

Commonwealth of Kentucky  
Before the Public Service Commission

In the Matter of: )  
THE JOINT PETITION OF KENTUCKY-AMERICAN )  
WATER COMPANY, THAMES WATER AQUA )  
HOLDINGS GmbH, RWE AKTIENGESELLSCHAFT, )  
THAMES WATER AQUA US HOLDINGS, INC., ) Case No. 2002-00317  
APOLLO ACQUISITION COMPANY, AND )  
AMERICAN WATER WORKS COMPANY, INC., )  
FOR APPROVAL OF A CHANGE IN CONTROL OF )  
KENTUCKY-AMERICAN WATER COMPANY )

**ATTORNEY GENERAL'S REQUEST FOR REHEARING**

Comes now the Attorney General of the Commonwealth of Kentucky, by  
and through his Office of Rate Intervention, and requests rehearing, pursuant to KRS  
278.400, of the Commission's 20 December 2002 Order.

Respectfully submitted,

A. B. CHANDLER III  
ATTORNEY GENERAL

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## **GENERAL OBJECTIONS**

The Attorney General adopts his objections, arguments, and positions stated or otherwise maintained in Case number 2002-00018. In addition, the Attorney General does not retreat from positions taken in his post hearing brief in this action, including but not limited to the request that the application be denied. Furthermore, the Attorney General does not waive the right to demand any benefits, conditions, restrictions, or limitations that may be available to the ratepayers through the most favored nations clause contained within the orders in case number 2002-00018.

## **SCOPE OF THE HEARING**

In determining the scope of the proceedings for the current case, the Commission has made the following ruling.

The scope of this proceeding is limited to: reviewing TWUS's qualifications, determining whether the transfer of control of KAWC to TWUS is consistent with the public interest, and determining whether any change in circumstances since the issuance of our Order of May 30, 2002 in Case No. 2002-00018 requires reconsideration of the findings contained that Order.

The Attorney General's objection to the Commission's ruling relating to the scope of this proceeding is a matter of record, and the objection remains. The previous arguments are hereby adopted and incorporated herein by reference.

## **STANDARD OF REVIEW**

In Case Number 2002-00018, the predecessor case to this case, the Commission sets forth its standard of proof necessary to demonstrate whether a transfer of control is in the public interest.<sup>1</sup>

Any party seeking approval of the transfer of control must show that the proposed transfer will not adversely effect the existing level of utility service or rates or that any potentially adverse effects can be avoided through the Commission's imposition of reasonable conditions on the requiring party. *The acquiring party should also demonstrate that the proposed transfer is likely to benefit the public through improved service quality, enhance service reliability, the availability of additional services, lower rates, or a reduction in the utility expenses to provide present services. Such benefits, however, need not be immediate or readily quantifiable.*<sup>2</sup> [Emphasis added].

The Attorney General objected to this standard and renews his objection. The Applicants must be required to demonstrate an affirmative benefit that is immediate and readily quantifiable. In the interest of judicial economy, the Attorney General adopts and incorporates his arguments on this point from case number 2002-00018 by reference.

## **MOST FAVORED NATIONS CLAUSE**

In its 30 May 2002 Order in case number 20002-00018, the Commission found that a "most favored nations clause" would ensure that KAWC ratepayers receive all of the merger benefits that RWE, Thames, and AWWC make available to other

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<sup>1</sup> *In the Matter of: Application for Approval of the Transfer of Control of Kentucky-American Water Company to RWE Atiengesellschaft and Thames Water Aqua Holdings GmbH*, Case No. 2002-00018, Joint Petition, page 1.

<sup>2</sup> See Order May 30, 2002, at p. 7 and 8. See also Order on Rehearing, July 10, 2002, at p. 9.

jurisdictions.”<sup>3</sup> Thus, “if any state regulatory commission, except for a commission that presently exercises jurisdiction over both AWWC and Thames operating subsidiaries, imposes conditions on RWE, Thames or AWWC as a condition for its approval of the proposed merger and those conditions would benefit ratepayers in other jurisdictions, proportionate net benefits and conditions will be extended to KAWC ratepayers.”<sup>4</sup> RWE, AWW, and the joint applicants from Case No. 2002-00018 accepted this requirement and condition. Accordingly, any conditions imposed in other jurisdictions must be observed here as well. Otherwise, the clause is meaningless.

At the hearing, the “Terms and Conditions” of the Maryland-American approval were introduced. They include, in part, the following commitments.

With respect to its Maryland customers, neither American, Thames, RWE nor Maryland-American shall disclose confidential customer information, including names, addresses, and phone numbers to an affiliate of RWE, except for contracted billing purposes, without prior written notice to the Commission and without prior consent of the customer.<sup>5</sup>

and

Upon closing of the merger transaction, RWE and Thames shall each appoint an agent who will accept service of process in Maryland.<sup>6</sup>

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<sup>3</sup> Case No. 2002-00018, Order, 30 May 2002, page 23.

<sup>4</sup> Case No. 2002-00018, Order, 30 May 2002, Appendix A, page 9, Condition 51.

<sup>5</sup> Responses to the Attorney General’s Supplement Request for Information Dated October 7, 2002, Item Number 6, Maryland-American agreement numbered paragraph 11.

<sup>6</sup> Responses to the Attorney General’s Supplement Request for Information Dated October 7, 2002, Item Number 6, Maryland-American agreement numbered paragraph 12.

The Commission should recognize and impose these conditions for the immediate benefit of the Kentucky ratepayers if it is to give meaning to the most favored nations clause.<sup>7</sup> To do otherwise will nullify the condition—one of 56 conditions that the Commission itself found necessary in order to find that the application is in the public interest. As previously noted by the Attorney General in his initial brief, the circumstances of this transaction warrant the immediate recognition of these two conditions.

### **ENFORCEMENT CAPABILITY AND INTERNATIONAL LAW**

Conditions imposed by the Commission in both this case and Case No. 2002-00018 and accepted by the Joint Applicants create obligations and duties for parties other than Kentucky-American. “These conditions are meaningless without the ability to ensure the Joint Applicants’ compliance.”<sup>8</sup> Thus, the Commission recognizes the critical nature of the ability to enforce its orders against RWE, Thames GmbH, TWUS, and American Water Works. Further, it also recognizes the regulatory threat that exists by virtue of foreign ownership.

The Commission, in recognition of potential threats, acknowledges that certain conditions are necessary to preserve its jurisdiction from foreign regulators.<sup>9</sup> In Case No. 2002-00018, it required RWE, AWW, and the Joint Applicants for that case to agree

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<sup>7</sup> This does not suggest that these are the only benefits in existence that fall under the “most favored nation” provision. These particular benefits are of paramount interest in providing protection to Kentucky rate payers and should be given recognition and imposed as quickly as possible.

<sup>8</sup> Order, 20 December 2002, page 20.

<sup>9</sup> Order, 20 December 2002, page 18.

to conditions on this point. In the current proceeding, the Commission requires additional commitments on this point to preserve its enforcement powers.

Hence, there is simply no doubt that rights and claims under international law or treaties present a threat to the Commission's jurisdiction. Indeed, the Commission, in order to conclude that the transaction is within the public interest, requires measures of protection. Thus, the issue is not the need for protection against this threat. The issue is the level of protection, and the present commitments that have been accepted or otherwise given recognition in Kentucky are insufficient. The absence of sufficient conditions may not bode well for Kentucky-American's ratepayers.

The Commission has determined that "neither NAFTA nor GATS presently presents a threat to our jurisdiction."<sup>10</sup> In the event, however, that the Commission's determination is incorrect or if international law changes in the future, a waiver of any defenses or challenges that the Joint Applicants may have or come to have is essential for the Commission's enforcement power to continue. The Commission should recognize the following conditions as commitments, that have been made in West Virginia, for the Joint Applicants for this jurisdiction.

3. International Law:

A) WVAWC, AWW, Thames, RWE, and any other company owned or controlled, directly or indirectly, by any of the above companies shall not invoke the provisions of any international trade agreement or treaty, including those hereafter ratified or executed, to challenge the jurisdiction or authority of the Commission or any other State or local regulatory agency having jurisdiction to regulate WVAWC;

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<sup>10</sup> Order, 20 December 2002, page 17.

B) Nor shall any such company invoke the provisions of any such international trade agreement or treaty to challenge or defend against the orders or actions of any State or local governmental body or regulatory agency exercising power or authority with respect to WVAWC that is granted by statute or by the Constitution of West Virginia, including the exercise of the power of eminent domain;

C) Nor shall any such company invoke the provisions of any such international trade agreements or treaties to seek damages or other remedies in any international tribunal panel founded on any such orders issued, actions taken, or powers exercised with respect to WVAWC by the Commission or any other such State or local regulatory or governmental body having jurisdiction to regulate WVAWC;

D) Nor shall any such company invoke the provisions of any such international trade agreements or treaties as grounds in support of expanding WVAWC's service territory, or as grounds for challenging the Commission's jurisdiction to approve or disapprove any expansion by WVAWC or any other water or wastewater utility regulated by the Commission;

E) Nor shall any such company invoke the provisions of any such international trade agreement or treaty to challenge or defend against the orders or actions of the Commission or any State or local governmental body or regulatory agency having jurisdiction to regulate WVAWC with respect to the ownership or control of public water resources, or take any position with respect to this issue that is different from the positions set forth in paragraph 4 below; and

F) Nor shall any such company rely on any standards now or hereafter developed by the International Organization of Standards (or any similar organization) to challenge or defend against the application of stricter or more onerous standards imposed by State or local law on the operations of WVAWC.

These conditions are not onerous and are natural and logical companions to other conditions that the Joint Applicants have already accepted in this jurisdiction. Consequently, they should be imposed for this reason alone. These conditions,

however, are also commitments that the Joint Applicants have made in West Virginia. Therefore, the most favored nation's clause stands as an independent and wholly adequate ground to recognize their applicability for Kentucky.

In order to guarantee Kentucky-American's ratepayers current and future protection against any element of international law that could be presented to trump Kentucky law, the Commission should impose or otherwise immediately recognize these additional conditions. There is no doubt that protection is necessary, and there is no doubt of Kentucky-American's ratepayers' entitlement to them.

### **CONCLUSION**

Wherefore, the Attorney General submits this Request for Rehearing.

Respectfully submitted,

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*Notice of Filing*

Counsel gives notice of the filing, by hand delivery to Thomas M. Dorman, Executive Director of the Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601, of the original and three photocopies. Further, counsel gives notice of the uploading to the Commission's file transfer protocol site of one copy in electronic medium. The filing is in compliance with Instructions 5(a) and 9 of the Commission's 16 September 2002 Order of procedure. This action was taken on 9 January 2003.

/s/ David Edward Spenard  
Assistant Attorney General

*Instruction 13 Certification*

Per Instruction 13 of the Commission's 16 September 2002 Order of procedure, counsel certifies that the electronic version of the filing is a true and accurate copy of the document filed in paper medium. The electronic version has been transmitted to the Commission. The 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*

Counsel certifies service of this document. Service took place on 9 January 2003 by mailing of a true and correct photocopy of the same, first class postage prepaid, to the other parties of record. The other parties of record are the following: Roy W. Mundy II, Kentucky-American Water Company, 2300 Richmond Road, Lexington, Kentucky 40502; Lindsey W. Ingram Jr., Robert Watt, Stoll, Keenon & Park, LLP, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507 1801; Jack Hughes, 124 West Todd Street, Frankfort, Kentucky 40601; David Barberie, Lexington-Fayette Urban County Government, Department of Law, 200 East Main Street, Lexington, Kentucky 40507; Anthony G. Martin, Lexington-Fayette Urban County Government, Department of Law, 200 East Main Street, Lexington, Kentucky 40507; and Foster Ockerman, Jr., Martin, Ockerman & Brabant, 200 North Upper Street, Lexington, Kentucky 40507.

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