

Commonwealth of Kentucky
Before the Public Service Commission

In the Matter of:)
AN INVESTIGATION INTO THE FEASIBILITY AND) Case No. 2001-117
ADVISABILITY OF KENTUCKY-AMERICAN WATER)
COMPANY'S PROPOSED SOLUTION TO ITS WATER)
SUPPLY DEFICIT)

ATTORNEY GENERAL'S
OBJECTIONS TO PRELIMINARY FINDINGS OF FACT

Comes now the Attorney General and provides this Commission with his objections to the preliminary findings of fact. The Attorney General also gives notice of issues he plans to contest and explore in subsequent proceedings in this case.

Overview – The Commission's 11 January 2002 Order Does Not Focus Upon Kentucky-American. The Order Does Not Discuss Several Material Facts and Topics, and It Does Not Convey Some Facts in Proper Context.

As the Commission notes, the purpose of this proceeding is “to investigate the feasibility and advisability of Kentucky-American’s proposed solution to its water supply deficit.”¹ Moreover, “the responsibility to develop an adequate and reliable source of water supply for Kentucky-American’s customers is the direct obligation of Kentucky-American itself.”² The Commission correctly sets forth its instruction to Kentucky-American in the Commission’s 21 August 1997 Order in Case No. 93-434.

¹ Case No. 2001-117, 11 January 2002, Order, page 2.

² Case No. 93-434, 21 August 1997, Order, page 6.

Kentucky-American shall take the necessary and appropriate measures to obtain sources of supply so that the quantity and quality of water delivered to its distribution system shall be sufficient to adequately, dependably, and safely supply the total reasonable requirements of its customers under maximum consumption through the year 2020.³

Thus, there is no debate on the issue of who bears the responsibility to step forward with a plan. It is Kentucky-American's responsibility to take action. The focus of this investigation should be upon Kentucky-American's activities (or failure to act) since 21 August 1997. Additionally, the Commission should provide a comprehensive critique of Kentucky-American's "decision tree" proposal in the Company's 21 March 2001 report to the Public Service Commission.

While it is true that many of the facts in the January 11th Order are relevant, the Order fails to focus upon Kentucky-American's efforts. In sum, this investigation should examine in detail how Kentucky-American has chosen to act (or failed to act) in meeting its responsibility to its customers. The need to focus upon Kentucky-American's activities is compelling in light of the fact that the Company continues to grow each year. Through the years, various groups have taken a look at the Kentucky River as a resource. It is time to examine Kentucky-American's conduct.

³ Case No. 93-434, 21 August 1997, Order, page 6.

The 11 January 2002 Order Fails To Clearly Identify Kentucky-American's Plan. Under The Assumption That Kentucky-American's March 2001 Report To The Public Service Commission Sets Forth A Plan, The Order Fails To Address It.

“KAWC’s proposal to resolve the deficits [both supply and treatment] is to continue to follow a ‘decision tree’ that is aligned with the LFUCG resolution of December 9, 1999.”⁴ It is, however, important to point out that Kentucky-American’s “proposal” is less than concrete. KAWC has some form of commitment to the Kentucky River, but the terms of its commitment are rather vague. The Company’s discussion in its March 21st report reveals that Kentucky-American’s proposal is, essentially, to continue to ask questions and otherwise think inside-the-box.⁵

The Commission’s January 11th Order fails to comprehensively address or critique the March 21st report. The focus of this investigation is not upon the Lexington-Fayette Urban County Council or the Kentucky River Authority. While their activities have relevance, **Kentucky-American** is the subject of this examination.

The Attorney General provides the following objections on this point.

1. The January 11th Order does not adequately identify Kentucky-American’s proposal for a solution to its water supply deficit. The Commission states that the proposed improvements to the Kentucky River are not sufficient. The magnitude of the deficit is not the reason for this investigation. For years, Kentucky-American has been aware of a deficit. The focus of the investigation should be upon what Kentucky-American has been doing about its deficit. The Order fails to adequately address the actual aspects of **Kentucky-American’s** plan or planning process.
2. Kentucky-American has yet to fully document and set forward its solution. Under the assumption that its March 21st report contains its proposal, **Kentucky-American** has yet to fully document its plan in order to allow a meaningful review.

⁴ KAWC 21 March 2001 Report to the PSC, page 26 of 32.

⁵ KAWC 21 March 2001 Report to PSC, pages 29 through 31.

3. The January 11th Order does not explore or address the regulatory consequences of being unable to meet its requirement under 807 KAR 5:066. The Commission has made clear **Kentucky-American's** responsibility for meeting drought demands, and the Company has known of this problem since 1986. The January 11th Order does not make clear what Kentucky-American has actually done in order to comply with 807 KAR 5:066. The Company cannot simply “accede to the wishes” of another party. The obligation belongs to Kentucky-American. The Order does not contain any discussion of **Kentucky-American's** failure to meet its regulatory requirement.
4. The January 11th Order does not address the issue of whether Kentucky-American's actions since 21 August 1997 are in compliance with the Commission's instruction to take the necessary and appropriate measures to ensure its supply. There is a significant amount of discussion concerning the Lexington-Fayette Urban County Government, the Kentucky River Authority, and the Army Corps of Engineers. The instruction from Case No. 93-434 does not, however, apply to these groups. It applies to Kentucky-American. There is no discussion whether **Kentucky-American** has been reasonable in executing its responsibilities per the 21 August 1997 Order.
5. The January 11th Order does not address Kentucky-American's discussions with other water suppliers. Kentucky-American's March 21st Report to the PSC conveys the fact of Kentucky-American's “dialogue” with other water providers.⁶ The January 11th Order notes that this is one of the responsibilities that Kentucky-American undertook in response to the Urban County Council's resolution. There are, nonetheless, no findings pertaining to a review or examination of **Kentucky-American's** participation in this “dialogue.”
6. The Commission made the determination that **Kentucky-American's** business development planning and activities will greatly affect its water supply requirements and is, therefore, relevant to this investigation. There are no findings of fact concerning this topic.
7. The January 11th Order does not address **Kentucky-American's** actions or lack of action concerning significant changes in population forecasts, customer growth, and customer demand. It is clear that the facts have changed. **Kentucky-American's** conduct in reaction to these changes is not clear.
1. The Commission's Preliminary Finding “that the proposed improvements to the Kentucky River are no sufficient to adequately, dependably and safely supply the total reasonable requirements of Kentucky-American's customers under maximum consumption through the year 2020” is a conclusion that puts the cart before the horse. The Attorney General objects to the finding.

⁶ KAWC 21 March 2001 Report to PSC, pages, 22 and 23.

The Finding of Fact that Kentucky-American Dropped Its Plans to Purchase Water from Louisville Water and Focus Exclusively on the Kentucky-River as Its Sole Source of Supply as a Consequence of the Wishes of the Lexington-Fayette Urban County Government Is Amiss and Does Not Comport with the Sworn Testimony of Kentucky-American Representatives.

During Case No. 2001-120, Kentucky-American made clear the following point.

The 1999 action by the Lexington-Fayette Urban County Government had an impact in Kentucky-American's planning activities.⁷ Nonetheless, Kentucky-American also made clear that the Company's plan for a solution did not require the approval of the Lexington-Fayette Urban County Council.⁸ Also, consider the following.

Q. Mr. Mundy, did you agree with the Commission's finding in August of 1997 that all evidence at that time indicated that the net effect of the Kentucky River Authority's proposed activities would be insufficient even if implemented?

A. At that time, yes, I did.

Q. Did that evidence change as things progressed from 1997 until you made a decision in 1999 to support a river solution?

A. Yes.

Q. ***Is that the real reason that Kentucky-American decided to support a river solution?***

A. ***Yes. There are clearly dynamics there today that were not there in 1997.***⁹

Thus, to the extent that the Commission isolates the "LFUCG's wishes" as the reason behind the Company's decision to drop the Louisville Pipeline project, the Attorney General objects. The Company had other reasons for this action.

⁷ See, for example, Case No. 2001-120, TE Vol. I of II, pages 20, 34, 48, and 49.

⁸ Case No. 2001-120, TE Vol. I of II, page 68.

⁹ Case No. 2001-120, TE Vol. I of II, pages 84 and 85.

The January 11th Order Omits Several Material Facts and Topics.

The January 11th Order indicates changes in population projections and customer demand. Updating information is appropriate. The Order, however, does not discuss several other material facts and topics. Specifically, the Order does not discuss updates to Kentucky-American's water withdrawal permits and production capacity. The Order does not discuss the revisions and modification to the Kentucky River Authority "baseline" study by the Fayette County Water Supply Planning Council or the Lexington-Fayette Urban County Government's inquiry into the information. Population and demand projections are not the only areas that have seen updates since the conclusion of Case No. 93-434. It is appropriate to update all material facts. The Attorney General cannot simply concede to the theory that the supply deficit number remains at 3.489 billion gallons.

The Attorney General provides notice that he has questions concerning the demand forecast, and he will examine Kentucky-American's forecasts of demand. Additionally, on this point, the Attorney General does not object to the finding that demand management and conservation alone will not solve the deficit. He does, however, assert that these tools play a vital role in Kentucky-American's planning process. Consequently, an examination into Kentucky-American's use of these factors in its planning process is necessary and appropriate.

Summary

At this stage, most parties agree that there is a deficit and work must be done. In fact, this has been the state of affairs since 21 August 1997. Thus, we know that there is a problem. We do not know what **Kentucky-American** has been doing over the course of the last few years to solve this problem. We do not know specific terms of **Kentucky-American's** plan to meet its responsibility.

This investigation should focus upon the actions (and inaction) of the Kentucky-American Water Company. The burden to come up with a solution is upon Kentucky-American. This investigation should determine whether Kentucky-American has been using all reasonable efforts to deal with this problem.

WHEREFORE, the Attorney General submits his objections to the preliminary findings of fact.

Respectfully submitted,

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Notice of Filing

Counsel gives notice that (pursuant to Instruction 4(a) of the Commission's 15 May 2001, Order of procedure) the original and three copies in paper medium have been filed by hand delivery to Thomas M. Dorman, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601. Further, one copy in electronic medium has been filed by uploading the filing to the file transfer protocol site designated by the Executive Director all on this 22nd day of January 2002.

/s/ David Edward Spenard
Assistant Attorney General

Instruction 10 Certification

Per Instruction 10 of the Commission's 15 May 2001, Order of procedure, counsel certifies that the electronic version is a true and accurate copy of the document filed in paper medium, the electronic version has been transmitted to the Commission, and the Commission and other parties have been notified by electronic mail that the electronic version has been transmitted to the Commission.

/s/ David Edward Spenard
Assistant Attorney General

Certificate of Service and Filing

Counsel certifies that this response has been served by mailing a true and correct copy of the same, first class postage prepaid, to Roy W. Mundy II, Kentucky-American Water Company, 2300 Richmond Road, Lexington, Kentucky 40502; and Lindsey W. Ingram Jr., Stoll, Keenon & Park, LLP, 201 East Main Street Suite 1000, Lexington, Kentucky 40507 1380, Joe F. Childers, 201 West Short Street, Suite 310, Lexington, Kentucky 40507, Phillip J. Shepherd, P. O. Box 782, Frankfort, Kentucky 40602, Gerald J. Edelen, Department of the Army, Corps of Engineers, P. O. Box 59, Louisville, Kentucky 40201, Libby Jones, P. O. Box 487, Midway, Kentucky 40347, Damon R. Talley, P. O. Box 150, Hodgenville, Kentucky 42748-0150, and Edward W. Gardner, David Barberie, Lexington-Fayette Urban County Government, Department of Law, 200 East Main Street, Lexington, Kentucky 40507 all on this 22nd day of January, 2002.

/s/ David Edward Spenard
Assistant Attorney General