

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>THE INVESTIGATION INTO THE FEASIBILITY</b>	)	<b>CASE NO. 2001-117</b>
<b>AND ADVISABILITY OF KENTUCKY-AMERICAN</b>	)	
<b>WATER COMPANY'S PROPOSED SOLUTION</b>	)	
<b>TO ITS WATER SUPPLY DEFICIT</b>	)	

**KENTUCKY AMERICAN WATER'S RESPONSE**  
**TO THE LFUCG'S MOTION TO SUPPLEMENT RECORD**

Comes Kentucky-American Water Company ("Kentucky American Water"), by counsel, and hereby responds to the Lexington-Fayette Urban County Government's ("LFUCG") September 8, 2006 Motion asking the Commission to order Kentucky American Water to supplement the record in this matter. In keeping with Commission precedent, the Commission should deny the LFUCG's Motion because it seeks the disclosure of a draft report that is not in final form. Kentucky American Water will gladly make the report available after it is finalized, but it should not be compelled to do so before that time.

The LFUCG's Motion<sup>1</sup> arises from a discovery response made by the Joint Petitioners in Case No. 2006-00197. In that case, the AG asked the Joint Petitioners what options they had considered for addressing Kentucky American Water's source of supply issue.<sup>2</sup> The Joint Petitioners responded, in part, as follows:

In February 2004, the BWSC<sup>3</sup> finalized a report titled "Water System Regionalization Feasibility Study." This report studied 40 water supply alternatives and recommended a new treatment plant be built on Pool 3 of the Kentucky River. This report also indicated that grants, Congressional

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<sup>1</sup> The Attorney General ("AG") joined in the LFUCG's Motion by way of its September 13, 2006 response.

<sup>2</sup> See AG's June 27, 2006 First Request for Information, Item No. 30.

<sup>3</sup> "BWSC" is the Bluegrass Water Supply Commission.

appropriation, low interest loans and/or long term debt issues would be used to fund the \$200 million to \$300 million project and that each member utility would pay for the plant and pipeline grid based on its pro-rated share of overall plant capacity.

The BWSC's plan included a Phase 1 project to install a pipeline between Lexington and Frankfort because KAWC had the most immediate need of the group and Frankfort indicated that it had up to 5 mgd of capacity available for resale in the short term until the full regional solution could be implemented. It became apparent to KAWC during the summer of 2005, that the BWSC's plan to install a Phase 1 pipeline between Lexington and Frankfort would not work since Frankfort did not have available capacity during peak events as previously thought. It was also apparent that BWSC was not meeting scheduled milestones and did not appear to be in the position to attract grants, and/or Congressional appropriation to supply KAWC with its water needs in the foreseeable future. KAWC commissioned a third party consultant to review and update as needed the cost for the recommended BWSC plan, and to provide an updated project scope and opinion of cost for KAWC to design, build and operate a water treatment plant on pool 3 of the Kentucky River.

In March 2006, KAWC met with representatives of the BWSC to discuss potential partnership arrangements that could help get the regional effort on track for a 3-5 year implementation. It became apparent that BWSC plans were still not progressing sufficiently to meet the water supply needs of KAWC's customers in a timely manner. At the March 14, 2006 informal conference with the Kentucky Public Service Commission and other stakeholders, KAWC indicated that it would take the lead in designing, building and operating a water treatment plant on the Kentucky River with a goal that KAWC's customers would have adequate source of supply by 2010. KAWC is continuing to discuss public-private partnership arrangements with the BWSC.

*The third party consultant's report is currently in draft form and will be submitted as part of the Certificate of Convenience and Necessity proceeding that KAWC plans to file for the new water treatment plant in the Spring of 2007. (Emphasis added).*

Thus, in response to the discovery request, Kentucky American Water (as one of the Joint Petitioners in Case No. 2006-00197) explained that it had become concerned about the BWSC's plan and, thus, had commissioned a consultant to review the BWSC plan and to assess the costs of designing, building and operating a water treatment plant on Pool 3 of the Kentucky River. In

that response, Kentucky American Water also specifically stated that the report was in draft form.

The report at issue is still not final. It is in draft form and, thus, has no relevance to any issue in this matter or any other matter pending before the Commission. Accordingly, it should not be made available until it is finalized. The Commission has squarely addressed the issue of whether draft reports are discoverable and has ruled that they are not. In Case No. 10117,<sup>4</sup> the AG moved to compel the production of a final management audit report and *preliminary draft recommendations of the audit report*. GTE opposed the production of the draft recommendations because they were not final. The Commission ruled as follows in its May 9, 1988 Order:

The Commission, being advised, is of the opinion and finds that the AG's Motion to Compel the production of preliminary draft recommendations from the management audit and a list of recommendations included in the audit which result in savings should be denied because of the unfinalized and preliminary nature of such draft recommendations.<sup>5</sup>

Thus, the Commission has recognized the lack of relevance inherent in draft reports and has specifically held that draft reports are not discoverable. Certainly, when the report at issue is finalized, it will be relevant to this proceeding and the Certificate for Convenience and Necessity proceeding that Kentucky American Water will initiate in 2007. However, in its draft form, which is subject to change, the report has no meaningful (or non-political) value to the LFUCG or the AG.

Finally, the LFUCG itself recently refused to provide a cost analysis on the basis that the analysis is "preliminary." In response to an open records request, the LFUCG issued the attached September 18, 2006 letter in which the LFUCG refused to provide "a cost analysis as

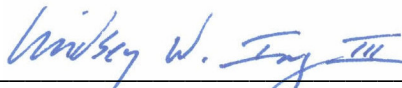
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<sup>4</sup> *In the Matter of: Adjustment of Rates of GTE South Incorporated*, Case No. 10117.

<sup>5</sup> See May 9, 1988 Order, pp. 8-9.

those documents are preliminary in nature” and relied on KRS 61.878(1)(i)&(j) in its refusal. (See page 2, Item No. 7). Certainly, if the LFUCG can rely on the fact that a document is “preliminary” in refusing to provide it, Kentucky American Water should not be compelled to produce similar preliminary documents. For all of these reasons, the LFUCG’s Motion should be denied.

STOLL KEENON OGDEN PLLC  
300 West Vine Street, Suite 2100  
Lexington, Kentucky 40507  
859-231-3000

By:   
Lindsey W. Ingram, Jr.  
Lindsey W. Ingram III

## CERTIFICATION

In conformity with paragraph 10 of the Commission's Order dated May 15, 2001 herein, this is to certify that the electronic version of this pleading is a true and accurate copy of this pleading filed in paper medium; that Kentucky American Water has notified the Commission, the Attorney General, N.O.P.E., Inc., the Bluegrass Water Supply Consortium, the Lexington-Fayette Urban County Government and Bluegrass FLOW, Inc. by electronic mail that the electronic version of this pleading has been transmitted to the Commission; that a copy has been served by mail upon:

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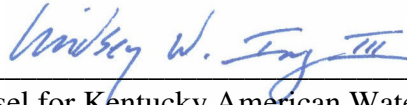
David Barberie, Esq.  
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Public Service Commission  
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Frankfort, Kentucky 40601

and that the original and three (3) copies have been filed with the Public Service Commission in paper medium, all on this 20<sup>th</sup> day of September, 2006.

A handwritten signature in blue ink, reading "Lindsey W. Engle". The signature is written in a cursive style with a horizontal line extending from the end of the name.

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Counsel for Kentucky American Water

LEX 010311/110469/3458931.1



Mayor Teresa Ann Isaac

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT

Department of Public Works  
Office of the Commissioner

September 18, 2006

RE: Open Records Request  
Log # 2006-10

Harly A. Ingram  
Stoll, Keenon Ogden, PLLC  
300 West Vine Street  
Lexington, KY 40507-1801

Dear Mr. Ingram:

In regards to the above referenced open records request (enclosed) received on September 13, 2006, the Lexington-Fayette Urban County Government (LFUCG) provides the following responses. Please note that your requests are showed in italics.

1. Your request falls into the category of a blanket request because it is inferred that you are requesting any and all *correspondence between the Lexington-Fayette Urban County Government (LFUCG) or any employee or official thereof and the United States Environmental Protection Agency (EPA) concerning any EPA inspection, examination or evaluation of the LFUCG sanitary sewer system.* The Attorney General has stated that as a precondition to inspection, a requesting party must identify with a reasonable particularity those documents he wishes to review. The Attorney General has stated that a request for any and all records which contain a name, a term, or a phase is not a properly framed open records request and that generally need not be honored. Such a request places an unreasonable burden on the agency to produce often incalculable numbers of widely dispersed or ill-defined public records. 00-ORD-132. To attempt to compile a response to your general request which did not identify with a reasonable particularity documents you wish to review would require enumerable employee hours. Requests that would place an unreasonable burden on a public agency need not be honored (KRS 61.8872(6)).

Items pertaining to EPA's August 2005 Section 308 request are available for inspection at the LFUCG - Division of Sanitary Sewers, Town Branch Wastewater Treatment Plant. The treatment plant is located 301 Lisle Industrial Ave.. Please contact Cassie Felty at 425-2405 to schedule your review.

2. Your request falls into the category of a blanket request because it is inferred that you are requesting any and all *correspondence between LFUCG and EPA concerning any EPA inspection, examination or evaluation of the LFUCG storm water sewer system.* The Attorney

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General has stated that as a precondition to inspection, a requesting party must identify with a reasonable particularity those documents he wishes to review. The Attorney General has stated that a request for any and all records which contain a name, a term, or a phase is not a properly framed open records request and that generally need not be honored. Such a request places an unreasonable burden on the agency to produce often incalculable numbers of widely dispersed or ill-defined public records. 00-ORD-132. To attempt to compile a response to your general request which did not identify with a reasonable particularity documents you wish to review would require enumerable employee hours. Requests that would place an unreasonable burden on a public agency need not be honored (KRS 61.8872(6)).

Items pertaining to EPA's August 2005 Section 308 request are available for inspection at the LFUCG - Division of Engineering, located at 101 E. Vine Street, 4<sup>th</sup> floor. Please contact Marwan Rayan at 258-3410 to schedule your review.

3. Items pertaining to *correspondence between LFUCG and EPA concerning the January 2004 EPA inspection of the LFUCG storm water and sanitary sewer systems* are available for inspection at the LFUCG - Division of Engineering, located at 101 E. Vine Street, 4<sup>th</sup> floor. Please contact Marwan Rayan at 258-3410 to schedule your review.
4. Due to the potentially voluminous nature of your request and the fact that the documents are not centrally located, LFUCG is still in the process of determining if documents exist in response to your request for *all records related to the January 2004 EPA inspection of the LFUCG sewer system (stormwater and/or sanitary)*. We will update you on our progress in 5 to 7 business days.
5. Your request for *records concerning any negotiation between the LFUCG and the EPA concerning potential violations of the Clean Water Act related to the LFUCG sewer system (stormwater and/or sanitary)* is denied. This portion of your request is denied as to correspondence and/or emails between attorneys for the LFUCG and the EPA in that those documents are preliminary in nature. K.R.S. § 61.878(i)&(j). This portion of your request is further denied as to correspondence and/or emails between the LFUCG and its attorneys pursuant to K.R.S. § 61.878(1)(l), incorporating the attorney client privilege and/or work product doctrine. K.R.E. 503; K.R.S. 422A.0503; C.R. 26.02(3)(a) and S.C.R. 3.130(1.6).
6. Items pertaining to *records of any finding by the EPA concerning potential violations of the Clean Water Act related to the LFUCG sewer system (stormwater and/or sanitary)* are available for inspection at the LFUCG - Division of Sanitary Sewers, Town Branch Wastewater Treatment Plant. The treatment plant is located 301 Lisle Industrial Ave.. Please contact Cassie Felty at 425-2405 to schedule your review.
7. Your request for *any evaluation or analysis of any costs, fines, or penalties concerning potential violations of the Clean Water Act related to the LFUCG sewer system (stormwater and/or sanitary)* is denied. This portion of your request is denied as to a cost analysis as those documents are preliminary in nature. K.R.S. § 61.878(1)(i)&(j). This portion of your request is further denied pursuant to K.R.S. § 61.878(1)(l), incorporating the work product doctrine. C.R. 26.02(3)(a).



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Records will be available for your inspection for thirty (30) calendar days from the date of this letter. After thirty (30) calendar days, the records will be returned to the filing system and this matter will be considered closed.

Sincerely,

A handwritten signature in dark ink, appearing to read "Charles H. Martin", with a long horizontal flourish extending to the right.

Charles H. Martin, P.E., Acting Commissioner  
Department of Public Works

pc: Carolyn Zerga, Department of Law  
Marwan Rayan, P.E., Urban County Engineer  
Rod Chervus, P.E., Acting Director, Sanitary Sewers  
Cassie Felty, Administrative Officer, Sanitary Sewers