

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION FOR APPROVAL OF THE)
TRANSFER OF CONTROL OF KENTUCKY-)
AMERICAN WATER COMPANY TO RWE) CASE NO. 2002-00018
AKTIENGESELLSCHAFT AND THAMES WATER)
AQUA HOLDINGS GMBH)

ORDER

This Order addresses the Joint Applicants outstanding petitions for confidentiality of certain responses to discovery requests of the Intervenors and Commission and to the Commission's Order of January 30, 2002. At issue is whether KRS 61.878(1)(c) exempts the responses from public inspection. Finding that some of the information contained in the responses is exempt, we grant the petitions in part and deny in part.

PROCEDURE

On January 30, 2002, the Commission established this docket and, inter alia, directed the Joint Applicants to provide certain information regarding the proposed transfer of control of Kentucky-American Water Company (Kentucky-American). On February 14, 2002, the Joint Applicants submitted this information with two exceptions¹ and petitioned for confidential treatment of these two exceptions. On February 25,

¹ The Joint Applicants did not submit a response to Items 13 and 22 of the Order of January 30, 2002, but instead asserted that the material was confidential.

2002, the Commission's Executive Director, the official custodian of the Commission's records,² determined that materials in question were entitled to confidential protection.³

Following the establishment of a procedural schedule in this matter, the Attorney General (AG), Lexington-Fayette Urban County Government (LFUCG) and Commission Staff served interrogatories and requests for production of documents upon the Joint Applicants. In response to certain of these discovery requests, the Joint Applicants asserted the materials in question were confidential and refused to produce them. The AG and LFUCG moved to compel the production of these documents.⁴ They further moved the Commission to make a formal ruling on the Joint Applicants Petition for Confidentiality.

In response to the Intervenor's motions to compel, the Joint Applicants formally moved for confidential treatment of their responses to the discovery requests in question and provided under seal a copy of the materials in dispute. They did not provide a redacted version of these materials to the Intervenor. The Intervenor filed responses in opposition to the petition.

² See KRS 278.100.

³ Letter of Thomas M. Dorman, Executive Director of Public Service Commission to Lindsey W. Ingram, Jr., counsel for Kentucky-American Water Company (Feb. 25, 2002). The materials afforded confidential treatment have never been filed with the Commission as a response to our Order of January 30, 2002. The Joint Applicants subsequently filed these materials with the Commission under seal as responses to the AG's Initial Request for Information, Items 87 and 88.

⁴ After the Joint Applicants' response to supplemental discovery requests, LFUCG supplemented its motion to compel to include certain requests contained in its Supplemental Interrogatories and Requests for Production of Documents. At the hearing on April 10, 2002, LFUCG withdrew its motion as it pertained to these supplemental requests.

At a hearing in this matter on April 2, 2002, the Commission granted the Intervenor's motions to compel and required the Joint Applicants to produce redacted versions of the disputed materials to the Intervenor. We continued the hearing until April 10, 2002 to permit the Intervenor an opportunity to review the redacted copies of the disputed materials.

On April 10, 2002, the Commission resumed its hearing on Joint Applicants Petition for Confidential Treatment and the Intervenor's Motions for Formal Ruling. During the course of this hearing, the parties agreed that, pending a ruling on the motions, the Joint Applicants would provide the Intervenor with disputed materials under conditions similar to those set forth in Appendix B of this Order and without any party waiving its right to seek judicial review of the Commission's decision. They further agreed to withdraw their requests for any further evidentiary hearings on the disputed materials and requested that we base our decision upon the existing record and our inspection of the disputed materials.

DISCUSSION

Standard of Review

KRS 61.872(1) provides that [a]ll public records shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884. KRS 61.878(1) establishes several classes of public records that are excluded from public inspection. Among those classes are documents generally recognized as confidential or proprietary whose disclosure would permit an unfair commercial advantage to competitors of the entity that disclosed the records. KRS 61.878(1)(c)1.

Joint Applicants argue that KRS 61.979(1)(c)(1) exempts all material in dispute. They bear the burden of demonstrating that unfair commercial advantage will result to their competitors from disclosure of the materials. To meet this burden, they must demonstrate that disclosure will give their competitors substantially more than a trivial unfair advantage. Southeastern United Medigroup, Inc. v. Hughes, Ky., 952 S.W.2d 195, 199 (1997). The damage must be more than merely speculative.

Material in Dispute

Commission Staff 1-9.⁵ Commission Staff requested that Joint Applicants provide an analysis of the potential growth that RWE Aktiengesellschaft (RWE) expects to obtain in external growth in the regulated water business, growth through the expansion of rate base, unregulated O&M business, and new products and services. Seeking confidential protection for their response, the Joint Applicants assert the materials reveal RWE s plans relating to potential acquisitions that could easily have the effect of increasing the price of the acquisitions and thus harm RWE.

We find no evidence to support the Joint Applicants contention and deny the requested relief. The material does not indicate any potential acquisition target or indicate any new service or product. Given the testimony of the Joint Applicants witnesses that each acquisition is unique and must be judge on its own basis, we find the potential for release of the disputed material to cause any competitive harm to be speculative.

⁵ When referring to a discovery request, the Commission will refer first to the set and then to the individual request. For example, Item 9 of the Commission Staff s First Set of Interrogatories and Requests for Production of Documents is referred to as Commission Staff 1-9.

AG 1-24. The AG requested that the Joint Applicants provide all presentations that Kentucky-American presented to water suppliers since January 1, 1996 regarding the outsourcing of management, transfer of assets, merger, or any other form of consolidation or change in control. Joint Applicants argue that the proposals could be used by Kentucky-American's competitors to undermine or weaken Kentucky-American's ability to acquire additional water facilities or obtain outsourcing arrangements. Potential sellers or contract partners, moreover, the Joint Applicants assert, could use the information to obtain more favorable transactions at Kentucky-American's expense.

We find no evidence to suggest that public disclosure will create an unfair competitive advantage and deny the requested relief. None of the presentations involve transactions that are still in negotiation. Two of the presentations involve water utilities that Kentucky-American has already executed agreements to purchase and has or is currently seeking Commission approval for the purchase. In many instances, the material that the Joint Applicants seek to keep from public disclosure has already been disclosed to the public in prior Commission proceedings. Moreover, as virtually all of the presentations involve water suppliers that are public agencies subject to the Open Records Act and were made without obtaining any confidentiality agreement from the water supplier, much of the material is already available to the public.

AG 1-69. The AG requested all transition studies related to the proposed transaction. The Joint Applicants have sought confidential treatment of portions of a transition implementation plan that Thames Water Aqua Holdings GmbH (Thames) and American Water Works Company (American) prepared. They argue that the

document contains information regarding procurement, asset management, and human resources information that Joint Petitioners competitors and suppliers could use to extract higher prices or lure away key employees.

Our review indicates that the material in question is general in nature and does not appear to reveal any information that could be used by suppliers or competitors to the Joint Applicants disadvantage. With the exception of a reference to a potential supplier, we find that the material should not be afforded confidential protection.

AG 1-87. The AG requested all studies, analyses, memoranda, opinion letters, and other documents presented to American s Board of Directors at its special meeting on September 16, 2001 to consider approval of the merger agreement. Moving for confidential treatment for portions of these studies, the Joint Applicants argue that the documents are proprietary to the financial advisor and that disclosure of the material would result in a competitive disadvantage to the Joint Applicants if disclosed.

As to Joint Applicants contention that the documents are proprietary to the financial advisor, the Commission finds that only the financial advisor has standing to assert such argument. The financial advisors in question have not taken any action before this Commission to assert such argument in their behalf. We therefore deny Joint Applicants motion on that ground.

Our review of the documents indicates that some of the material contains financial analysis that is not available to the public and that would cause competitive harm to the Joint Applicants if disclosed to the public. This information includes material on potential competitors and projected earnings. We therefore grant confidential

protection to the material listed at Appendix A of this Order. We deny confidential protection to all remaining portions in dispute.

AG 1-88 and 1-106.⁶ The AG requested all studies, analyses, memoranda, opinion letters, and other documents presented to the boards of directors (or the equivalent) of RWE and Thames regarding approval of the merger agreement. In a separate request, he further sought all reports prepared by the financial advisors for American, Thames, and RWE in connection with the proposed merger. Moving for confidential treatment for portions of these studies, the Joint Applicants argue that the documents are proprietary to the financial advisor and that disclosure of the material would result in a competitive disadvantage to the Joint Applicants if disclosed.

As to Joint Applicants contention that the documents are proprietary to the financial advisor, the Commission finds that only the financial advisor has standing to assert such argument. The financial advisors in question have not taken any action before this Commission to assert such argument in their behalf. We therefore deny Joint Applicants motion on that ground.

Our review of the documents indicates that some of the material contains financial analysis that is not available to the public and that would cause competitive harm to the Joint Applicants if disclosed to the public. This information includes material on potential competitors, potential acquisition targets, methodologies for pricing such targets and projected earnings. Disclosure of this information would place Thames and RWE at a significant competitive disadvantage when acquiring other water suppliers or

⁶ These requests are addressed concurrently because Joint Applicants have submitted their response to these requests as one response.

seeking operation and maintenance contracts. We therefore grant the confidential protection to the material listed at Appendix A of this Order. We deny confidential protection to all remaining portions in dispute.

AG 1-99. The AG requested the minutes of American s Board of Directors meetings regarding the proposed merger. Requesting confidentiality for certain portions of these minutes, the Joint Applicants argue that these portions contain sensitive information regarding American s negotiation strategy and American s decision-making process. While our review of the material indicates the disputed portions involve sensitive information regarding the negotiation, we fail to find that any competitive harm will result to the Joint Applicants or American as a result of the disclosure and therefore deny the requested relief.

AG 1-100. The AG requested the minutes of Thames and RWE s Board of Directors meetings regarding the proposed merger. Requesting confidentiality for certain portions of these minutes, the Joint Applicants argue that these portions contain sensitive information regarding Thames and RWE s negotiation strategy and decision-making process. Our review indicates that the disputed material is devoid of any meaningful information and represents a very cursory account of the RWE Board proceedings. We fail to find that any competitive harm will result to the Joint Applicants or RWE as a result of the disclosure and therefore deny the requested relief.

AG 1-103. The AG requested reports of all due diligence reviews that RWE and Thames performed. Seeking confidential treatment for portions of this document, the Joint Applicants assert that the document contains the views of the RWE/Thames consultants and professionals about many aspects of American s business that could be

used to place RWE and Thames at a competitive disadvantage. Moreover, they argue, if the merger does not occur for some reason, the public disclosure of the information could be harmful to American and its subsidiaries.

Our review indicates that the disputed materials contain significant information about American's internal operations and about RWE's and Thames' valuations methodology that, if disclosed to the public, would place RWE and Thames at a significant disadvantage when dealing with their competitors for the acquisition of water systems and procurement of contracts for the operation and maintenance of water distribution. We therefore grant confidential protection to the material listed at Appendix A of this Order. We deny confidential protection to all remaining portions in dispute.

Conditions for Access

Our Order today does not afford immediate public access to the material denied confidential protection. Administrative Regulation 807 KAR 5:001, Section 7(4), requires that this material not be placed in the public record for 20 days to allow Joint Applicants to seek any remedy afforded by law. Accordingly, any party wishing immediate access to this material must agree to protect the confidentiality of this material during that 20-day period. Should the Joint Applicants seek review of our decision, the parties should also comply with any order from a court of competent jurisdiction.

As to material that has been granted confidential protection, any party wishing access to the material must protect the confidentiality of the material and must comply with the conditions set forth in Appendix B to this Order. Upon a party's acceptance of these conditions, the Joint Applicants should immediately provide a copy of the

confidential materials. Acceptance of these conditions does not constitute a waiver of any right to seek judicial review of this Order.

LFUCG has requested clarification on the right of its mayor and council members to have access to this information. The Commission is aware of no basis why LFUCG's counsel may not share this information with any of these elected officials provided such official agrees to the conditions set forth in Appendix B. We remind all the parties that failure to comply with the conditions after obtaining access to the confidential materials shall be considered as a willful failure to comply with this Order and may result in civil or criminal sanctions.

SUMMARY

IT IS THEREFORE ORDERED that:

1. The Motions of the AG and LFUCG for a Formal Ruling are granted.
2. Joint Applicants Petition for Confidentiality and Motion for Confidential Treatment, except for those document excerpts listed in Appendix A of this Order, are denied.
3. Confidential treatment is accorded to all document excerpts identified in Appendix A of this Order.
4. To the extent that the Executive Director's decision on the Joint Applicants Petition for Confidentiality conflicts with this Order, it is overruled.
5. For all material that is accorded confidential treatment under this Order, the Joint Applicants shall make available upon request an unredacted copy of this material to any party in this proceeding provided the requesting party agrees to comply

with the conditions set forth in Appendix B for the use of such material. Any person who is accorded access to the material in question by virtue of the provisions of this Order shall comply with the conditions set forth in Appendix B.

6. For all material which the Joint Applicants sought confidential treatment and was not accorded confidential treatment, the Joint Applicants shall make available an unredacted copy of this material to any party in this proceeding provided the requesting party agrees to comply with the conditions set forth in Appendix B of this Order until May 3, 2002.

7. Any person who is accorded access to the material in question by virtue of the provisions of this Order shall comply with the terms of this Order.

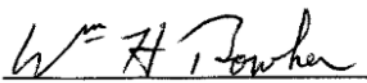
8. No party accepting the conditions set forth in Appendix B to this Order as a condition to receiving the requested material shall be deemed to have waived its right to judicial review of this Order or to contest the findings set forth in this Order.

9. The procedural schedule set forth in our Order of April 3, 2002 is modified and superseded by the schedule set forth in Appendix C to this Order.

Done at Frankfort, Kentucky, this 12th day of April, 2002.

By the Commission

ATTEST:

Deputy 
Executive Director

APPENDIX A

AN APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2002-00018 DATED APRIL 12, 2002

DOCUMENT EXCERPTS AFFORDED CONFIDENTIAL TREATMENT

- Joint Applicants Response to AG s Initial Requests for Information, Item 69, page 18.
- Joint Applicants Response to AG s Initial Requests for Information, Item 87, pages 3, 16-19, 21, 28-32, 36-38, 41, 44, 46, 48, 96, 99-101, and 115-117.
- Joint Applicants Response to AG s Initial Requests for Information, Items 88 and 106, pages 14, 26-28, 46-50, 54, 62, 71-73, 77-81, 85-8, 91-92, 101, 103, 106-108, 110 137, 139-143, 151-154, 157, 174-177, 212, 214, 216-217, 219-224, 229-28, 300-309, 313-321, and 323-327.
- Joint Applicants Response to AG s Initial Requests for Information, Item 103, pages 2, 4-5, 7-9, 11-38, 40-46, 54-57, 60, 62-63, 75-79, 110, 115-118, 120-124, 126, 136, 145-147, 149-155, 158-161, 165-166, 168, 170, 177-186, 189-198, 201-204, 206-207, 209-213, 220-233, and 235-271.
- Joint Applicants Response to AG s Initial Requests for Information, Item 87 (Supplemental Filing), Uniting for World-Wide Excellence presentation, page 24.
- Joint Applicants Response to AG s Initial Requests for Information, Item 87 (Supplemental Filing), American Water Works Company, Inc. Management Presentation, August 2001, pages 36-38, 51, 58, 60, 63, 67, 69-71, 74, 76, 93-94, 97-101, 106, 108, 110, 114, 118-119, 121, and 124-129.
- Joint Applicants Response to AG s Initial Requests for Information, Item 103 (Supplemental Filing), pages 1-21, 23, 27-29, 31-33, and 36-39.

APPENDIX B

AN APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2002-00018 DATED APRIL 12, 2002

CONDITIONS UNDER WHICH A REQUESTING PARTY SHALL BE ENTITLED TO RECEIVE MATERIAL AFFORDED TEMPORARY OR PERMANENT CONFIDENTIAL TREATMENT

- The Requesting Party shall not use the material for purposes other than to prepare for or try this case.
- The Requesting Party shall not use the material for any other purpose in this jurisdiction or in any other jurisdiction.
- The Requesting Party shall not disclose or permit the disclosure of this material to any persons, including officers, employees and consultants, except as expressly permitted herein.
- The Requesting Party shall take all steps reasonably necessary to see that no person receiving access to this material shall use, disclose, copy or record this material for any purpose other than the preparation or conduct of this case.
- The Requesting Party shall maintain a register in which counsel shall currently record the name and position of persons who have had access to this material.
- The Requesting Party shall not disclose this material except to counsel regularly employed by Intervenor, secretaries, paralegals, and other staff of such attorneys or counsel, and bona fide outside experts or consultants and their employees. Where the Requesting Party is a governmental entity whose officers are elected officials and govern the Requesting Party's actions in this case, the material may be disclosed to those officials.
- The Requesting Party shall not disclose this material to any outside experts or consultants who at any time during their employment or retention by the Intervenor are also employed or retained by a competitor of the Joint Applicants.
- The Requesting Party shall inform in writing each person to whom the material is disclosed of these conditions and shall obtain a written acknowledgement from such person that he or she has been informed of these conditions and agrees to be bound by them. It shall further advise each person that failure to comply with these provisions may result in the imposition of civil or criminal sanctions under KRS 278.990.
- The Requesting Party shall provide counsel for the Joint Applicants with a copy of each written acknowledgement.

- The Requesting Party shall not disclose the material in whole or in part during any aspect of this proceeding except under seal and shall not refer to such material in open proceedings except in a manner which maintains the confidentiality of the material.

APPENDIX C

AN APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2002-00018 DATED APRIL 12, 2002

- Joint Applicants shall deliver no later than 4:30 p.m. to the offices of the counsel of any Intervenor who has agreed to the conditions set forth in Appendix B and Ordering Paragraphs 5 and 6 of this Order an unredacted copy of all materials for which they seek confidential treatment 04/12/2002
- Intervenors may serve upon the Joint Applicants supplemental interrogatories and requests for production of documents related to those materials for which the Joint Applicants petitioned for confidential no later than 04/18/2002
- Joint Applicants shall file with the Commission and serve upon all parties of record responses to supplemental interrogatories and requests for production of documents no later than 04/24/2002
- Intervenors testimony, if any, shall be filed in verified prepared form no later than 04/26/2002
- Public Hearing in this matter shall resume at 9:00 a.m., Eastern Daylight Time, in Hearing Room 1 of the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky, for the purpose of cross-examination of witnesses 05/01/2002
- Briefs, if any, shall be filed no later than..... 05/17/2002
- Commission decision on Joint Applicants Application shall be issued no later than..... 05/31/2002