

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 RESPONSE TO JOINT APPLICANTS'
NOTICE OF CLOSING IN CASE NO. 2002-00277

WITH

ATTORNEY GENERAL'S MOTION FOR REESTABLISHMENT
OF KENTUCKY-AMERICAN'S PRE-CLOSING STATUS

AND

ATTORNEY GENERAL'S REQUEST FOR FINDINGS OF FACT
AND CONCLUSIONS OF LAW REGARDING THE CLOSING

The Attorney General provides his Response to the Joint Applicants' Notice that the closing for the transaction has taken place. The Attorney General further submits a Motion for the Commission to modify its 20 December 2002 Order and require that the Joint Applicants reestablish the status held by the Kentucky-American Water Company prior to the closing. Finally, the Attorney General submits his request that the Commission render findings of fact and conclusions of law regarding the closing.

THE JOINT APPLICANTS' DECISION TO CLOSE THE TRANSACTION IS UNREASONABLE.
THE COMMISSION SHOULD TAKE STEPS TO ADDRESS AND REMEDY THE ACTION.

The Joint Applicants have given notice of the consummation of the transaction in the 16 September 2001 Agreement and Plan of Merger. The closing took place on 10 January 2003. At the time of the closing, the Joint Applicants either knew or should have known that timely-filed petitions for rehearing had been presented to the Commission for Case No. 2002-00317.

The Joint Applicants are well-aware that a petition for rehearing permits the Commission to **lawfully** take further actions in this proceeding. The actions may include further conditions for approval, and one or more of the Joint Applicants might reject one of these conditions. The actions may include the Commission decision not to approve the transaction. The 20 December 2002 Order of conditional approval of the Joint Petitioners' request for Kentucky regulatory approval for the merger remains under the Commission's lawful jurisdiction. The matter remains open.

The Joint Applicants' choice to forge ahead and change the legal status of the Kentucky-American Water Company prior to the disposition of the petitions for rehearing is unreasonable. The Joint Petitioners appear to base this action on the "force and effect" of the 20 December 2002 Order.¹ The action of the Joint Applicants is rash and serves to foreshorten the Commission's continuing authority in this action. The action of the Joint Applicants warrants a remedy.

¹ John Stamper, *FLOW files against water sale*, Lexington Herald-Leader, 18 January 2003 (<http://www.kentucky.com/mld/heraldleader/4976667.htm>)

KRS 278.390 does specify, in part, the following:

Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in the order, or until revoked or modified by the commission, unless the order is suspended, or vacated in whole or in part, by order or decree of a court of competent jurisdiction.

While Commission orders are enforceable upon entry, common sense does not suggest that the legislature had any desire to promote the result that the Joint Applicants seem to suggest. It is unreasonable to suggest that a utility may change its legal status prior to the end of the Commission's lawful consideration of an application for a change in control. The action of the Joint Applicants is unreasonable.

The Joint Applicants have done the following. In anticipation of the Commission issuance of an Order that might contain conditions for acceptance, the Joint Applicants made a request for twenty days to respond to any order.² Thus, by their actions, the Joint Applicants themselves established a period of time in which the parties could not properly seek rehearing or judicial intervention for a suspension of the December 20th Order. The reason is simple and obvious. Until the acceptance by the Joint Applicants of the conditions, the December 20th Order was not ripe for such action. Unremarkably, no action was taken by the intervenors prior to acceptance.

Following the Joint Applicants' acceptance on January 8th, the parties filed separate petitions for rehearing. The Joint Applicants appear to contend that the petitions for rehearing are of no consequence because of KRS 278.390 (which sets forth

² Public Hearing, 21 November 2002, TE pages 250, 251.

the **Commission's authority to enforce its orders**). They appear to advance the position that the December 20th Order permits them to change the legal status of Kentucky-American prior to the disposition of the petitions for rehearing. The Joint Applicants err in relying on KRS 278.390. First, KRS 278.390 is an enforcement tool of the Commission. It is not a private "right" of any utility. Second, the Joint Applicants' interpretation of this statute produces an absurd result – the impairment of the Commission's regulatory powers.

Until January 10th, there was no basis for the Commission or any of the parties to seek the revocation, modification, suspension, or vacation of the December 20th Order. Upon the Joint Applicants' acceptance, the Attorney General filed an application for rehearing (as did the other parties). The Joint Applicants either knew or should have known that the Attorney General's petition, which is pending, seeks a change in the result of the Commission's December 20th Order. In sum, they knew or should have known that the December 20th Order is clearly and lawfully contested and that a change in the December 20th Order is lawfully possible prior to the close of this proceeding.

The Commission did not require or encourage a closing on January 10th. It has sought a closing at any time prior to the termination of the Commission's jurisdiction over this case. Thus, there is no room for the Joint Applicants to argue that KRS 278.390 required them to take any action prior to the disposition of the petitions for rehearing. The closing on January 10th was not in response to a specific Commission mandate. The focus, therefore, shifts to the issue of whether KRS 278.390 permits them to unilaterally take such an unreasonable action. The statute does not.

KRS 278.390 is an **enforcement tool** for the Commission. Unlike statutes such as KRS 278.183 or KRS 278.192 that expressly grant statutory rights to utilities, KRS 278.390 does not create any private “rights” for utilities. A utility or party may not knowingly act unreasonable and thereafter claim a “safe harbor” under KRS 278.390. Such a practice would allow a utility or a party to knowingly engage in unreasonable conduct with regard to an order of the Commission under the contention that the order was “in force.” KRS 278.390 is to promote the Commission’s regulatory oversight and enforcement of KRS Chapter 278. It is simply absurd to suggest that it provides a shield for this type of unreasonable conduct by a party or a utility.

Moreover, KRS 278.390 should never offer comfort to a party that does what the Joint Applicants have done. As aptly demonstrated, it is the Joint Applicants who asked for and created the circumstances that prevented any intervening party’s action relating to the December 20th Order prior to January 8th. It is the Joint Applicants that took action to close the transaction while the petitions for rehearing are pending. They changed the legal status of the Kentucky-American Water Company **with knowledge that the approval was still subject to a contest at the Commission level**. The result of this action is an impairment to the Kentucky regulatory process.

It is also noteworthy to point out that the Joint Applicants seem to pursue a regulatory world in which the judiciary will have an unnecessary level of involvement in the regulatory process. The prospect of parties engaging the Franklin Circuit Court to guard against this type of impairment is both daunting and now an unfortunate

reality. The actions of the Joint Applicants are clearly contrary to the reasonable expectations of the regulatory framework.

Although the notice of closing was given in Case No. 2002-00277, the primary damage is to the rehearing pending in this proceeding.³ Consequently, the remedy sought for this damage is applicable to this proceeding rather than the compliance docket. The Commission has the power to remedy the wrong done by the Joint Applicants. The Commission can and should – in furtherance of its lawful control of this proceeding - order the Joint Applicants to take the necessary steps to return the Kentucky-American Water Company to the legal status that it held prior to the January 10th closing. While this mandate may present some measure of hardship for the Joint Applicants, it is important to point out the fact that they made their own bed.

The actions of the Joint Applicants create yet another problem. At the time that the parties timely-filed their respective requests for rehearing, there were no issues relating to the lawfulness of closing the transaction prior to the disposition of the applications for rehearing. Now, by virtue of the Joint Applicants' actions, we have another situation in this proceeding. This issue was not addressed by the Attorney General in its application for rehearing.

At this stage, the Attorney General requests the following findings of fact.

1. The Joint Applicants either knew or should have known that petitions for rehearing were pending in Case No. 2002-00317 when they took steps to close the transaction.

³ To the extent necessary, the Attorney General submits this response – by reference – to Case No. 2002-00277. Again, the remedy is sought where the primary damage has been done, Case No. 2002-00317.

2. The Joint Applicants either knew or should have known that the Commission would continue to retain lawful authority to change or modify its December 20th Order in Case No. 2002-00317 following the close of the transaction.
3. The Joint Applicants either knew or should have known that closing the transaction represents a material change in the legal status of the Kentucky-American Water Company.
4. The Joint Applicants either knew or should have known that a material change in the legal status of the Kentucky-American Water Company seriously hampers, frustrates, or otherwise impairs the lawful authority of the Commission's regulatory oversight of the pending application.

The Attorney General requests the following conclusions of law.

1. With knowledge that petitions for rehearing were pending, the Joint Applicants acted unreasonably in closing the transaction prior to the disposition of the applications for rehearing in Case No. 2002-00317.
2. The change in the legal status of the Kentucky-American Water Company constitutes an impairment of the Commission's lawful authority.
3. For the period of time that the applications for rehearing are pending and for twenty days following the disposition of the applications for rehearing, the protection of the public interest requires a return of the Kentucky-American Water Company to the legal status that it occupied prior to the January 10th closing.

WHEREFORE, the Attorney General submits his response to the Joint Applicants' notice of closing of the transaction. FURTHER, the Attorney General submits his request that the Commission modify its December 20th Order to require a return of Kentucky-American to the legal status that it occupied prior to the December 10th closing. The modification should specify the period of time that the Joint Applicants shall maintain this status. FURTHER, the Attorney General submits his request that the Commission enter findings of fact and conclusions of law regarding the premature closing.

Respectfully submitted,

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ATTORNEY GENERAL

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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 22 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 22 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, P. O. Box 1812, Lexington, Kentucky 40588; and Foster Ockerman, Jr., Martin, Ockerman & Brabant, 200 North Upper Street, Lexington, Kentucky 40507.

/s/ David Edward Spenard
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