

COMMONWEALTH OF KENTUCKY
Before the Public Service Commission

IN THE MATTER OF:

AN INVESTIGATION INTO THE FEASIBILITY AND)
ADVISABILITY OF KENTUCKY-AMERICAN WATER)
COMPANY'S PROPOSED SOLUTION TO ITS WATER) CASE NO. 2001-117
SUPPLE DEFICIT)

**INTERVENOR N.O.P.E.'S
COMMENTS ON AND OBJECTIONS TO
PRELIMINARY FINDINGS OF FACT**

Comes now the Neighbors Opposing Pipeline Extravagance, Inc. ("NOPE") by counsel, pursuant to the Public Service Commission's January 11, 2002 Order, and submits the following comments on and objections to the preliminary findings of fact set forth in the Commission's Order:

INTRODUCTION

The Commission's Order is premised upon an erroneous finding on page 1 that Kentucky-American Water Company ("KAWC") has "focused exclusively on the Kentucky River as its sole source of supply" since the December 9, 1999 resolution of the Lexington-Fayette Urban County Government (LFUCG") calling for a Kentucky River Solution to the region's water supply shortage. In fact, the record in this case is almost devoid of any meaningful action by KAWC to "focus" on the Kentucky River as a solution to the region's water supply problem.

Rather, the KAWC's report submitted to the Commission on March 21, 2001 is a thorough study of the possible obstacles to a Kentucky River solution. The KAWC report reaches the pre-ordained conclusion that "The proposal to purchased finished Ohio

River water (via a pipeline from the Louisville Water Company) would resolve both problems [water supply and water treatment] coincidentally." The KAWC Report then goes on to exhaustively list questions and potential problems with a Kentucky River solution to the water supply problem. (KAWC Report, 3/21/01, pp. 29-32).

Accordingly, the Commission's factual predicate for its preliminary findings is clearly erroneous, and the Commission should determine the full scope of KAWC's activities on this issue, rather than accepting KAWC's unilateral and unsupported assertion that it has "exclusively" pursued a Kentucky River solution over its still preferred pipeline alternative. KAWC's unsupported allegation that it has "exclusively" focused on the Kentucky River presents a highly contested issue of material fact. NOPE believes the evidence will show that KAWC has engaged in only a half-hearted effort to pursue a Kentucky River solution to the water supply problem, and it has in fact focused most of its efforts on alternative pipeline proposals that would enhance KAWC's prospects for increased profits through new business development and acquisition of additional customers that would be created by a pipeline alternative.

OBJECTIONS AND COMMENTS

1. The Commission's Order begins its "Discussion" section, not with a finding of fact, but with a conclusion: "[t]he evidence in Case No. 93-434 supports the conclusion that the Kentucky River cannot supply an adequate amount of water to meet the unrestricted demands of Kentucky-American's customers during drought conditions." This conclusion, on which the rest of the preliminary findings of the Commission are based, cites a clearly erroneous legal standard. The "unrestricted demands of Kentucky-American's customers during drought conditions" is simply irrelevant to this

Commission's proceeding, and is outside the scope of the Commission's jurisdiction.

The Commission's own administrative regulation limits the Commission's inquiry to "total reasonable requirements of its customers under maximum consumption." 807 KAR 5:066, Section 10(4). The total reasonable requirements of KAWC customers during drought conditions would not even approach "unrestricted demands."

2. The preliminary finding, on page 3 of the Commission's Order that "The Kentucky River Study also estimates that during the 1930 drought of record and the 2020 growth scenario that Kentucky American customers could face a 53-day period during which no water will be available" is likewise clearly erroneous. This finding appears to be taken from advertising materials prepared by KAWC that grossly distort the findings of the University of Kentucky Water Resources Institute ("UK-WRI"). This statement, taken out of context from one of the early UK-WRI reports, fails to take into consideration the impact of the now installed valves, and is therefore no longer accurate. Moreover, this statement is based on the erroneous assumption that minimum flow requirements would be strictly enforced by the regulatory authorities in the Kentucky Division of Water during extreme drought conditions, an assumption that is also clearly erroneous.

3. The preliminary findings fail to cite any current data or any testimony from UK-WRI in support of its conclusion that the Kentucky River is an inadequate source of supply for KAWC. NOPE submits that it is critical to obtain testimony from UK-WRI on these issues before the Commission makes any findings and conclusions on this investigation. The Commission's Order indicates that it has accepted KAWC's modifications to the original UK-WRI Kentucky River Study, but fails to provide any

information on how KAWC calculated those modifications, or what assumptions KAWC used in making those modifications. (Commission's Order, pp. 3-4). NOPE believes that any modifications to the UK-WRI study that it intends to use as a basis for its findings should be examined by UK-WRI for accuracy, and for full disclosure of all assumptions.

4. The Commission's Order states that the 2000 census shows an increased population for Lexington, and that this "unanticipated population growth has had a corresponding impact on Kentucky-American's demand forecasts." (Order, p. 4). The Commission's preliminary findings in this respect again are clearly erroneous. They compare apples and oranges. While KAWC may have used data that erroneously projected population growth, it is clear that the UK-WRI used accurate projections and it forecasts population for 2020 that exceeds the numbers currently used by KAWC for the forecast period. Only by substituting the erroneous population growth projections of KAWC based on the Louisville Data Center information, can there be any adverse impact on the demand forecasts. In fact, when UK-WRI's accurate population projections are used, it is clear that the projected deficit is now smaller rather than larger.

5. The Commission further erroneously finds that "demand management and conservation alone would not be sufficient to eliminate the deficit that would occur during the drought of record." (Commission Order, pp. 4-5). In fact, KAWC has never submitted a meaningful conservation plan, and the Company should be required to submit such a plan as part of this Investigation.

6. The Commission's Order, at page 6, cites "delays from possible litigation resulting from permitting decisions, other regulatory decisions, or real estate acquisitions" as a problem with dam reconstruction on the Kentucky River. The

Commission's Order ignores the corresponding fact that those same delays (permitting decisions, other regulatory decisions, or real estate acquisitions) will certainly plague any proposed pipeline alternative. If the Commission ordered or authorized a pipeline to the Ohio River, such action would face the additional regulatory hurdle of obtaining a certificate of environmental compatibility under KRS 278.025. In fact, such delays are much more likely with a pipeline solution, most major environmental groups are supportive of a Kentucky River solution, and oppose a pipeline solution. The proposed pipeline solution is the only alternative that has a proven history of galvanizing public opposition and litigation.

7. The Commission's Order essentially ignores the on-going work of the Bluegrass Water Supply Consortium, and there is no evidence in the record concerning the proposals currently being developed by that group of public and private water supply entities.

8. The Commission's Order erroneously states that "[e]ven though plans presented by KWRRI and the KRA could possibly reduce the deficit to Kentucky-American, it does not address the entire basin deficit." NOPE submits that the UK-WRI studies do consider and include the deficits associated with other users in the Kentucky River basin (besides KAWC). Once again, NOPE submits that it is critical to obtain current testimony from UK-WRI and the Kentucky River Authority, before the Commission makes any findings or conclusions on this issue.

9. The Commission's only regulatory authority cited in support of this Investigation is 807 KAR 5:066, Section 10(4). That regulation provides that the Commission shall impose certain standards on construction projects authorized by the

Commission. While the Commission has broad regulatory authority to regulate "rates and services" of public utilities (KRS 278.040(2)), the statutory responsibility for water supply planning is vested in the Natural Resources and Environmental Protection Cabinet, Division of Water, and the Kentucky River Authority, under KRS Chapter 151. To the extent that the Commission intends to issue an Order that would direct or purport to authorize the construction of a pipeline to the Ohio River to "solve" a supposed water supply deficit in the Kentucky River basin, the Commission would be exceeding its statutory authority. If the Commission, after full evidentiary hearing, makes such a finding, it would be obligated to petition the Kentucky River Authority, and the Natural Resources & Environmental Protection Cabinet, to take appropriate action to authorize such action under KRS Chapters 151 and 224, prior to implementing any such decision.

10. The Commission's preliminary findings ignore the question of the repair and maintenance of the Kentucky River locks and dams. Under any scenario possible, including the building of a pipeline to the Ohio River, the primary source of water supply for KAWC, and the entire central and eastern Kentucky regions, will continue to be the Kentucky River. Accordingly, the Commission cannot adequately decide the issue of addressing the alleged water supply deficit without considering the issue of the maintenance of the current water supply from the Kentucky River. If large capital construction costs will be necessary to maintain the existing water supply through repair and renovation of the dams on the Kentucky, what are the marginal costs of addressing the increased supply through a Kentucky River solution as opposed to building a pipeline which would create a vast amount of unused capacity? The Commission's preliminary findings simply ignore this critical issue.

CONCLUSION

For the reasons stated above, the intervenor NOPE respectfully requests that the Commission set aside its preliminary findings, and set this matter for a pretrial conference at which the parties can confer and agree upon the issues to be addressed, a schedule for the taking of evidence, and the holding of an evidentiary hearing prior to the entry of any final order of the Commission.

Respectfully submitted,

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Notice of Filing

The original and three copies of this document have been filed by hand-delivery to Thomas M. Dorman, Executive Director, Public Service Commission, 211 Sower Blvd., Frankfort, Kentucky 40601. In addition, this Notice has been filed by uploading the filing to the file transfer protocol site designated by the Executive Director, this 22d day of January, 2002

Instruction 10 Certification

Per Instruction 10 of the Public Service Commission's procedural order of May 15, 2001, the undersigned counsel hereby certifies that the electronic version is a true and accurate copy of the document filed in paper, the electronic version has been transferred 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, on this the 22d day of January, 2002.

COUNSEL FOR NOPE

Certificate of Service and Filing

I hereby certify that this document has been served by first class mail, postage prepaid, to Lindsey, W. Ingram, Jr. Stoll, Keenon & Park, LLP, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507; David Edward Spenard, Assistant Attorney General, 1024 Capitol Center Drive, Suite 200, Frankfort, Kentucky 40601-8204; and Edward W. Gardner and David J. Barbie, Lexington-Fayette Urban County Government, Department of Law, 200 East Main Street, Lexington, Kentucky 40507; and Damon Talley, 112 Lincoln Blvd., P.O. Box 150, Hodgenville, Kentucky 42748, this 22d day of January, 2002.

COUNSEL FOR NOPE