

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 )

**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  
THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT'S  
PETITION FOR REHEARING**

The Lexington-Fayette Urban County Government ("LFUCG") has filed a Petition for Rehearing seeking to reargue four issues already addressed by the Commission and additionally asking that the Commission adopt certain conditions approved by regulatory agencies in other states. The LFUCG has failed to identify any flaw in the Commission's prior reasoning and has come up with no stronger argument for promoting the proposed conditions than that they must be necessary because other regulatory agencies have adopted them. A rehearing is not warranted to address any of these arguments. The Commission did not err in its December 20, 2002 Order and has been provided with no basis for modifying the Order. The LFUCG'S Petition for Rehearing should, therefore, be denied.

1. **THE COMMISSION HAS NOT BEEN EMPOWERED TO PROTECT THE LFUCG FROM POTENTIAL JURISDICTIONAL CHALLENGES RAISED BY JOINT PETITIONERS**

The LFUCG appears to believe that the role of this Commission is not to protect "the public interest," but rather to promote the particularized interests of the LFUCG. It argues that the Commission was wrong to protect "its own interests in enforcing its orders while failing to protect the legitimate statutory rights of parties to its proceedings." (Lexington-Fayette Urban County Government's Petition for Rehearing, p. 3). Such argument fails to consider the role of the Commission as mandated by the Kentucky General Assembly. The Commission's purpose and duties do not entail promoting the isolated interests of the LFUCG.

The Commission is an administrative agency created in accordance with the directives of the General Assembly. Its jurisdiction, powers, and duties are all limited by the provisions of KRS Chapter 278. See KRS 278.040, KRS 278.200, KRS 278.260. Accordingly, not only the decisions which can be made by the Commission, but also the factors which it is to consider in making such decisions are dictated by statute. KRS 278.020 defines the relevant factors for the Commission's determination of what conditions should be imposed on the Joint Applicants herein. The General Assembly has compelled that the public interest be protected. KRS 278.020(5). The Commission has imposed sufficient conditions to protect the public interest. It is neither required nor authorized to impose any additional conditions to promote the LFUCG's separate agenda.

The Commission fully understood the statutory restrictions placed upon it in this regard and crafted the conditions it imposed upon the Joint Applicants so as to stay within the confines of its mandate while at the same time protecting its ability to fulfill its statutory duties:

Our authority extends only to the rates and services of utilities. KRS 278.040(1). So long as KAWC operates facilities in

this Commonwealth that distribute water to the public for compensation, it is subject to our jurisdiction and will be the focus of our regulatory efforts. Moreover, KAWC's ownership and operation of such facilities, its physical presence in the Commonwealth, and its status as a Kentucky corporation make it readily amenable to the service of process.

Many conditions necessary for Commission approval of the proposed transfer of control, however, involve not only KAWC, but also some or all of the Joint Applicants. These conditions are meaningless without the ability to ensure the Joint Applicants' compliance. To the extent that persons fail to comply with our Orders or aid and abet the violation of those Orders, KRS 278.990(1) provides us with limited enforcement powers. KRS 278.390, furthermore, authorizes us to obtain judicial enforcement of our Orders. However, such enforcement is not possible if service of process cannot be obtained.

.....

Accordingly, we 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, pp. 20-21).

The LFUCG apparently concedes that these conditions are sufficient to ensure that the Commission has the full authority to act on behalf of Kentucky-American's ratepayers and enforce its orders through the Franklin Circuit Court.

The LFUCG argues, however, that the Commission was short-sighted in failing to also look out for the separate and conflicting interests of the LFUCG. Absent from the LFUCG's argument is any reference to a statute or court decision which empowers the Commission to act on behalf of, or promote the isolated interests of the LFUCG. The LFUCG nonetheless contends that since it has a statutory right to challenge a Commission decision, the Commission must adopt a condition which shields the LFUCG from "personal jurisdiction challenges" when it

seeks to set aside a Commission Order. (Lexington-Fayette Urban County Government's Petition for Rehearing, p. 3). The response to this proposal is obvious. Any further delineation of the LFUCG's statutory right to challenge the Commission's Orders must come from the Legislature, not the Commission.

Furthermore, it is inconceivable that the Commission's obligation to protect the public interest would ever be construed to include a duty to assist the LFUCG in its efforts to overturn a Commission Order. Yet, that is precisely what the LFUCG requests. It argues that the Commission must require Joint Petitioners to appoint a service of process agent for the purpose of accepting process for "statutory actions by the parties to this case", *i.e.*, actions seeking to overturn the Commission's Order. (Lexington-Fayette Urban County Government's Petition for Rehearing, p. 3). The LFUCG maintains that this requirement is necessary to shield it from "personal jurisdiction challenges" raised by Joint Petitioners. (Lexington-Fayette Urban County Government's Petition for Rehearing, p. 3). The LFUCG fails to explain, however, how any "personal jurisdiction challenges" raised by Joint Petitioners can defeat the LFUCG's ability to obtain a review of the Commission's Order as authorized by KRS 278.410.

The LFUCG hopes to gloss over this obvious flaw in its argument. It makes much of the fact that some of the Joint Petitioners have raised "personal jurisdiction challenges" in the current appeals from the May 30, 2002 Order. The LFUCG does not argue that the assertion of the challenges has either resulted in any prejudice to the LFUCG in the appeals or in any fashion altered the course of the Franklin Circuit Court's review. To the contrary, even in the face of "personal jurisdiction challenges" the appeals continue as authorized by the Legislature, with all Joint Petitioners submitting to the jurisdiction of the Court for the purpose of the appeal. Joint Petitioners' Answers challenging the applicability of the long-arm statute to the statutory appeals did not prove to be fatal to such appeals and caused no harm to the LFUCG.

As to future appeals, one cannot imagine any circumstance where a party who prevailed in a Commission proceeding would take any action in an appeal from the Commission Order which would deprive such party of the right to rely on such Order. It would not be logical for a prevailing party to refuse to appear and defend the Order during a statutory appeal. Even if one of the beneficiaries to a Commission order took the position that it would not participate in the appeal, that stance would not impede the court's jurisdiction over the Commission whose Order is being challenged. The LFUCG's concern over "personal jurisdiction challenges" is thus much ado about nothing. Such challenges pose no threat to the appeals authorized by the General Assembly. See KRS 278.410. A rehearing is thus not warranted on this issue.

**2. JOINT PETITIONERS' AUTHORITY TO FILE THE APPLICATION IS WELL-DOCUMENTED**

The LFUCG's argument that this Application has not been properly authorized by any of the Joint Petitioners is equally lacking in substance. As Joint Petitioners established in Case No. 2002-00018, the original acquisition was properly placed before the shareholders of American Water Works Company, Inc. and approved by them on January 17, 2002. (Prepared Testimony of Roy Mundy, "Mundy", p. 11). The transaction was also approved by the Boards of Directors of Thames Water Aqua Holdings, GmbH and RWE Aktiengesellschaft. (Mundy, p. 11). The formation of an intermediary holding company was an aspect of the original transaction which was duly authorized by the parties to such transaction. No further authorization is required.

Nonetheless, the LFUCG continues to insist that the Commission require supplemental authorization. It argues that authorization for the formation of an intermediary holding company is not enough; rather, there must additionally be subsequent authorization specifically identifying Thames Water Aqua US Holdings, Inc. as that intermediary holding company. Moreover, the LFUCG contends that it is insufficient for the Joint Petitioners to have authorized the transaction,

they must also specifically authorize the commencement of every administrative action required for approval of the transaction. There is no supporting authority for requiring such supplemental authorization.

In fact, the suggestion that this transaction has proceeded without proper authorization is almost comical. The magnitude of the complex transaction at issue herein is thoroughly documented, highly publicized, and the topic of discussion across several continents. The corporate documents filed in this proceeding as well as Case No. 2002-00018 are comprehensive and detailed. The documents leave no doubt that the governing boards of American Water Works Company, Inc. and RWE Aktiengesellschaft approved both the merger and the commencement of all administrative proceedings necessary to obtain approval thereof. See Agreement and Plan of Merger, Section 2.01 and Section 5.03. There are no legal deficiencies which would support the LFUCG's contention that the Application should be declared void *ab initio* as unauthorized. A rehearing should therefore not be granted on this issue.

3. **THE COMMISSION DID NOT ERR IN ASSESSING THE BENEFITS FROM THE ENTIRE TRANSACTION**

Under the theory that the benefits arising from a proposed transaction are like votes which once having been cast for one candidate can never be cast again, the LFUCG argues that the Commission wrongfully attributed benefits from "a prior decision to this transaction." (Lexington-Fayette County Urban Government's Petition for Rehearing, p. 4). The Commission did not however attribute benefits from a prior decision, but rather scrutinized the entire transaction and simply reaffirmed the continued existence of benefits which it had previously recognized. It did not err in rejecting the LFUCG's contention that any benefit found in Case No. 2002-00018 to have resulted from the transaction could not be considered in this proceeding, notwithstanding its continued viability.

The LFUCG has clearly misunderstood the principles of res judicata upon which the Commission based its decision to limit the scope of this proceeding. Those principles preclude the re-adjudication of certain matters. They do not additionally prohibit any further reference to, or reliance on, previously adjudicated facts. Such a result would render the doctrine of res judicata meaningless. Accordingly, there is no inconsistency between the scope of the hearing herein as defined by the Commission, and its holding that the previously recognized benefits from this transaction as it was originally structured, continue to exist following the addition of Thames Water Aqua US Holdings, Inc. to the corporate hierarchy.

The Commission correctly rejected the LFUCG's contention that it must put blinders on, and limit its examination solely to Thames Water Aqua US Holdings, Inc. without any regard for the remaining participants in the transaction:

This argument is myopic. The proposed transaction involves the transfer of control to TWUS and Thames and RWE. As control has yet to pass from AWWC to any other entity, we cannot view the creation of TWUS in isolation. It is part of a much larger and complex transaction. The focus of our examination, therefore, must be upon the entire transaction and any benefits that such transaction will bring to KAWC and its ratepayers. The record clearly shows that significant benefits will result from the entire transaction. . . . There is no evidence in the record, nor do the Intervenors suggest, that these benefits will be diminished as a result of the revisions to the transaction originally approved.

(December 20, 2002 Order, pp. 13-14).

The LFUCG has failed to provide any reason why this issue should be revisited through a Rehearing.

4. **THE LFUCG HAS NOT IDENTIFIED ANY BENEFITS TO BE GAINED FROM IMPOSING ADDITIONAL CONDITIONS ON JOINT PETITIONERS**

As its final ground for a Rehearing, the LFUCG contends that a rehearing should be granted in order for the Commission to review conditions imposed by other jurisdictions. It is suggested that all conditions framed by other jurisdictions must be reviewed in order "to ensure that this transaction is consistent with the public interest and to meet the intent and spirit of the 'most favored nations clause' provision adopted by the Commission in Case No. 2002-00018." (Lexington-Fayette Urban County Government's Petition for Rehearing, p. 8). Such argument distorts the purpose of the Most Favored Nations Clause as previously expressed by the Commission and thus does not warrant a rehearing.

The Commission clearly rejected the contention that the Most Favored Nations Clause was designed as an all-encompassing catch-all provision incorporating by reference every condition deemed necessary by other jurisdictions:

Every 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 and involves different AWWC subsidiaries and different local concerns. KRS 278.020 requires us to review the proposed transaction as it affects KAWC ratepayers and to apply the standard of review that the Kentucky General Assembly has established. The actions of other states in this regard should have little bearing on our decision. . .

(July 10, 2002 Order, Case No. 2002-00018, p. 16).

The Most Favored Nations Clause does not either directly state or imply that every condition imposed by another jurisdiction should automatically be applicable to this jurisdiction. It is apparent not only from the Commission's discussion, but also from the literal language of the provision, that the Commission's focus in drafting the provision was on ensuring that the Kentucky-American ratepayers share in the "proportionate net benefits" afforded to ratepayers in



other jurisdictions. Accordingly, it is simply insufficient for the LFUCG to argue that the Commission must grant a rehearing in order to review the conditions imposed in Maryland, New Jersey and West Virginia. LFUCG must instead identify what proportionate net benefits are to be gained by Kentucky-American's ratepayers by the adoption of the conditions. In fact, Kentucky-American ratepayers would gain no proportionate benefits by the adoption of the specific Maryland, New Jersey and West Virginia conditions identified in LFUCG's motion; nor would the conditions "benefit ratepayers in any other jurisdiction" as required under the Most Favored Nations Clause. The LFUCG is therefore not entitled to a rehearing on this issue.

### **CONCLUSION**

The LFUCG failed to meet the standard required under KRS 278.400 in order to establish an entitlement to a rehearing. The statute allows for the introduction of "additional evidence that could not with reasonable diligence have been offered on the former hearing." The LFUCG'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. 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 LFUCG has failed to establish any reason why the Commission should grant a rehearing of its December 20, 2002 Order, the Petition for a Rehearing should be denied.

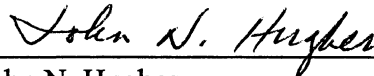
Respectfully submitted on this the 17<sup>th</sup> day of January, 2003.

STOLL, KEENON & PARK, LLP



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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 The Lexington-Fayette Urban County Government'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 The Lexington-Fayette Urban County Government'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 The Lexington-Fayette

Urban County Government's Request for Rehearing has been transmitted to the Commission, and that a copy has been served by mail upon:

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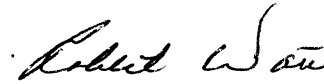
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and that the original and three copies have been filed with the Public Service Commission in paper medium on the 17<sup>th</sup> day of January, 2003.



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