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April 20, 2009

HAND DELIVERED

Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40601

RECEIVED

APR 20 2009

**PUBLIC SERVICE
COMMISSION**

Re: Case No. 2009-00096, *Chris Schimmoeller & Connie Lemley v. Kentucky-American Water Company*

Dear Mr. Derouen:

Enclosed please find for filing the original and ten copies of Kentucky American Water's response to the complaint in the above-referenced matter.

Very truly yours,

Stoll Keenon Ogden PLLC

Lindsey W. Ingram III

Enclosures

010311.003026/3634856.1

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

MOTION TO DISMISS

Kentucky-American Water Company (“KAW”), by counsel, moves the Commission to enter an Order dismissing the formal complaint in this proceeding for two reasons: (1) the Commission lacks jurisdiction over the subject matter of the complaint because the underlying “certificate of public convenience and necessity” case is on appeal to the Franklin Circuit Court; and (2) the Commission lacks jurisdiction over the allegations of the complaint that fall squarely within the jurisdiction of some other agency or court.

As for the first reason, as the Commission has stated, “Generally, a lower tribunal loses jurisdiction to amend or modify a decision once that decision is appealed.”¹ The Commission has adhered to that principle even when there is a separate proceeding addressing the same subject matter, as it did when conducting a six-month review of Kentucky Utilities Company’s (“KU”) environmental surcharge mechanism (“ESM”) in Case No. 1995-00445. In that proceeding, an intervenor sought a refund of certain amounts on the ground that the Franklin

¹ *In the Matter of the Union Light, Heat and Power Company's Motion for Extension of Filing Date and Continuation of Its Current Rider AMRP Rates*, Case No. 2004-00403, Order at 5 (Dec. 7, 2005).

Circuit Court had overturned a Commission Order in Case No. 1993-00465 granting KU authority to collect those amounts through its ESM.² The Commission refused to grant the requested refund because the subject matter of Case No. 1993-00465 was still on appeal: “The Commission finds that it cannot implement the Court’s judgment until Case No. 93-465 is actually remanded. Contrary to KIUC’s argument, sound public policy requires the Commission to recognize the uncertainties present during the appeal and wait until all appeals are exhausted.”³ The principle is therefore well-established that the Commission lacks jurisdiction of a matter on appeal to the Franklin Circuit Court. That principle is rooted in the concept that once a matter is appealed, jurisdiction of the matter lies exclusively within the appellate court and the lower tribunal no longer retains jurisdiction. Johnson Bonding Co. v. Ashcroft, Ky., 483 S.W.2d 118 (1972) (“[t]he general rule, with certain exceptions, is that the trial court loses jurisdiction over matters that have been appealed until mandate has issued.”); City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990) (“[a] notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court”).

Applying this principle to this proceeding, the Commission lacks jurisdiction over the subject matter of its April 25, 2008 Order in Case No. 2007-00134, which granted KAW a Certificate of Public Convenience and Necessity (“CPCN”), because it is currently the subject matter of an appeal in the Franklin Circuit Court, Division One, Civil Action No. 08-CI-1055. The letters the Commission construed collectively to be a formal complaint initiating this proceeding are clear in their intent; they seek to attack the Commission’s grant of the very CPCN

² *In the Matter of an Examination by the Public Service Commission of the Environmental Surcharge Mechanism of Kentucky Utilities Company as Billed from February 1, 1995 to July 31, 1995*, Case No. 1995-00445, Order at 3 (Mar. 6, 1996).

³ *Id.*

that is the subject matter currently on appeal in the Franklin Circuit Court.⁴ As shown by the Commission's precedent in Case No. 1995-00445 (discussed above), making a collateral attack on the subject matter of a Commission Order on appeal by initiating a separate proceeding does not thereby give the Commission jurisdiction over that subject matter. KAW therefore respectfully asks that the Commission adhere to its precedents by entering an Order dismissing the formal complaint in this proceeding.

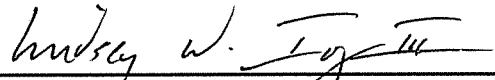
As for the second reason, the Commission lacks jurisdiction over the formal complaint not only because its subject matter is on appeal, but also because what the complainants allege against KAW falls under the jurisdiction of other branches of state government, not the Commission. In Chris Schimmoeller's letter to the Commission dated February 25, 2009, she asserted, "For instance, as we detailed in our January 17, 2009 email to you, KAW is failing to abide by the provisions of its permits and the state largely is failing to enforce those permits." Ms. Schimmoeller's letter dated March 18, 2009, contains nothing but complaints about road closures and the permits KAW has obtained for such closures, which complaints fall under the jurisdiction of the Transportation Cabinet, not the Commission. Connie Lemley's letter, which the Commission received on March 16, 2009, also complains of alleged road closure and construction issues, which again fall under the jurisdiction of the Transportation Cabinet, not the Commission. Furthermore, though both Ms. Schimmoeller and Ms. Lemley allege that KAW may not be able to condemn land necessary to KAW's project, jurisdiction to conduct condemnation proceedings lies in the relevant courts of general jurisdiction for the land at issue, not the Commission. Therefore, even if the complainants' allegations were true (KAW denies them), the Commission would lack jurisdiction over the complaint.

⁴ See, e.g., Letter from Chris Schimmoeller to Jeff R. DeRouen (dated March 18, 2009) ("I have requested that Case No. 2007-00134 be reopened"); Letter from Connie Lemley (received March 16, 2009) ("I am writing to ask you to reopen the Kentucky American Pipeline Case (2007-00134).")

In sum, the Commission lacks jurisdiction over the subject matter of the complaint because the CPCN the complaint attacks is on appeal to the Franklin Circuit Court and because KAW's alleged wrongdoing falls under the jurisdiction of the Transportation Cabinet and the courts. For these reasons, the Commission should enter an Order dismissing the formal complaint in this proceeding. If, however, the Commission does not issue such an Order, KAW generally denies the allegations set forth in the complaint and respectfully requests an additional ten days to file its formal answer in this proceeding.

WHEREFORE, Kentucky-American Water Company respectfully requests that the Commission enter an Order dismissing the formal complaint in this proceeding; in the alternative, Kentucky-American Water Company respectfully requests an additional ten days to answer the formal complaint.

Respectfully submitted,



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and

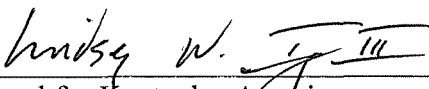
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Counsel for Kentucky-American
Water Company

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above and foregoing Motion to Dismiss was served upon the following persons by first class United States mail, postage prepaid, on the 20th day of April 2009:

Chris Schimmoeller
660 Mt. Vernon Ridge
Frankfort, KY 40601

Connie Lemley
2235 Gregory Woods Road
Frankfort, KY 40601



Counsel for Kentucky-American
Water Company