

Commonwealth of Kentucky  
Before the Public Service Commission

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

ATTORNEY GENERAL'S MEMORANDUM  
IN RESPONSE TO 13 SEPTEMBER 2002  
ORDER OF THE PUBLIC SERVICE COMMISSION

Comes now the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and submits his Memorandum addressing the scope of the transfer of control proceeding.

Respectfully submitted,

A. B. CHANDLER III  
ATTORNEY GENERAL

Dennis G. Howard II

/s/ David Edward Spenard  
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1. Should the scope of this proceeding be limited to reviewing the qualifications of Thames Water Aqua US Holdings, Inc. (“Thames USA”) and determining whether the modifications to the proposed transaction approved in Case No. 2002-00018<sup>1</sup> are consistent with the public interest?

## RESPONSE

No. First, Thames Water Aqua US Holdings, Inc. (Thames USA), is not the only applicant in Case No. 2002-00317. The Kentucky-American Water Company, Thames Water Aqua Holdings GmbH (“Thames Holdings”), RWE Aktiengesellschaft, Apollo Acquisition Company, and American Water Works Company, Inc., are also (as Joint Petitioners) Applicants. Second, the Commission is without jurisdiction to “modify” the May 30<sup>th</sup> Order or the July 10<sup>th</sup> Order on rehearing from Case No. 2002-00018.

In Case No. 2002-00018, Kentucky-American and Thames Holdings were the Applicants. The Attorney General continues to submit that essential and necessary parties were not applicants in the proceedings for that case. In the present case, the Joint Petitioners concede that the best practice is for all corporate entities to jointly apply for Commission approval.<sup>2</sup> Thus, RWE, American Water Works, Apollo, and Thames USA – along with Kentucky-American and Thames Holdings - are all new applicants or new petitioners. Consequently, all of these corporate entities are before this Commission in this proceeding and are subject to examination.

The role of an administrative body is to implement the will of the legislature. KRS 278.020 manifests the will of the General Assembly regarding change of control

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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 Aktiengesellschaft and Thames Water Aqua Holdings GmbH*, Case No. 2002-00018. Further, aside from being a “best practice,” it is what KRS 278.020 requires.

<sup>2</sup> Case No. 2002-00317, Joint Petitioners’ Motion and Petition to Modify Order, Numbered Paragraph 8.

proceedings. A change of control proceeding requires investigation into the financial, technical, and managerial abilities of the acquirer. KRS 278.020(4). It also requires an investigation to determine whether the transaction is in accordance with law, for a proper purpose, and consistent with the public interest. KRS 278.020(5). The statute contains nothing to suggest that **any** of the Joint Petitioners fall outside of the scope of the inquiry for this proceeding.<sup>3</sup> The statute does not support a theory that its requirements are only applicable to a portion or a segment of the acquirer.

With regard to modification, the Commission no longer has jurisdiction or power to make any determinations relating to the validity of or to make any modifications to its May 30<sup>th</sup> and July 10<sup>th</sup> Orders for Case No. 2002-00018. To suggest otherwise is to forward a theory that the Commission has a power to collaterally attack its own orders. The legislature has not given the Commission such power. While the Commission has some level of inherent power to correct clerical errors, it has no power to amend a docket that is no longer within its jurisdiction. It cannot reopen Case No. 2002-00018.

Orders of the Public Service Commission have a presumption of validity. Thus, once issued, there is a presumption that the determinations, requirements, and directions of an underlying order are reasonable and lawful. Once issued, a party presenting a matter pertaining to the **validity** of an order may seek the revocation or modification of the determinations, requirements, and directions of the order while the

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<sup>3</sup> Indeed, the General Assembly has chosen to grant specific exemptions from review for certain types of acquisitions. See KRS 278.020(6). The current transaction does not fall within any of the exemptions. The fact that the legislature has chosen to expressly remove certain types of transaction from Commission review only strengthens the position that no implicit exemptions or limitations arise under sub-sections 4 and 5. The General Assembly's delegation of authority calls for a comprehensive review.

Commission has jurisdiction over the order. Also, while it has jurisdiction over the order, the Commission has some level of authority to revoke or modify on its own initiative. It is clear, though, that once the Commission loses jurisdiction over a case, it ceases to have any independent power to revoke or modify its orders for that case. The Commission no longer has jurisdiction over Case No. 2002-00018; therefore, it has no power to modify or revoke the May 30<sup>th</sup> and July 10<sup>th</sup> Orders or otherwise amend the case.

Pursuant to a grant of jurisdiction under KRS 278.020, Kentucky-American and Thames Holdings as Joint Petitioners had their opportunity to prosecute an application at the Public Service Commission in Case No. 2002-00018. The Commission's jurisdiction over Case No. 2002-00018 was extended during rehearing by virtue of KRS 278.410. Thereafter, the Commission lost jurisdiction over questions concerning the validity of its orders in Case No. 2002-00018. Parties from that case took action in the Franklin Circuit Court for a judicial review, and the Commission is without power to revoke or modify its orders because the case is properly before the judiciary.<sup>4</sup> For this reason alone, there can be no modifications to the Orders in Case No. 2002-00018.

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<sup>4</sup> This does not mean that the Commission is without jurisdiction or power to enforce the orders. The enforceability of the orders, however, should not be confused with the validity of the orders. They are distinct matters. Due to the presumption of validity, the statutory scheme permits the Commission to enforce the orders even though the Commission no longer has jurisdiction over the underlying case. KRS 278.390. The statutory authorization to enforce does not reflect Commission jurisdiction to modify or revoke the orders while the case is in the judiciary. Such power would necessarily destroy the finality of the orders and thwart judicial review of their validity. KRS Chapter 278 allows for one forum at a time to have jurisdiction to determine the validity of a Commission order.

Notwithstanding the fact that the Franklin Circuit Court now has jurisdiction over Case No. 2002-00018, it is inappropriate to talk in terms of modifications to that case. Case No. 2002-00018 had its hearing and rehearing. The Commission has made it clear that it will not undertake a rehearing upon a rehearing.<sup>5</sup> Simply put, that case is gone, and it can only return if the judiciary sees fit to return it. Moreover, if it returns, the judiciary will provide the terms and conditions relating to further proceedings.

The Joint Petitioners may not do indirectly what they cannot do directly. Specifically, they may not now come back to the Commission and essentially seek a reopening of Case No. 2002-00018.<sup>6</sup> They cannot merely “tack on” Thames USA to the May 30<sup>th</sup> and July 10<sup>th</sup> orders. Case No. 2002-00317 is a new proceeding under KRS 278.020. It represents a transfer of control that requires Commission approval.

It is inappropriate and contrary to KRS 278.020 to limit the scope of the proceeding to Thames USA. It is inappropriate and contrary to KRS Chapter 278 to treat a transfer of control application as an invitation to merely reopen Case No. 2002-00018, a case with orders that are beyond the jurisdiction of the Commission to revoke or modify by virtue of the transfer of jurisdiction to the Franklin Circuit Court.

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<sup>5</sup> *In the Matter of: An Investigation of the Sources of Supply and Future Demand of Kentucky-American Water Company*, Case No. 93-434, Order, 29 September 1997.

<sup>6</sup> It is important to point out that any theory that the Commission may presently modify its May 30<sup>th</sup> and July 10<sup>th</sup> Orders and rewrite the determinations, requirements, and directions of that case runs in tandem with the theory that the Commission may presently (and hereafter at anytime) revoke those orders. To be blunt, either the case is over or it is not. Obviously, statutory provisions such as KRS 278.250 and KRS 278.260 (and through dockets such as Case No. 2002-00177) will permit the Commission to monitor, investigate, and exercise jurisdiction over the conditions and activities of the Joint Petitioners and prospectively address all matters properly before the Commission. The exercise of such power does not entail any retroactive determinations, requirements, or directions.

2. May the parties properly present additional evidence regarding issues on which the Commission issued findings in Case No. 2002-00018?

RESPONSE

Basically, yes. Case No. 2002-00317 is a new case. It is not a rehearing for Case No. 2002-00018. Consequently, the KRS 278.400 prohibition relating to additional evidence does not apply at this stage of the proceedings in Case No. 2002-00317. Nevertheless, while the parties may present “additional” evidence regarding issues on which the Commission issued findings in Case No. 2002-00018, the application of any evidence placed into or becoming part of the record for this proceeding has bearing only upon this proceeding.<sup>7</sup>

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<sup>7</sup> The Attorney General declines to speculate regarding any issues concerning additional evidence in the event that the judiciary remands Case No. 2002-00018 to the Commission for further proceedings. At this stage, he simply notes that his position in Case No. 2002-00317 does not act as a waiver for any theories or remedies that are applicable upon a remand of Case No. 2002-00018.

3. Assuming that the parties may properly present additional evidence regarding issues on which the Commission issued findings in Case No. 2002-00018, to what extent is the Commission bound by those earlier findings and under what conditions may the Commission issue findings that are contrary to the earlier findings?

#### RESPONSE

Case No. 2002-00317 is a new case. It is not a rehearing for Case No. 2002-00018. Thus, the Commission may not use this proceeding to rewrite the 30 May 2002 Order or the 10 July 2002 Order on rehearing from Case No. 2002-00018. That case and those orders are presently within the jurisdiction of the Franklin Circuit Court, and the Commission has no power to modify those orders absent a remand from the judiciary.

At present, the evidentiary findings pertaining to the determinations, requirements, and directions for Case No. 2002-00018 have not been suspended or vacated. They, in a general sense, presently have the same weight, validity, and status as any other earlier findings of the Commission. The particular weight, validity, and status of a specific finding is dependent upon a number of factors including the actions of the judiciary for Case No. 2002-00018 and the evidentiary record that develops in the present proceeding.

4. To what extent, if any, is the Commission precluded from considering any issue in this proceeding as a result of the actions pending before the Franklin Circuit Court in *Commonwealth of Kentucky, ex rel. A.B. Chandler, Attorney General v. Public Service Commission*, No. 02-CI-001012 (Franklin Cir. Ct. Ky. filed July 29, 2002)?

#### RESPONSE

It is well-settled that the Public Service Commission is a creature of statute. It has the powers the General Assembly elects to provide. Again, the current Joint Petition represents a new case before the Public Service Commission. KRS 278.020 sets forth the issues that the Commission must consider, and it grants the Commission the power to proceed with its review.

One further point warrants discussion. While the Commission may presently rely upon a presumption of validity for the actions it took in Case No. 2002-00018, it is precluded from asserting that its actions in Case No. 2002-00018 are conclusively valid. At this stage, any issues relating to the validity of the Commission's Orders in Case No. 2002-00018 are properly before the Franklin Circuit Court. To this extent, it may not consider at the Commission level any issues relating to this topic.



## Comments Relating to Other Issues Pertaining to Scope

The Commission, by its September 13<sup>th</sup> Order, authorizes presentation of “any issues directly relating to the scope of this proceeding” in this memorandum. The Attorney General again submits that this is a transfer of control proceeding under KRS 278.020. The General Assembly sets forth the statutory mandate for the scope of the proceeding. The Attorney General intends to request discovery, present evidence, and test the evidence of the **Joint Petitioners** concerning the financial, technical, and managerial abilities to provide reasonable service. He also has the same intent for the matters pertaining to whether the proposal is in accordance with law, for a proper public purpose, and is consistent with the public interest. The Joint Petitioners may not contract, reduce, or otherwise limit the Commission’s charge under statute.

Clearly, there may be new areas of inquiry by the Attorney General; however, the examination will be within the range of inquiry called for by KRS 278.020. All of the Joint Petitioners are before the Commission seeking this approval. Consequently, all of the Joint Petitioners are properly held to answer for their deeds and status. It is difficult to conceive a more meaningless act than the act of all of the corporate entities submitting to the jurisdiction of this Commission at one moment<sup>8</sup> and then arguing that the Commission may only review the portion of the proposal and the entity deemed relevant by the Joint Petitioners in the next.<sup>9</sup>

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<sup>8</sup> Case No. 2002-00317, Joint Petitioners’ Motion and Petition to Modify Order, Numbered Paragraph 8.

<sup>9</sup> Case No. 2002-00317, Memorandum for 11 September 2002 Informal Conference, Page 2.

*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 18 September 2002.

/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 16 September 2002 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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