

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

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**MEMORANDUM OF JOINT PETITIONERS
REGARDING THE SCOPE OF THIS PROCEEDING**

Joint Petitioners, Kentucky-American Water Company (“Kentucky-American”), Thames Water Aqua Holdings GmbH (“Thames Holdings”), RWE Aktiengesellschaft (“RWE”), Thames Water Aqua US Holdings, Inc. (“TWUS”), Apollo Acquisition Company (“Apollo”) and American Water Works Company, Inc. (“American”), submit this memorandum regarding the scope of this proceeding.

In their Motion and Petition to Modify Order herein (the “Petition”), Joint Petitioners have requested approval of a change of control under the terms of which TWUS will acquire indirect control of Kentucky-American following the merger of Apollo and American. Petition at 9. TWUS is a holding company formed and wholly owned by Thames Holdings for the sole purpose of holding the stock of American and Thames Holdings’ other U.S. water operations and filing consolidated income tax returns. Petition ¶ 7. This will occur as part of the transaction by which Thames Holdings will

acquire ownership of all the stock of American and thus indirect control of Kentucky-American. That transaction was approved by this Commission in the Order of May 30, 2002, and affirmed by the Order of July 10, 2002, in Case No. 2002-00018, 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. The only modification to the transaction that was approved in Case No. 2002-00018 is the insertion of TWUS in the organizational chain between Thames Holdings and American. The scope of this proceeding, therefore, should be confined to an examination of the qualifications of TWUS to hold the American stock in light of the fact that the acquisition of American's stock by TWUS's parent, Thames Holdings, has been approved by the Commission.

On September 13, 2002, the Commission issued an Order directing the parties to brief the following four specific issues:

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 are consistent with the public interest?

2. May the parties properly present additional evidence regarding issues on which the Commission issued findings in 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?

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. Pub. Serv. Com'n, No. 02-CI-001012 (Franklin Cir. Ct., Ky. filed July 29, 2002)?

1. SHOULD THE SCOPE OF CASE NO. 2002-00317 BE LIMITED TO A REVIEW OF THE QUALIFICATIONS OF TWUS?

Yes. The only issues for review are the qualifications of TWUS and whether the modifications to the proposed transaction approved in Case No. 2002-00018 are consistent with the public interest. All relevant issues related to RWE, Thames Holdings and the other participants in Case No. 2002-00018 have been resolved. A final order has been issued concluding all matters presented in Case No. 2002-00018. The Commission has noted that there was “extensive discovery” in that case. Order of May 30, 2002, at 2. Indeed there was. The Commission and its Staff submitted 71 data requests to the Joint Petitioners; the Attorney General submitted 268 data requests and the Lexington-Fayette Urban Government submitted 89 data requests for a total of 428 data requests. These data requests had numerous sub-parts as well. The data requests and the responses are part of the record of Case No. 2002-00018.

The Orders in Case No. 2002-00018 reflect the detailed analysis of the Commission and its Staff of this extensive discovery, evidence adduced at the hearings and the briefs of the parties. That ground does not need to be re-plowed in this case. In the event the Commission, its Staff or the Intervenors believe the information considered in that case might be useful in this case, Joint Petitioners have requested that the entire record of Case No. 2002-00018 be made a part of the record in this case. No further inquiry into the issues in Case No. 2002-00018 is necessary or appropriate here.

The only issue that needs consideration here is the introduction of TWUS into the organizational chain and its ownership and control of American’s stock. Having previously found that RWE and Thames Holdings meet the statutory criteria for ownership of American’s stock, the only remaining issue is whether TWUS meets those

criteria. If RWE and Thames Holdings have already been found to be proper owners of American, and TWUS is merely a subsidiary created by and owned by Thames Holdings, no additional investigation into the propriety of their ownership of TWUS is necessary. It would be a feat of illogical reasoning to find that RWE and Thames Holdings are capable owners of their subsidiaries in Case No. 2002-00018, but are not in this case.

Significantly, the issue of the impact of TWUS's acquisition of American's stock on the approval of the transaction in Case No. 2002-00018 has already been considered and decided in the Order of July 10, 2002, in Case No. 2002-00018, because it was urged by Bluegrass FLOW, Inc. and the other intervenors to be grounds for rescinding the Order of May 30, 2002. The Commission rejected the intervenors' arguments after the following analysis:

The creation of TWUS does not alter the final result of the proposed transaction. While TWUS will own all the outstanding shares of the survivor of the AWWC-Apollo merger, Thames Aqua will own and control TWUS. Thus RWE and Thames Aqua will retain ultimate control over the AWWC-Apollo merger survivor. Thames Water Plc, which operates all of Thames Aqua's water holdings, will operate and manage TWUS. The members of TWUS's board of directors will be identical to the board of directors of the survivor of the AWWC-Apollo merger. (Footnote omitted).

The Commission has just conducted an extensive review of Thames Aqua and RWE's qualifications and concluded that they have the requisite abilities to provide reasonable utility service. The Intervenor has not suggested, nor do we find, any basis for concluding that the changes to the proposed transaction will alter these qualifications. The Intervenor also fails to state how the public interest will be adversely affected by the modifications to the proposed transactions if the ultimate control of KAWC is still transferred to Thames Aqua and RWE.

Case No. 2002-00018, Order of July 10, 2002, at 4-5. The Commission's analysis was based on information contained in material filed by FLOW in Case No. 2002-00018 in support of its Motion to Rescind. A comparison of the information in the material filed by FLOW to the information contained in the Petition herein demonstrates that the TWUS modification to the transaction will be exactly as the Commission's analysis above describes it to be.

The Intervenors have suggested that it is necessary to examine certain aspects of RWE, Thames Holdings and American that were not examined in the prior case or at least were not examined to the extent that they now believe is necessary. To allow the Intervenors to reexamine the qualifications of RWE, Thames Holdings or American is nothing more than a rehearing of previously considered issues or issues that could have been, but were not previously raised. The Commission dealt with the Intervenors' rehearing issues in the Order of July 10, 2002, in Case No. 2002-0018. To allow the same issues to be resurrected in this case will amount to a rehearing of a rehearing, something the Commission does not have the authority to do. As it said in the Order of September 29, 1995 in Case No. 95-010 In the Matter of: An Adjustment of Rates of Western Kentucky Gas Company:

. . . The Commission has previously addressed the issue of granting a 'rehearing on a rehearing.' In Case No. 10201 (An Adjustment of Rates of Columbia Gas of Kentucky, Inc.), the Commission stated: "Furthermore Columbia has cited no authority by which the Commission could undertake 'rehearing on rehearing' . . . The Commission has an additional concern that granting the requested reconsideration herein would seriously undermine the finality of Commission Orders and would encourage parties to crowd the Commission's dockets with endless requests to reconsider its actions.

Order of September 29, 1995, Case No. 95-010, at 2. Allowing the Intervenors to revisit the issues already decided by the Commission in Case No. 2002-00018 creates the same concerns as expressed in the Western Kentucky Gas Company case above.

The scope of this proceeding should be confined to an examination of the qualifications of TWUS and a determination of whether the modifications to the proposed transaction approved in Case No. 2002-00018 are consistent with the public interest. Any broader scope, including any re-examination of the proposed transaction as approved in Case No. 2002-00018, would cause administrative inefficiency.

2. MAY THE PARTIES PRESENT ADDITIONAL EVIDENCE ON FINDINGS MADE PREVIOUSLY IN CASE NO. 2002-00018?

No. Principles of res judicata preclude relitigation of the issues decided in Case No. 2002-00018. Kentucky's highest court has addressed the issue of res judicata in administrative proceedings. In Williamson v. Public Service Commission, Ky., 174 S.W.2d 526, 529 (1943), the court said that res judicata applies to quasi-judicial acts of ". . . public, executive or administrative officers and boards acting within their jurisdiction." In Brock v. Western Rockcastle Water Association, Case No. 97-311, Order of February 28, 1998, the Commission dismissed a complaint on res judicata grounds because the issues had been litigated in a prior proceeding.

In an extensive discussion of the rules applicable to res judicata matters in the Order of August 30, 2002, in Case No. 2002-00107, In the Matter of: An Adjustment of Rider AMRP of the Union, Light, Heat and Power Company the Commission found that an issue the Attorney General attempted to relitigate was precluded from review because there was an identity of issues between the present and an earlier case, there was a final decision on the merits, the estopped party was given a fair opportunity to litigate the issue

and the issue was necessary to the commission's final decision in the earlier case. All of these elements are present in this case as they relate to RWE and Thames Holdings. The only matter to be resolved is TWUS's ability to meet the criteria of KRS 278.020(4) and (5).

The statutory issues related to RWE, Thames Holdings, Apollo, American and Kentucky-American were fully and completely litigated in Case No. 2002-00018. The Intervenor were given an opportunity to fully explore the issues. The Commission's findings as to the qualifications of RWE and Thames Holdings and of the transaction's consistency with the public interest were necessary to the determination made and are final, subject only to review by the appellate courts. The same intervenors are present in this case as in Case 2002-00018. The Joint Petitioners here are the same as, or have privity with the parties in Case No. 2002-00018 so as to be considered, the parties to the earlier case. As the Court said in Ralph Wolfe & Sons v. New Zealand Ins. Co., et al., Ky., 58 S.W.2d 623, 624 (1933) res judicata applies to “. . . one who, though not a formal party to the first suit, was actively interested in the case and had participated in its prosecution so as to constitute himself a real party.” Unquestionably, RWE, Thames Holdings, Apollo, and American were actively involved in the prior proceeding and were essential to the Commission's determination that the transaction is in the public interest. All of the elements of res judicata being present, there is nothing for the Commission to relitigate in this case in so far as its orders in Case No.2002-00018 made specific findings or conclusions.

The Commission said in In the Matter of: An Investigation of the Sources of Supply and Future Demand of Kentucky-American Water Company, Case No. 93-434,

Order of September 29, 1997, that KRS 278.410 provides when a rehearing has been granted, any party may within 20 days bring an action against the Commission in the Franklin Circuit Court. “Thus, once a final order on rehearing has been issued, any further relief must be sought from the court, not the Commission.” The Intervenors, having followed the statutory process for challenging a rehearing order, must now confine their efforts to the appeals of Case No. 2002-00018 currently pending in the Franklin Circuit Court. Evidence cannot be presented to the Commission related to its findings in Case No. 2002-00018. As discussed in Section 4, the Commission cannot modify an order during appellate review. Even if the Commission could consider the issues in this case to be a rehearing of Case No. 2002-00018, any evidence related to RWE, Thames, American or any of the other participants in that case would be inappropriate. The Commission has rejected evidence proffered in a rehearing that was “. . . not new, nor was it previously unavailable.” In the Matter of: Area Code Exhaustion Relief, Case No. 377, Order of September 8, 1999. The Commission has rejected the introduction of evidence that was not in existence at the time of the initial hearing. In the Matter of: An Adjustment of Rates of Kentucky-American Water Company, Case No. 2000-120, Order of February 26, 2001. Finally, the Commission said in In the Matter of: Application of Blazer Energy Corp., Case No. 98-489, Order of March 16, 2000: “The intervenors have not offered to produce any new evidence that could not have been reasonably available in the former hearing and the issues specified in the rehearing application have been heretofore decided by the Commission.”

Thus, even if there were no legal proscription against relitigating issues in its prior orders, there is no evidence that the Intervenors can provide that would meet the criteria established by the Commission for the introduction of evidence upon rehearing.

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?

For the reasons stated above, the Joint Petitioners do not believe that the parties may properly present additional evidence regarding issues on which the Commission issued findings in Case No. 2002-00018. Even if it were permissible, the Commission is bound by those earlier findings because of principles of res judicata discussed in Part 2 above and because of the legal constraints preventing the modification of orders that are on appeal discussed in Part 4 below. The only condition under which the Commission may issue findings that are contrary to the earlier findings is if it is directed to do so by an appellate court. See the discussion in Part 4 below.

4. TO WHAT EXTENT IS THE COMMISSION PRECLUDED FROM CONSIDERING ANY ISSUE IN THIS PROCEEDING AS A RESULT OF THE PENDING APPEALS IN FRANKLIN CIRCUIT COURT?

The orders in Case No. 2002-00018 are the subject of appeals currently pending in the Franklin Circuit Court and have not been revoked or modified by the Commission or suspended or vacated, in whole or in part, by the Franklin Circuit Court. Thus, those orders continue in effect pursuant to KRS 278.390. Supporting this interpretation, Kentucky's highest court has said,

A finding and order of such commissions as the Public Service Commission of Kentucky, while not a judgment with the attributes of a final judgment or decree

of a judicial tribunal, has the effect of a legislative act as to the parties to the proceeding and is very far reaching in its operation. Broadly speaking, the order of the Commission is conclusive when made within the scope of its authority and binding upon all parties except as a review thereof may be had by the courts. 51 C. J. 62, 64, 67.

Frankfort Kentucky Natural Gas Co. v. City of Frankfort, 276 Ky. 199, 123 S.W.2d 270, 272 (1938).

While the Commission has the authority to modify its orders in cases that have not been appealed, this control over its orders ceases when an appeal is perfected, at which time the commission loses jurisdiction of the matter. See for example, Ky. Unemployment Ins. Com'n v. Carter, Ky., 689 S.W.2d 360 (1985) and Kentucky Utilities Co. v. Farmers RECC, Ky., 361 S.W.2d 300 (1962). In this case the appeal has been perfected and the Franklin Circuit Court has assumed jurisdiction over the orders issued by the Commission in Case No. 2002-00018. On August 29, 2002, the Court entered an order consolidating the three appeals of Case No. 2002-00018 filed by the Intervenors. Thus, the Court has deprived the Commission of its statutory authority to amend or modify the orders.

The Commission has recognized the superior authority of the court in similar situations. In the Order of January 22, 1992 in Case No. 10320, In the Matter of: An Investigation of Electric Rates of Louisville Gas and Electric Company to Implement a 25 Percentage Disallowance of Trimble County Unit No. 1, the Commission was asked by several parties to hold in abeyance a hearing ordered by the Franklin Circuit Court. The Commission declined saying that to do so “. . . presumes that the Commission is superior to that Court. As the language of KRS Chapter 278 clearly shows, we are not. See e.g., KRS 278.410 (making all Commission Orders subject to Franklin Circuit

Court's review). Until a higher court relieves us of the obligations imposed by the Franklin Circuit Court, we must obey that Court's orders. Any other action would be inconsistent with the principles of constitutional government."

Similarly, in the Order of April 10, 1996 in Case No. 95-455, In the Matter of: An Examination by the Public Service Commission of the Environmental Surcharge Mechanism of Louisville Gas and Electric Company as Billed From May 1, 1995 to October 31, 1995, the Commission expressed the reasons for not modifying orders while an appeal is pending:

LG&E also argues that since the Judgment in the KU case has been appealed to the Court of Appeals, it is neither good practice nor common sense for the Commission to reverse itself on an interim basis. The Commission finds that neither good law nor good policy supports implementing the Circuit Court Judgment in the KU case while it is on review at the Court of Appeals. . . . Sound public policy requires the Commission to recognize uncertainties that exist during the appeal process . . .

Accordingly, the Commission refused to modify its order while the appeal remained in the jurisdiction of the Court.

Because the Commission appropriately takes the position that it cannot modify orders that are on appeal, this proceeding must go forward on the basis that the change of control of Kentucky-American from American to Thames Holdings and its parent, RWE, is consistent with the statutory requirements of KRS 278.020(4) and (5) and that the Commission's approval is in full force and effect. Therefore, the only issues to be examined are the qualifications of TWUS and whether the transfer of American's stock to Thames Holdings' subsidiary, TWUS, is also consistent with the statutory requirements of KRS 278.020(4) and (5).

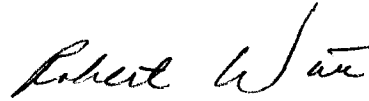
CONCLUSION

For all of the reasons set forth above, the scope of this proceeding should be limited to an examination of the qualifications of TWUS and whether the modifications to the proposed transaction approved in Case No. 2002-00018 are consistent with the public interest.

Respectfully submitted,

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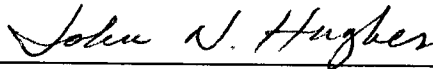


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CERTIFICATION

In conformity with paragraph 13 of the Commission's Order dated September 16, 2002, herein, this is to certify that the electronic version of this pleading is a true and accurate copy of the pleading filed in paper medium; that the Petitioners have notified the Commission and the parties in this case by electronic mail on September 18, 2002, that the electronic version of this pleading has been transmitted to the Commission, and that a copy has been served by mail upon:

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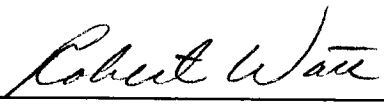
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and that the original and three copies have been filed with the Public Service Commission in paper medium on the 18th day of September 2002.



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