

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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**RESPONSE OF JOINT PETITIONERS TO THE LEXINGTON-FAYETTE
URBAN COUNTY GOVERNMENT’S MOTION TO DISMISS**

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. (“AWW”), submit this Response to the Motion to Dismiss of the Lexington-Fayette Urban County Government (“LFUCG”). The Motion should not be considered and should be dismissed without further review because it violates the procedural schedule to which all of the parties agreed at the informal conference in this case held on September 11, 2002. The procedural schedule does not provide for this type of pleading. The parties at the conference, including the LFUCG, did not request the opportunity to file motions and did not indicate that there was a need for such. Having agreed to the establishment of the schedule, the LFUCG should not now be able to revise it to conform to its belated belief

that the Joint Motion and Petition is inappropriate. The interjection of superfluous motions only disrupts the schedule that was extensively discussed and finalized at the conference.

In a related effort, Bluegrass FLOW, Inc. (“FLOW”), in its statement of support of the LFUCG’s Motion to Dismiss, opines that a two week extension should be added to the initial stages of the schedule. There was no such request made at the conference and no party objected to the due dates that were ultimately reflected in the Commission’s procedural order of September 16, 2002. FLOW is, even at this early stage of the proceeding, engaging in the very type of delay and disruption that it has said it would avoid, but of which Joint Petitioners forewarned. The Commission should take a firm position that such procedural maneuvering will not be condoned and reject both efforts of these intervenors.

Substantively, the Motion provides no factual or legal basis for dismissal of the Joint Petition. On page three of the Motion, the LFUCG says that the Commission should “reject the Motion as beyond its jurisdiction or authority, and allow the Joint Petitioners the opportunity to file a new Application that allows for a full investigation of all issues related to a new change of control.” The flaw in this argument is that there is no “new” change of control. Thames Holdings, a subsidiary of RWE, is still the corporation that will acquire the stock of AWW and it will still control the AWW stock and indirectly Kentucky-American. The change is only to the organizational chart of RWE and its subsidiaries, not to the Merger Agreement and its underlying transaction.

The Commission, in its Order of July 10, 2002, specifically determined that the creation of TWUS does not alter the result of the proposed transaction and because

TWUS is part of that overall transaction, a simple modification of the order would resolve any remaining issues about TWUS. Because appeals were filed prior to the time a modification could be made, the Joint Petition requests the establishment of a new docket, recognizing the constraints on the Commission's jurisdiction pending an appeal. With only the limited issue of the nature and role of TWUS in the corporate structure of the acquiring corporation - RWE - to be considered, a limited proceeding is all that is required.

The Motion states on page 2 that "The fundamental problem with the Motion is that it seeks modification of the Orders over which the Commission no longer has jurisdiction..." This is incorrect. The Joint Petition seeks approval of the change of the corporate structure of RWE, which inserts TWUS in the chain of the organization. The Commission has not made any findings or issued any order that deals with the ownership of AWW stock by TWUS.

Continuing in that same sentence, the LFUCG says that the Joint Petitioners seek to limit the nature of this proceeding beyond that provided by law. It cites no authority for this proposition (probably because there is none). KRS 278.020(4) and (5) require only that the Commission find that the applicants have the technical, financial and managerial ability to own or control the utility and that the change of control is in the public interest. The Commission has already found that RWE and Thames have met those qualifications to own the stock of AWW and to acquire indirect control of Kentucky-American. The Joint Petition does not request any modification of those findings and none are necessary.

KRS 278.020 only requires Commission approval change in control. Thames Holdings is the corporation that is acquiring AWW stock and indirectly control of Kentucky-American. Since the parent company complied with the requirements of KRS 278.020, it is unnecessary that each subsidiary obtain independent approval of the transaction to which it may be a part. Thus, the only nature of this proceeding is the investigation of TWUS as an intermediate subsidiary in the chain of control of the stock of AWW. To investigate the relationship between TWUS and the transaction, the Commission can rely on the findings it made in Case No. 2002-00018 as to RWE, Thames Holdings and the other participants. It can investigate the nature of TWUS' corporate structure, its relationship to RWE, Thames Holdings, AWW and Kentucky-American. None of these issues affect the status of the finality of the orders in Case No. 2002-00018 or on the approval of the transaction. Thus, the arguments that the orders in Case No. 2002-00018 are final and that an appeal precludes any modification are irrelevant. The issues in this case are distinct from those already decided.

In Case No. 2002-00107, In the Matter of: An Adjustment of Rider AMRP of the Union, Light Heat and Power Company, Order dated August 30, 2002, the Commission considered and approved a main replacement rider rate for ULH&P. The initial approval of the rider (AMRP) was granted in a prior case, Case No 2001-00092, In the Matter of: An Adjustment of Gas Rates of the Union, Light Heat and Power Company. The Attorney General was a party to Case No. 2001-00092 and appealed the Commission's order to the Franklin Circuit Court, specifically objecting to the AMRP rider. Nonetheless, in spite of the appeal, the Commission accepted the filing of the subsequent case to set the rate pursuant to the AMRP rider. The Attorney General objected, but the

Commission found that it had the authority to proceed on this new, but related matter, even though the appeal in Case No. 2001-00092 was pending. Similarly, in this case, the Commission can consider the related, but unresolved, issue of the creation of an intermediary subsidiary to hold the AWW stock.

The final flaw in the LFUCG's argument is its assertion that a new proceeding investigating all issues related to the merger transaction involving RWE, Thames Holdings, AWW and Kentucky-American must be held. That argument contradicts the main premise of the Motion to Dismiss that the prior orders are final and the appeal precludes any modifications to them. If the Commission begins a new investigation and issues new orders involving the transaction, it will have done the very thing the LFUCG says it cannot do – modify the orders previously issued.

The arguments made in the Motion are inconsistent, contradictory and implausible. It should be denied without further action.

Respectfully submitted,

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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 23, 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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and that the original and three copies have been filed with the Public Service Commission in paper medium on the 23d day of September 2002.

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