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	)	

THE ATTORNEY GENERAL'S OBJECTION TO, WITH MOTION FOR RECONSIDERATION OF, THE 16 OCTOBER 2002 ORDER OF THE PUBLIC SERVICE COMMISSION

Comes now the Attorney General to provide his objection to the 16 October 2002 Order relating to the scope of this proceeding. The Order improperly narrows the scope of the inquiry. Further, the Attorney General submits his request for the Commission to reconsider its Order of 16 October 2002. In support of his Motion, the Attorney General notes the following:

1. The Attorney General Objects to the Commission's Determination to Unduly Limit the Scope of the Inquiry for Case No. 2002-00317.

From the outset of the current case, it has been abundantly clear that the current Joint Petitioners could not merely "tack on" the TWUS transaction by a modification to the Commission's Orders in Case No. 2002-00018. In his response to the 13 September 2002 Order of the Commission, the Attorney General states the following.

> With regard to modification, the Commission no longer has jurisdiction or power to make any determinations relating to the validity of or make any modifications to its May 30th and July 10th 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 (emphasis added).[1]

Quite simply, the Attorney General does not seek to re-litigate Case No. 2002-00018 through the current Commission review of the application in Case No. 2002-00317. Hence, the Attorney General does not argue that the Commission should litigate anew Case No. 2002-00018. Indeed, he argues the opposite. Case No. 2002-00018 is no longer within the Commission's power, and it cannot reopen it.[2]

Nonetheless, the Attorney General objects to the Commission's decision to unduly limit the scope of the proceeding to a review of TWUS's qualifications and to determine whether the transfer of control of KAWC to TWUS is consistent with the public interest. The rationale that serves as the underpinning for the decision is simply incorrect. It is also inconsistent with the will of the legislature.

Following a discussion of some of the judicial precedent concerning res judicata, the Commission makes the following statement.

> Based upon the above, we conclude that the principles of *res judicata* bar us from considering issues already litigated and addressed in Case No. 2002-00018 unless conditions or circumstances have changed such that the Commission should reconsider these issues. To date, no showing of any such change has been made.[3]

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[1] Attorney General's Memorandum in Response to 13 September 2002 Order of the Public Service Commission, page 3.

[2] Attorney General's Memorandum in Response to 13 September 2002 Order of the Public Service Commission, page 3. The Attorney General notes that Case No. 2002-00018 is currently the subject of litigation in the Franklin Circuit Court. Whether the Court will return the case to the Commission is unknown. That question, however, is one for the Court to decide. Absent an order of the Court, the Commission is without power. It, acting on its own, may not reopen Case No. 2002-00018.

[3] Order, 16 October 2002, page 10.

The first problem is that res judicata requires a final judgment. *Yeoman v. Commonwealth*, Ky., 983 S.W.2d 459, 464 (1998)(citing 46 AmJur 2d § 514). Case No. 2002-00018 is not final. While the Commission no longer has jurisdiction over Case No. 2002-00018, the Orders of the case are not yet a final adjudication of the rights of the parties based upon the facts of that proceeding. Further, while the Commission may 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.[4]

The second problem is that the doctrine of res judicata (when it is applicable) operates as a bar to further litigation of certain issues. It does not bar inquiry or examination into whether there has been a change in conditions or circumstances. Indeed, that examination necessarily precedes the determination of whether res judicata is properly available. The completion of this examination has yet to take place.

In the current case, the Commission asserts its conclusion that there has been no showing of any change in conditions or circumstances.[5] This is hardly remarkable in light of the following facts. The Commission asked the parties to brief the issues relating to the scope of this hearing by 18 September 2002. The Commission's procedural schedule did not require responses to the first round of data requests until 1 October 2002.[6] Therefore, at the time that the Commission sought comment on the

[4] See Attorney General's Memorandum in Response to 13 September 2002 Order of the Public Service Commission, page 8. Currently, any issues relating to the validity of the Commission's Orders in Case No. 2002-00018 are properly before the Franklin Circuit Court. It is patently premature to assert the application of res judicata when the underlying orders remain in litigation subject to change in a direct challenge in a judicial review allowed under statute.
[5] Order, 16 October 2002, page 10.
[6] Order, 16 September 2002, Appendix A.

scope of the case, the *initial* round of discovery had not taken place. Hence, the intervenors were not given any meaningful opportunity to address the issue of whether there have been any changes in conditions or circumstances.[7]

There is no aspect of the doctrine of res judicata that bars examination into the issue of whether there has been a change in conditions or circumstances. In fact, this type of examination is an expectation of the doctrine. The Commission's conclusion on this point is without proper foundation.

The next set of problems concern the Commission's application of the doctrine. The Commission wishes to utilize the issue preclusion aspect of the doctrine.[8] Res judicata does not provide the Commission with a tool to bar inquiry into everything except the subjects that the Commission likes.

> For issue preclusion to operate as a bar to further litigation, certain elements must be found to be present. First, the issue in the second case must be the same as the issue in the first case. *Restatement (Second) of Judgments § 27 (1982).* Second, the issue must have been actually litigated. *Id.* Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action. *Id.* Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment. *Id.*[9]

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[7] It is extraordinarily easy to conclude that there has been no showing when no meaningful opportunity to make a showing has taken place. A condition precedent for the application of res judicata is absent.
[8] Order, 16 October 2002, page 8. Oddly enough, the Commission relies upon *Newman v. Newman*, Ky., 451 S.W.2d 417 (1970) for its discussion of issue preclusion. It is clear that the "*Newman* analysis" of *Yeoman* applies to claim preclusion. *Yeoman v. Commonwealth*, Ky., 983 S.W.2d at 465. *Yeoman* relies upon the *Restatement (Second)* for setting forth the standard for issue preclusion, and that is the proper standard. To the extent that the Commission utilizes aspects of a claim preclusion test to support an issue preclusion analysis, the Attorney General objects. Further, to the extent that the Commission wishes to mention the claim preclusion aspect of res judicata (Order, page 7), the Order does not appropriately analyze or apply that standard. This interjection of the concept of claim preclusion is unnecessary and in error. If claim preclusion were applicable, it would bar the Application.
[9] *Yeoman v. Commonwealth*, Ky., 983 S.W.2d 459, 465 (1998).

Thus, from the foregoing, it is obvious that the issue preclusion aspect of res judicata represents a set of tests to determine what items may not be proper for re-litigation. It does not - in any way - represent a per se bar to extinguish all issues except TWUS's qualifications and whether the transfer of control to TWUS is consistent with the public interest. A party seeking to apply the issue preclusion aspect of res judicata must (among other things) show that the issue was ***actually decided*** in a prior action. *Yeoman v. Commonwealth*, Ky., 983 S.W.2d at 465. Thus, issue preclusion does not bar inquiry into matters other than TWUS. Suggestion to the contrary is in error.[10]

The res judicata analysis in the 16 October 2002 Order is simply incorrect. The Attorney General notes his objection and requests reconsideration of the Order. Res judicata is not applicable because Case No. 2002-00018 is not final. The conclusion that there have been no changes in conditions or circumstances is premature and was made without any meaningful discovery or argument by the parties. The claim preclusion aspect of res judicata is not relevant to the analysis. Issue preclusion is not applicable to issues that have not been previously litigated and addressed. The issue preclusion aspect of res judicata does not bar inquiry into all matters except the qualifications of TWUS's and whether the transfer of TWUS is consistent with the public interest. The doctrine of res judicata does not support the Commission's position.

[10] Thus, to the extent that the Commission wishes to apply res judicata for issues ***already litigated and addressed*** in Case No. 2002-00018, that action is (in the absence of any change in conditions or circumstances) consistent with the doctrine. To the extent that the Commission wishes to use res judicata to bar consideration of issues that were not ***litigated and addressed*** in Case No. 2002-00018 (other than those relating to TWUS), that desire reflects a palpable misapplication of the issue preclusion aspect of the doctrine. The latter effort simply is wrong and directly contrary to *Yeoman.*

2. The Commission's Position is Inconsistent With the Will of the Legislature.

In 1954, in reviewing a Commission Order in a change of control proceeding, the Court of Appeals of Kentucky held that the Commission had the implicit authority to determine whether a purchaser is ready, willing, and able to continue to provide adequate service.[11] The General Assembly made the decision to legislatively confirm the holding, and, subsequently, it went one step further by adding another test for change in control proceedings. Specifically, the Commission must now assess questions of basic public policy. KRS 278.020(5).

The Commission's role is to execute the will of the legislature. There is no statutory basis for narrowing the scope of review. In reality, the development of KRS 278.020 manifests a desire by the General Assembly to expand the scope of inquiry in change of control proceedings. Questions relating to issues including, but not limited to, the enforceability of the Commission's Orders and the legal status of the Joint Petitioners fit squarely under the topics that the legislature mandates the Commission to examine in an application.

It is wholly inconsistent with the will of the legislature for the Commission to limit the proceeding to a review of TWUS's qualifications and whether the transfer to TWUS is consistent with the public interest. The Commission has made clear (and correctly so) that "the Joint Petition represents a new application."[12] The fact that RWE AG did not have its act together for Case No. 2002-00018 is solely RWE AG's fault.

[11] *Public Service Commission v. Cities of Southgate, Highland Heights et al.*, Ky., 268 S.W.2d 19 (1954).
[12] Order, 16 October 2002, page 6 (footnote omitted).

There is no legislative basis for rewarding RWE AG's decision to engage in piece-meal litigation. The unduly narrow scope of this proceeding as set forth by the 16 October 2002 Order is not what KRS Chapter 278 requires.

WHEREFORE, the Attorney General provides notice of his objection to the unduly narrow scope of the proceedings, and he asks that the Commission reconsider its Order remove this restriction.

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 24 October 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 24 October 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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