COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISISON

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., APOLLO ACQUISITION COMPANY AND AMERICAN WATER WORKS COMPANY, INC. FOR APPROVAL OF A CHANGE IN CONTROL OF KENTUCKY-AMERICAN WATER COMPANY	))))))))	CASE NO. 2002-00317

RESPONSE OF KENTUCKY-AMERICAN WATER COMPANY, THAMES WATER AQUA HOLDINGS GmbH, RWE AKTIENGESELLSCHAFT, THAMES WATER AQUA US HOLDINGS, INC., APOLLO ACQUISITION COMPANY, and AMERICAN WATER WORKS COMPANY, INC. TO ATTORNEY GENERAL'S REQUEST FOR REHEARING

The Attorney General has filed a Request for Rehearing seeking yet another opportunity to reargue the positions it previously stated not only in this proceeding, but in Case No. 2002-00018 as well. The Attorney General has failed to raise any matter which has not already been thoroughly addressed by the Commission. Nor has he pointed out any errors, omissions, or flaws in the Commission's reasoning as set forth in its prior rulings. The Attorney General merely seeks to re-plow old ground without justifying the need to do so. A rehearing is neither appropriate nor available under such circumstances. The Attorney General has failed to present to the Commission any reason why it should re-examine its December 20, 2002 Order. The Attorney General's Request for a Rehearing accordingly should be denied.

1. THE ATTORNEY GENERAL'S "GENERAL OBJECTIONS" DO NOT REQUIRE FURTHER CONSIDERATION

Under the theory that all his prior arguments bear repeating, the Attorney General premises the Request for Rehearing on his "objections, arguments, and positions stated or otherwise maintained in Case number 2002-00018" as well as the "positions taken in his post hearing brief in this action". (Attorney General's Request for Rehearing, p. 2). Additionally, the Attorney General assures the Commission that he has not waived "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". (Attorney General's Request for Rehearing, p. 2). The Attorney General need not seek a rehearing under the provisions of KRS 278.400 in order to preserve any of these "General Objections"; nor is a rehearing appropriate solely to provide the Attorney General with yet one more opportunity to voice his objection to all prior adverse rulings.

The Attorney General's "objections, arguments, and positions" regarding the Commission's ruling in Case No. 2002-00018 are before the Franklin Circuit Court and need not be further addressed herein. Indeed, under the Commission's prior rulings, such "objections, arguments and positions" are not properly asserted herein. (October 16, 2002 Order, p. 10; October 30, 2002 Order, pp. 4-5). Nor is a rehearing necessary in order for the Commission to address the positions taken by the Attorney General in his post-hearing brief filed in this action. The December 20, 2002 Order contains a complete analysis of such positions. Additionally, since the Attorney General is not in the position to waive[1] the "right to demand" compliance with any provision of an Order entered by this Commission, he need not affirmatively deny the

[1]Only the Commission may waive the right to enforce its Orders.

existence of such a waiver. Accordingly, the Attorney General's "General Objections" do not establish a ground for ordering a rehearing.

2. THE ATTORNEY GENERAL HAS NOT STATED WHY THE SCOPE OF THE HEARING SHOULD BE REVISITED

The Attorney General also raises an objection to the Commission's ruling concerning the scope of the hearing herein. Since the Commission has addressed this issue on two separate occasions and has conducted a thorough assessment of the Attorney General's position and the Attorney General has not presented any new matters in support of his request, a rehearing on such issue is not warranted.

At the outset of this proceeding, the Commission analyzed the proper scope of this hearing. (October 16, 2002 Order, pp. 5-10). It ultimately concluded that: "The scope of this proceeding is limited to reviewing TWUS's qualifications and to determining whether transfer of control of KAWC to TWUS is consistent with the public interest." (October 16, 2002 Order, p. 10). The Attorney General sought and obtained a clarification of this ruling, with the Commission specifically permitting evidence regarding "whether any change in circumstances since the issue of [the] Order of May 30, 2002 in Case No. 2002-00018 requires reconsideration of the findings contained in that Order." (October 30, 2002 Order, pp. 4-5).

The Commission soundly rejected the Attorney General's position that the scope of the hearing should be expanded any further:

> In the last proceeding, which concluded only 4 months ago, we conducted an exhaustive review into RWE and Thames Aqua's qualifications and the question of whether their proposed acquisition was in the pubic interest. A new proceeding dealing with modifications to that proposed transaction does not require that we repeat that review. We do not believe the Legislature intended that we engage in duplicative and unnecessary proceedings to reexamine issues that were decided only a few

> months earlier. Moreover, the AG has failed to present any legal authority, nor have we found any, for the proposition that recent amendments to KRS 278.020 reflected a legislative intent to abolish or curtail the use of well-accepted and longstanding doctrine of issue preclusion in Commission proceedings involving the transfer of control of a utility.

(October 30, 2002, Order, p. 4).

The Attorney General has stated no reason why it should be granted a rehearing on this issue which requires no further scrutiny by the Commission.

3. THE ATTORNEY GENERAL HAS STATED NO GROUND FOR RECONSIDERING THE STANDARD OF REVIEW

The Commission has also given ample consideration as to the appropriate standard of review required by the provisions of KRS 278.020. Indeed it has considered this issue on three separate occasions involving the control of Kentucky-American.[2] (See December 20, 2002 Order, pp. 9-12; May 30, 2002 Order in Case No. 2002-00018, pp. 7-8; July 10, 2002 Order on Rehearing in Case No. 2002-00018, p. 9). The Attorney General has failed to justify his repeated insistence that the matter be reviewed yet again.

The Commission has properly construed the requirements of KRS 278.020 concerning its review of applicants for approval for a change in control in a utility:

> KRS 278.020 does not define "public interest." In Case No. 2002-00018, we found that a transfer is in the "public interest" if it does not adversely affect 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 acquiring party. We further found that the acquiring party should also demonstrate that the proposed transfer is likely to benefit the public through improved service quality, enhanced service reliability, the availability of additional services, lower rates, or a

[2] In the December 20, 2002 Order the Commission indicates that this issue was also addressed in Case No. 2000-00129, Joint Application of NiSource, Inc, New NiSource, Inc., Columbia Energy Group, and Columbia Gas of Kentucky for Approval of a Merger. (December 20, 2002 Order, p. 10, footnote 19).

> reduction in utility expenses to provide present services. Such benefits, however need not be immediate or readily quantifiable.

(December 20, 2002 Order, p. 10).

The Attorney General has failed to identify any statutory provision which requires a different standard of review. In any event, no purpose would be served by granting a rehearing on this issue which is currently before the appellate court in its review of Case No. 2002-00018.

4. THE ATTORNEY GENERAL HAS MISREAD THE MOST FAVORED NATIONS CLAUSE

Contending that the Commission failed to adhere to the Most Favored Nations Clause contained within Condition No. 51 of the May 30, 2002 Order, the Attorney General argues that he should be granted a rehearing on the issue of whether the Commission's failure to adopt the Terms and Conditions included within the Maryland-American approval renders the Most Favored Nations Clause "meaningless". (Attorney General's Request for Rehearing, p. 4). Since the Attorney General has misread the Most Favored Nations Clause, rehearing is unnecessary.

The Most Favored Nations Clause does not provide, as the Attorney General contends, that "any conditions imposed in other jurisdiction must be observed here as well." (Attorney General's Request for Rehearing, p. 4). The Clause does not either directly state or remotely imply that every condition imposed by another jurisdiction should automatically be applicable to this jurisdiction. Rather, it is apparent from the literal language of the provision that the Commission's focus in drafting the provision was on ensuring the Kentucky-American ratepayers' share in the "proportionate net benefits" afforded to the ratepayers in other jurisdictions. The Attorney General has lost sight of that focus. He objects to the Commission's failure to adopt the Maryland Terms and Conditions without identifying what benefits are to be gained by Kentucky-American ratepayers from those Terms and Conditions. There are in fact

none. Accordingly, the Commission did not err in failing to adopt the Maryland Terms and Conditions.

The Attorney General also contends that the Commission should have adopted the Maryland provision requiring prior written notice to the Commission before disclosure of confidential customer information. The Commission accurately determined that the Kentucky statutory scheme renders such condition unnecessary in this jurisdiction. The provisions of KRS Chapter 278 go much further than the Maryland-American condition, with the Kentucky General Assembly imposing a complete ban on disclosure of confidential customer information unless the customer consents to such disclosure. KRS 278.2213(5) provides: "No utility employee shall share any confidential customer information with the utility's affiliates unless the customer has consented in writing, or the information is publicly available or is simultaneously made publicly available." In light of the statutory restriction, the Commission correctly found no reason to adopt the Condition:

> KRS 278.2213(5) already imposes this restriction on KAWC. Imposition of the proposal will neither enhance the public interest nor create additional protections for KAWC's ratepayers.

(December 20, 2002 Order, pp. 21-22).

The Attorney General has failed to identify any error in this conclusion.

The Attorney General also points to the Maryland condition requiring that "RWE and Thames shall each appoint an agent who will accept service of process in Maryland." (Attorney General's Request for Rehearing, p. 4). Again, the Attorney General fails to explain what benefit is gained by Kentucky-American ratepayers from the imposition of this condition. He ignores the distinctions between the Kentucky statutory provisions regarding agents for the service of process and the Maryland provisions and insists that the Maryland condition be blindly

adopted. The Commission noted the distinctions between the two jurisdictions. It correctly imposed a condition which provides the protections deemed necessary under the Kentucky statutory scheme:

> [W]e find that the public interest requires that, as a condition to our approval of the proposed transfer of control, the Joint Applicants should be required to waive all objections and defenses based upon personal jurisdiction to any action that the Commission may bring in Franklin Circuit Court to enforce the provisions and conditions set forth in this Order and appoint an agent in Kentucky for the sole and limited purpose of accepting the service of process of any action that the Commission may bring to enforce the provisions and conditions set forth in this Order.

(December 20, 2002 Order, p. 21).

The ratepayers of Kentucky–American thus stand on equal footing with those of Maryland-American with regard to enforcement of Commission rulings. The Attorney General fails to identify any additional benefit to be gained by the ratepayers. Moreover, the proposed conditions would not "benefit ratepayers in any other jurisdiction" as required by the Most Favored Nations Clause. A rehearing on this issue is therefore not necessary.

5. THE ATTORNEY GENERAL FAILED TO ESTABLISH ANY VIABLE THREAT TO THE COMMISSION'S ENFORCEMENT CAPACITY

As a final ground for obtaining a rehearing, the Attorney General argues that the Commission has not gone far enough to protect its "enforcement capacity" from the alleged threat posed under international law or treaties. (Attorney General's Request for a Rehearing, p. 5). This argument is based on the assumption that "rights and claims under international law or treaties present a threat to the Commission's jurisdiction." (Attorney General's Request for a Rehearing, p. 6). The obvious flaw in the argument results from the complete absence of any proof that such alleged threat has any basis whatsoever in realty.

The Commission was not fooled by frantic Chicken Little cries that the sky was falling. It searched the record for some reference to a specific provision of an international treaty or foreign trade agreement which extended an advantage to any of the Joint Applicants or in any manner diminished the Commission's jurisdiction, but found none. (December 20, 2002 Order, pp. 15-16). Not only did the Attorney General fail to identify a specific provision which poses a danger to the Commission, he did not even attempt to present any formal proof on the issue. To the contrary, the Attorney General remained content to rely on the evidence presented by Bluegrass FLOW, Inc. ("FLOW"). Such evidence was grossly inadequate:

> The record shows that neither of FLOW's witnesses is qualified to render an opinion on this issue. Neither witness is a lawyer nor has engaged in any formal study of international law or law in general. Neither witness has any significant experience in international commerce. While both witnesses testified on NAFTA and GATS, neither witness had fully reviewed the treaties. Both acknowledged that they were unfamiliar with many of the treaties' provisions. When cross-examined on various aspects of these treaties, they repeatedly indicated their lack of knowledge of the treaties' terms. Accordingly, we give little weight to their testimony or conclusions.

(December 20, 2002 Order, pp.16-17).

The Commission did not however end its examination by rejecting FLOW's "expert" testimony. It scrutinized both the North American Free Trade Agreement ("NAFTA") and General Agreement on Trade in Services ("GATS") which had been ambiguously identified by the "experts" as posing a threat. The Commission found the alleged threat to be completely unsubstantiated:

> Our own examination indicates that neither NAFTA nor GATS presently presents a threat to our jurisdiction. NAFTA is an agreement between Mexico, Canada, and the United States. Only investors from these nations are entitled to bring a claim under the treaty. None of the Joint Applicants are from Canada or Mexico. Moreover, any claim that is brought by the investor is brought

> against the member-signatory. Assuming *arguendo* that any of the Joint Applicants could bring a claim, that claim is solely against the United States. Moreover federal law would expressly prohibit the Joint Applicants from challenging any action of the Commission in any court of this country based upon the ground that such action is inconsistent with NAFTA.
>
> We find nothing in the record to suggest that GATS would restrict or curtail our jurisdiction. GATS governs trade in goods and services, but does not address investments. Water is not considered to be either a service or a good; therefore, it does not currently fall within the scope of GATS.
>
> Assuming *arguend*o that GATS addressed water services, it does not create any private right of action on behalf of a foreign corporation. GATS is designed to prevent discrimination by a World Trade Organization ("WTO") member state against other member states. Only members of the WTO can initiate dispute settlement proceedings against another member. If the Joint Applicants assert a violation of GATS based upon an action that we take, their only remedy is to request the European Union (which represents the interest of the United Kingdom and the Federal Republic of Germany) to initiate a dispute proceeding against the United States. Moreover, if a dispute panel were to find against the United States, it may not take any action against this Commission. Its only remedy is to direct the offending national government to remove the offending measure and to authorize "the claimant government to suspend an equivalent level of trade concessions, such as raising tariffs or suspending market access rights."

(December 20, 2002 Order, pp. 17-18).

The Attorney General does not attempt to identify any error in these findings. Rather, in order to justify a rehearing he argues that the Commission could be wrong, or even if it is right, it failed to consider future and as-of-yet unidentified changes in international law. Presumably relying on clairvoyant powers, the Attorney General offers the West Virginia-American conditions as an effective force-field against yet-to-be-formulated provisions of international treaties and agreements. Such reasoning could not be more flawed. It is not possible for the

Commission to either predict the future or to guard against the unknown. The Commission simply cannot frame conditions based on uneducated guesses and "what-ifs".

Undaunted, the Attorney General argues that the Most Favored Nations Clause requires that the Commission adopt the West Virginia conditions whether or not there is evidence to support them. This, too, is premised upon faulty reasoning. As the Commission recognized "[e]very state Commission reviewing the proposed transaction must judge the transaction based upon the specific facts before it and the laws of its state. Each review is separate . . ." (July 10, 2002 Order, Case No. 2002-00018, p. 16). It would be neither wise nor acceptable for the Commission to adopt a condition in the complete absence of any evidence requiring it simply because another regulatory body considered the condition to be a good idea. As previously recognized by the Commission, the purpose of the Most Favored Nations Clause is to ensure that the Kentucky-American ratepayers do not lose out on any benefits. Absent the finding of a benefit resulting from a condition, no purpose is served, either under the Most Favored Nations Clause, or otherwise, in imposing such condition on Joint Petitioners.

A rehearing is thus not necessary to address the Attorney General's fears that future international laws or treaties might pose a threat to the Commission's enforcement capacity.

CONCLUSION

The Attorney General's request for a rehearing is merely a re-argument of issues previously addressed by the Commission without any proffer of new or relevant evidence. That is simply insufficient to warrant a rehearing under KRS 278.400. See American Communications Services of Louisville d/b/a e.spire et al. v. Bell South Telecommunications, Inc., Case No. 98-212, Order of June 23, 2000; Approval of the Resale Agreement of Bell South Telecommunications, Inc. and Nustar Communications, Case No. 98-165, Order of June 5, 2002;

The Alternative Rate Filing of Lake Columbia, Case No. 2000-458. Since the Attorney General has failed to establish any reason why the Commission should grant a rehearing of its December 20, 2002 Order, the Request for a Rehearing should be denied.

Respectfully submitted on this the 17th day of January, 2003.

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CERTIFICATION

In conformity with paragraph 13 of the Commission's Order dated September 26, 2002, this is to certify that the electronic version of this Response of Kentucky-American Water Company, Thames Water Aqua Holdings GmbH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., Apollo Acquisition Company, and American Water Works Company, Inc. to Attorney General's Request for Rehearing is a true and accurate copy of the Response of Kentucky-American Water Company, Thames Water Aqua Holdings GmbH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., Apollo Acquisition Company, and

American Water Works Company, Inc. to Attorney General's Request for Rehearing filed in paper medium; that the Joint Petitioners have notified the Commission and all parties by electronic mail on January 17, 2003 that the electronic version of this Response of Kentucky-American Water Company, Thames Water Aqua Holdings GmbH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., Apollo Acquisition Company, and American Water Works Company, Inc. to Attorney General's Request for Rehearing has been transmitted to the Commission, and that a copy has been served by mail upon:

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and that the original and three copies have been filed with the Public Service Commission in paper medium on the 17th day of January, 2003.

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