- A. Since . . . well, the first conveyance on which the DuPont Warehouse No 1 was constructed, was 1965. That covered also the

water line extension.

(Tr. 37) Q. Mr. Brown, you indicated that the original contract for extending lines into this area, from the City of Martinsville, was let September 26, 1962, is that correct?

A. That's correct, sir.

(Tr. 39) Q. At the time the original line was constructed, the line ran from the city, into the city's land, owned by the city, known as the Industrial Park?

A. That is correct.

Q. There was no service outside the Industrial Park land, when the line was originally constructed, is that correct?

A. No sir.

(Tr. 41) Q. Do you have any knowledge of the City of Martinsville seeking, or the governing body of Henry County granting authority to extend lines for service from the city into the county, for purposes of serving customers located in the confines of Henry County?

A. I know of no instrument or ordinance providing for it.

THE COURT: You spoke about this contract of 1962?

A. Yes sir.

THE COURT: Was there any negotiation with the county
(Tr. 42) that day to your knowledge?

A. There were discussions . . . yes sir . . .
with the county, concerning the development
of the Industrial Park, and the provision
of water service.

Industrial Park at that time?

A. That's correct . . . yes sir.

THE COURT: All right.

Q. The purpose, when the lines were originally
constructed from the city to the Industrial
Park, was for the purpose of providing water
service to land owned by the city, is that
correct?

A. That was the purpose, yes sir.

Q. And the purpose was supplying water to that
area owned by the city, was for the purpose of
developing the land for commercial purposes,
is that correct?

A. No sir . . . for industrial purposes.

(Tr. 43) Q. Is it true that the city has under its current
capacity, indicated that it will be in a
deficit as far as water capacity is concerned,

within a short period of time?

A. Well, I couldn't say that we would have a deficit. I could respond in this manner . . . we did a survey of industry within the city . . . a number who contemplated expansion. Based on those expansion plans, it was necessary for us to expand our facilities to meet that new anticipated demand, and we have planned for that.

Q. You have plans now for the increasing of your capacity, is that correct?

A. That is correct, sir.

Q. To what extent?

A. We will be converting from the rate of six million gallons per day, treatment capacity, to ten million gallons per day.

Q. And the purpose of that increase, if I understand it, is to provide water service to users within the city?

A. To those users that contemplate expansion, which were those primarily within the city. I might add, there were a couple within the Industrial Park who talked about the expansion program, but were not concrete enough to be included.

Q. Mr. Brown, with the city's contract with these users outside the city . . . is that an

interruptable contract?

(Tr. 44) A. All services in the county are subject to a provision that first priority will be given to the in-city customer.

Q. They aren't guaranteed or assured of water service?

A. To the degree that the contract provides for and the facilities they are aware of. They are aware of the provision I mentioned, of first priority to the city.

Q. Would it be fair to say then these contracts for service outside the city, in effect say that, "We will serve the city, and if we have any water left, we will let you have it"?

A. Well, as I said, first priority is to the in-city user. Could I make one comment concerning that, Your Honor?

(Tr. 48) Q. Are there any limitations upon the amount of water that the city can deliver to this building?

A. Well, there is a limitation on how much we could deliver from the principal city system across the river . . . yes sir.

(Tr. 49) Q. Well, my question is simply this . . . if this building were to be used for any conceivable

purpose, would you be satisfied that the City of Martinsville could provide adequate water supply?

A. No sir . . . I would have the same concern for any building . . . whether it's inside or outside, as to whether it would be useful.

Q. How many buildings, to the best of your knowledge, on this map, have been connected to the city water, since the fall of '76?

A. I don't have it as a matter of record. I would assume possibly two . . . one or two.

Q. Which two would they be?

A. The new warehouse, Pannill Knitting Company, and possible the new warehouse in this location, and perhaps one of these buildings here (on map).

Q. So you indicated perhaps the Martinex Fabrics building, and the Pannill Distribution Center, as shown on the map?

A. And possibly only the Pannill building . . .

(Tr. 50) I would have to have my records, to be sure of this.

Q. All right, sir. I assume from that, you may be saying nothing has been connected since '76?

A. It's a possibility . . . again, I do not have the records to show that right now.

Q. Mr. Brown, was the approval by City Council,

of Frith Construction Company's petition, before or after the city received notice from the Public Service Authority, that the Public Service Authority desired to provide this service.

Q. You're speaking of the letter from Mr. Grant, to Mr. Noland.

A. Yes.

Q. Final approval came after that. I might add, City Council, on its first consideration of the matter, asked that I talk with Mr. Grant, concerning the application for water service, and I did that, and later on the letter did come to Mr. Noland, and at the next meeting, Council did give final approval of it.

(Tr. 54) Q. Well, Your Honor, I asked Mr. Brown if the city was able to provide adequate fire protection without any objection from counsel, and he said they were, and I have here a report from Wyllie and Wilson, which indicates they are not able to provide adequate fire protection, and I simply want to put that in the record.

THE COURT: All right . . . I overrule the objection.

Q. Mr. Brown, you have already indicated that you are familiar with this report. I will ask you if this report was prepared by Wyllie and Wilson, for the City of Martinsville?

A. (Looking at document) Yes.

(Tr. 55) Q. All right . . . Your Honor, I would just like to offer this as the plaintiff's exhibit.

THE COURT: Just read into the record that part you want.

Q. I ask you if you would read the second paragraph to the introduction of this report?

A. "Several large industries and warehouses have recently located in an area south of Smith River, along Highway 220. This Industrial Park section is owned largely by the city and is supplied water by the city. However, the water supply is inadequate for fire protection, and is resulting in the development of an area of warehouse type buildings, of a low cost per square foot evaluation".

Testimony of BERNICE K. FRITH;

(Tr. 61) Q. On this particular warehouse that Frith Construction Company is constructing in the area in question, which is outlined in green on Defendant's Exhibit A . . . to whom did you apply for water service?

A. To the City of Martinsville.

Q. Did you apply for water service to the Henry County PSA?

A. No sir.

Q. And what was your reason for applying to the City of Martinsville?

A. Well, the property or the building, and the property on which it is situated, is on the property which was a part of the city's Industrial Park, and on property that we acquired from others. There were lots of reasons . . . I believe I told City Council, and it's a matter of record, that I appeared before Council for the thirteenth time, to request water in that area. We . . . there are many reasons . . .

Q. How many properties do you have there now, presently in that area, which are served by city water, approximately . . . how many warehouses do you have there now?

- A. Well, we have more than warehouses
Yarn Carriers is a manufacturing concern,
which we still own. Martin Machinery is
a property we have recently disposed of,
which is not a warehouse. Martinex
Fabrics which we still own, is not a
(Tr. 62) not a warehouse . . . it's a manufacturer,
and my own office and warehousing facility
for our own use. I would say ten to
eleven buildings.
- Q. With what insurance company do you have
fire insurance for these various properties?
- A. Well, that's the first thing we have to do.
We have to go to our underwriters, and
that's Industrial Risk. Their district
office is in Richmond, Virginia, and when
you consider the value . . . not necessarily
the value of the real estate, but the
improvements thereto, and the value of the
contents. The DuPont Warehouse has had as
much as forty million dollars worth of
fiber under one roof. That's approximately
a ten acre plant, and that's indicated on
the drawing.
- Q. That's a warehouse that's owned by the
Frith Family Trust that leased to DuPont,
is that correct?

A. That is correct . . . yes, and we take into account a lot of things . . . the building is almost the least of it.

Q. Who is your insurance with on these various buildings?

A. Industrial Risk Insurance.

Q. All right . . . when you apply for insurance, is part of the application the source of your water supply?

A. Well, we have to do pretty much what they tell us. We go to them, and we say, "We would like to do this".

(Tr. 63) Q. Do you have to let them know where your water supply is coming from?

A. Yes sir . . . that's a requisite.

Q. Have you ever had any trouble getting fire insurance on these properties, with the city water?

A. No sir.

Q. Have you applied for your fire insurance on this warehouse under construction?

A. As a matter of fact, I have coverage.

Q. And what representation, if any, was made to the company, concerning your water supply in this case?

A. Well, at this time, we only have builder's

risk, but . . .

Q. Have you discussed getting a factory risk upon completion of the building?

A. Yes sir . . . we do that prior to construction.

Q. And what was your reason for applying for city water with reference to this building?

A. Well, we have to have the lowest possible insurance coverage. We have to do that to make it economically feasible, to even bring out the project.

Q. Have you gotten that with city water?

A. We have always gotten that, yes sir.

Q. Can you tell us approximately how far away the nearest Henry County PSA main would be, from the warehouse?

(Tr. 64) A. Yes. If I can refer to my notes, I can tell you within a foot or two, I believe. To the main, as best I can determine, four hundred thirty feet, from the building.

Q. All right, how far approximately is the city main?

A. The city main at the closest point is within eight feet. It's supposed to be ten feet away, but we had a grading problem, and it was too dangerous, so we fudged by about two feet at one corner, and we advised city

management of that.

Q. You relocated the main?

A. Yes sir . . . that's correct.

Q. But that main had been there since about 1965?

A. Oh, it had been there that long, I would say . . . yes sir.

Q. Mr. Frith, as the saying goes, "All I know is what I read in the Martinsville Bulletin", and what I read in the Martinsville Bulletin indicates that you have publically taken the stand that this is a dispute between the city and the county, and it's immaterial to you. Is that a fair statement of your position?

A. I think it would be fair to say that we would like . . . our posture has been somewhat aloof in these matters.

(Tr. 65) Q. Has Mr. Grant, with the Authority, indicated to you that they would provide you the . . . were willing to provide to you the necessary water service over there?

A. Yes sir. I approached Mr. Grant a few months ago, when we were considering this project

initially, and I think the conversation was something like this . . . "Bob, if the city refuses to serve us water for this project, would the Public Service Authority be in a position to give us water", and he gave me an affirmative answer.

(Tr. 69) Q. Mr. Frith, do you recognize this circle here (on map)?

A. Yes. It would appear to be the city water tank, plus the storage tank, which is seven hundred twenty feet from my building.

Q. Who built that tank?

A. The City of Martinsville.

Q. Do you recognize this circle too?

A. I have to get oriented here . . . Continental Can . . . no sir . . . the one to the right is my own tank. It would appear to be that . . . we own the tank at the top of the hill on our property, and that's additional protection for the large roughly ten acre DuPont Warehouse.

Q. Why was that tank built?

(Tr. 70) A. Well, the city required us to do it for water protection. We built the plant without water protection, and without having a commitment

from the city, and that was a requisite for the tap. The other round blue dot would be the city's 400,000 gallon storage tank.

ARGUMENT OF COUNSEL

Counsel for Appellant:

(Tr. 81) MR. WORTHY: If the Court please, as the Court may have gathered, the right of the city of Martinsville to sell surplus water outside of the city limits . . . we are not looking to our charter or any statute or any kind of statutory provision for that right, because that's a right, as these gentlemen

(Tr. 88) rights . . . where you have two competing utilities . . . granted we are acting in a proprietary capacity, and so is Henry County

Counsel for Appellee Henry County Board of Supervisors:

(Tr. 94) is not exclusive. It's true that they do not have exclusive authority . . . they do not have exclusive authority to this extent, and this extent only . . . when an area is designated for service by a Public Service Authority, as this area was, if there is

existing at that time a franchise private
supplier . . .

MR WORTHY: Public or private?

MR McGHEE: There is a franchised public
supplier . . as there was in this case . . .
a subdivision already supplied . . . the
authority wouldn't have the exclusive
jurisdiction to serve . . . that franchised
private utility supplier could continue to
serve water, and the Public Service Authority
couldn't go in competition with it. If there
is a public supplier . . . the town of
Ridgeway . . . the town of Ridgeway is in
this designated service area, and has a
water supply system, and the authority
couldn't go in and run lines throughout the
town of Ridgeway in competition with the town
of Ridgeway, but that's the extent of the
restriction. Otherwise, they do

LETTER OPINION OF TRIAL COURT FILED FEBRUARY 1, 1979

February 1, 1979

Mr. L. Dale McGhee
Philpott and McGhee
P. O. Box C
Bassett, Virginia 24055

Mr. David B. Worthy
Stone, Joyce, Worthy & Stone
P. O. Box 1432
Martinsville, Virginia 24112

Mr. Edwin A Gendron, Jr.
Gendron, Kirby & Smith
20 Walnut Street
Martinsville, Virginia 24112

Re: Board of Supervisors of Henry County
v.
City of Martinsville, et al

Gentlemen:

The Court has had this matter under consideration since the ore tenus hearing of January 3rd.

The city contends that its rights are not statutory but are its common law right to dispose of surplus water as established in Town of Mount Jackson v. Nelson & Bauserman, 151 Va. 396 (1928).

In 56 Am Jur2d at page 621 under the caption MUNICIPAL CORPORATIONS this is said:

"In the absence of express constitutional or legislative regulation, it is generally held that a municipal corporation, in conducting extraterritorial activities such as public utilities is subject to the conditions in force within the outside territory in which it acts. It has been declared broadly that a municipality may not compel consumers outside its corporate limits to purchase

commodities or services from it, and that, on the other hand, it cannot be compelled to furnish commodities or services to non-residents."

The Court feels that §15.1-875 and §15.1-1250.1 of the Code of Virginia of 1950, as amended, are not applicable to this situation.

When the City of Martinsville undertakes to dispose of its surplus water outside of the municipality and within Henry County it is subject to legislative control of the Board of Supervisors of Henry County and the jurisdiction which it has conferred upon its Public Service Authority.

The Court, therefore, feels that the injunction should be made permanent. The appropriate Decree may be prepared.

With best wishes, I am

Very truly yours,

/s/ W. Carrington Thompson

W. Carrington Thompson

WCT:hds

FINAL DECREE DATED MARCH 1, 1979

On February 28, 1979, came the parties to this suit and as well came Jimmie Ray Ford and Carlton Lee Ramsey, in person, and with their attorney, Junius P. Warren, and filed their motion asking leave of Court to intervene in this cause, which motion was argued orally before the Court and the Court being of the opinion that leave to intervene should not be granted IT DOTH SO DECIDE to which action the intervenors, Jimmie Ray Ford and Carlton Lee Ramsey object and except.

On January 3, 1979 the Court heard the evidence ore tenus in the case upon the temporary injunction entered on December 5, 1978, the answer of defendant, motion of plaintiff and defendant, and complaint in intervention by the Henry County Public Service Authority. The Court by order dated January 3, 1979, granted the petition to intervene and extended the temporary injunction.

The Court is of the opinion and doth find that when the City of Martinsville undertakes to dispose of its surplus water outside of the municipality and within Henry County it is subject to legislative control of the Board of Supervisors of Henry County and the jurisdiction which it has conferred upon its Public Service Authority, and

It is accordingly ORDERED that the City be, and it hereby is, permanently enjoined from connecting water service to Frith Construction Company in Henry County, without the authorization and consent of Henry County.

It is further ORDERED that the transcript of the hearing held on January 3, 1979 by Betty Thompson, Court Reporter, shall become a part of the record in this cause when filed in the office of the Clerk within sixty (60) days after the entry of this decree.

The objection and exception of defendant to this decree for reasons previously stated to the Court orally at the aforesaid hearing, and in writing in the defendant's answer and in correspondence to the Court, are noted.

Defendant having indicated its intention to appeal, it is ORDERED that the injunction be, and the same hereby is, suspended during the pendency of the appeal, and it is

ORDERED that Frith Construction Company be permitted, during the pendency of the appeal, to connect to its existing line and to use City water without prejudice to the position of any party.

ASSIGNMENT OF ERROR

The Trial Court erred in holding that the City of Martinsville needs the consent of Henry County to sell surplus water in an area of Henry County also served by the Henry County Public Service Authority.

ASSIGNMENT OF CROSS-ERROR

The Court erred in not enlarging the injunction to permanently enjoin the City from further additional connections and/or furnishing water within the county of Henry without the authority and consent of Henry County.

PLAINTIFF'S EXHIBIT B
(pp. 3-6)

PROJECT 3 -- U. S. 220 SOUTH WATER PROJECT: To provide, operate and maintain one or more water supply systems in an area of Henry County, Virginia, which area is located along U. S. Route 220, extending southward from the present City of Martinsville, Virginia, to and including the present Town of Ridgeway, Virginia, as shown on Plate II of a report entitle "Proposed Water and Sewerage Facilities Improvements, Plan for Interm Financing," dated June 30, 1974. The project and its Service Areas are described in the "Comprehensive Report" of January 5, 1970, referred to earlier, which summarizes in somewhat greater detail an earlier study breifely reported on in the "Engineering Report" of February 15, 1969, also referred to earlier.

Owing to changed economic and other conditions, the project cost has been revised, and is presently estimated at \$2,839,000.

The revised estimated capital cost of all of the hereinbefore described water and sewer construction projects is \$16,417,900.00, as described by the last mentioned letter report, dated June 30, 1974.

The initial rates estimated by the aforesaid responsible engineers for services for the proposed projects are as follows:

A. CONNECTION AND INSPECTION CHARGES

1. Water Service Connection Charge: The water service connection charge shall be \$400 for each residence or equivalent residential unit and for each small business with an average water consumption equivalent to that of a single residence. For industrial or commercial establishments or others with large water consumption demands, the connection charges shall be based upon estimated water consumptions required to meet both domestic and fire demands and negotiated accordingly.

2. Sewer Service Connection Charge: The sewer service connection charge shall be \$400 for each residence or equivalent residential unit and for each small business with the average sewage discharge equivalent to that of a single residence. For industrial or commercial establishments or others with larger sewage discharges and service demands, the connection charges shall be based upon estimated water consumptions and/or sewage discharges required to meet both domestic and other demands and negotiated accordingly.

B. SERVICE CHARGES

1. Water Service Charge: The minimum monthly water service charge shall be \$7.00 per residence or equivalent for the first 6,000 gallons of water consumed per month and \$1.00 per 1,000 gallons thereafter.

Industrial and commercial water service charges shall be

based upon the actual water consumption and upon a rate of \$1.00 per 1,000 gallons with a minimum monthly availability charge being applied in accordance with the service requirements of each connection.

2. Sewer Service Charge: The minimum monthly sewer service charge shall be \$6.00 per residence or equivalent. Industrial and commercial service charges shall be based upon the actual water consumption and upon a rate of \$1.00 per 1,000 gallons with a minimum monthly availability charge being applied in accordance with the service requirements of each connection. Premises not discharging the entire volume of water consumed into the sewers will be allowed a reduction in charge, provided the customer installs, at his expense, a meter or meters, or other positive means of measurement, satisfactory to the Authority, of the volume either discharged to not discharged into the sewers. Customers using private water supplies may be required to install, at their own expense, a meter or other device for determining the volume of sewage discharged into the sewers.

3. Billing: To each of the respective customers, bills for water and/or sewer service shall be rendered monthly.

C. INSPECTION CHARGE

An inspection charge in the amount of \$10.00 shall be assessed against the owner for each new water and/or

sewer service connection which is made to the Authority's water and/or sewerage systems, respectively.

D. ACCOUNT CHARGE

An account charge in the amount of \$5.00 shall be assessed against the owner for each new water and/or sewer service connection which is made to the Authority's systems, respectively.

E. FIRE PROTECTION SERVICE CHARGE

A fire protection service charge shall be assessed against the political subdivision in which the Authority's water system is constructed. Its purpose is to defray some of the cost of installing water mains, reservoirs and fire hydrants of sufficient size to provide fire protection service within the project service areas and to all properties adjacent to the system. The annual service charge shall be computed on the basis of \$400 per fire hydrant. Bills for the fire protection service shall be rendered annually at the beginning of each fiscal year to the respective political subdivision and its governing body.

F. ENFORCEMENT OF CHARGES AND FEES

The owners of all houses, buildings, or properties used for human occupancy, employment, recreation, or other purposes, presently existing or constructed subsequent to the installation of the hereinbefore described water and sewerage systems and situated within

the project areas of the Authority and abutting on any street, alley, right-of-way or easement in which there is located a public sanitary sewer and/or water main at a distance not greater than 300 feet from such houses, buildings or properties, shall be required to install suitable toilet and other disposable liquid waste facilities therein and to connect such facilities directly with the public sewer and water main.

If connection is not made to the systems upon the completion of the particular system, the owner, occupant, or tenant shall have thirty days to connect to the system. In the even the connection is not made at the expiration of such thirty day period the connection fee is then due and payable to the Authority the same as if the connection had been made. A service charge applicable to the property, as if the connection had been made, shall begin to accrue as of the expiration of such thirty day period and shall be payable to the same as if such connection had been made as of that date.

The above stated rates and charges shall be subject to increase or other adjustment to the extent found necessary.

SECTION TWO: No other Authority has been created under the provisions of said Act serving the whole or part of the same area for the same purposes, and none of the powers granted by said Act shall be exercised by the

Authority in construction, improvement, maintenance, extension of operation of any project or projects which in whole or in part shall duplicate or compete with existing utilities, public or private, serving substantially the same purposes.