

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

The Attorney General argues that the Commission has improperly narrowed the scope of the inquiry of this proceeding and accordingly asks the Commission to reconsider its Order of October 16, 2002. Joint Petitioners 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. urge the Commission to deny such request since the Commission neither made any errors in its application of the principles of res judicata upon which the Order was partially based, nor has it failed to follow the will of the Legislature. The Commission's October 16, 2002 Order herein is no more than an acknowledgement of the jurisdictional restrictions imposed upon it as a result of the appeal from the May 30, 2002 and July 10, 2002 Orders in PSC Case No. 2002-00018 ("the Appealed Orders").

1. There is no Error in the Commission's Res Judicata Analysis

The Attorney General is correct in the acknowledgement that the Commission lacks the jurisdiction to re-litigate PSC Case No. 2002-00018. The appeal of the Orders entered by the Commission in PSC Case No. 2002-00018 resulted in a transfer of jurisdiction to the Franklin Circuit Court. Hoy v. Newberg Homes, Inc., Ky., 325 S.W.2d 301, 302 (1959). Notwithstanding the recognition that the Commission has no jurisdiction to re-litigate the issues of PSC Case No. 2002-00018, the Attorney General nonetheless argues that the Commission must permit the matters addressed therein to be re-litigated in this proceeding. Its attempt to support such an illogical conclusion, by contending that the Commission's analysis of res judicata is flawed, fails to establish a basis for exercising jurisdiction over matters currently pending before the Franklin Circuit Court.

The Attorney General begins by challenging the application of the doctrine of res judicata to this proceeding by erroneously assuming the Commission would not have lost its jurisdiction over the matters under appellate review if res judicata did not apply. The Attorney General correctly notes that res judicata applies only under circumstances where there has been a final judgment. The Attorney General suggests that the Appealed Orders are not final. However, if the Orders had not been final, they could not have been appealed. KRS 278.410(1). In terms of Chapter 278, the Appealed Orders are without question a final and appealable. The Appealed Orders may not be final in the sense that they are currently under appellate review, but as far as the Commission's jurisdiction to revise them is concerned, they are final. Moreover, KRS 278.390 provides that every order of the Commission shall continue in force until revoked, modified, suspended, or vacated. The Appealed Orders thus remain unchanged.

It may be that the Attorney General is attempting to argue that res judicata cannot be invoked until after the appeal has ended. That argument is also wrong. The courts have rejected such a contention. See Stemler v. City of Florence, 126 F.3d 856, 871 (6th Cir. 1997), cert. denied, 118 S. Ct. 1796 (1998) ("the pendency of an appeal does not destroy the finality of the judgment for the purposes of issue preclusion under Kentucky law").

Second, the Attorney General argues that the Commission has not provided it with the opportunity to prove that there has been a change in conditions or circumstances which were not a part of the Commission's review in PSC Case No. 2002-00018. The Attorney General complains that when the issue was initially briefed, the parties had not yet received the responses to the data requests. Obviously such responses have now been served and presumably reviewed. Yet, still the Attorney General identifies no change which requires broadening the scope of this proceeding. Certainly, the Commission imposed no restriction upon the Attorney General's efforts to identify a change of conditions and circumstances or upon discovery. No complaint has been made by the Intervenors that they were deprived of a full, unfettered opportunity to question the Joint Petitioners during the discovery process. Even without any limitation on discovery, they have yet to identify any issue not litigated previously.

The Attorney General's argument appears to be that the Commission must permit a rehashing of the issues addressed in PSC Case No. 2002-00018 under the theory that a change in conditions or circumstances might be stumbled upon during the presentation of proof. Again, no authority is cited in support of such contention. If there has been a change of conditions and circumstances which require the Commission's consideration in this proceeding, that change is ascertainable and should be specifically identified by the Attorney General. See Angel v. Palmer-Ball, Ky., 461 S.W.2d 105, 106 (1970). Since the Attorney General has been unable to

do so, there is no legal basis for expanding the scope of the hearing beyond that required by the October 16, 2002 Order.

He alludes to two issues that "fit squarely under the topics that the legislature mandates the Commission to examine": enforceability of Commission's Orders; and the legal status of the Joint Petitioners. (Motion, p. 6). Both of these matters were considered by the Commission in its Order of May 30, 2002 in PSC Case No. 2002-00018 as to all participants in that case. On pages 10 and 11, the Commission discusses its jurisdiction over the transaction and the entities involved. Additionally, in the Order on Rehearing dated July 10, 2002, the Commission specifically referred to the jurisdiction over RWE and American Water Works Company, Inc. On page 7 of that Order, the Commission addresses the Intervenors' contention that the enforcement of the conditions in its May 30, 2002 Order is problematic: "Moreover, we find that the actions of RWE and AWWC are sufficient to constitute an appearance before us and confer jurisdiction to enforce the provisions of the Order of May 30, 2002." Thus, the Commission has already disposed of the issues of jurisdiction over the participants and the enforceability of its orders. Because the Attorney General has been unable to identify any issue not previously raised or not previously available to be raised, there is no legal basis for expanding the scope of the hearing beyond that required by the October 16, 2002 Order.

Finally, the Attorney General argues that the Commission has misapplied the doctrine of res judicata, accusing the Commission of utilizing the doctrine to bar inquiry into "everything except the subjects that the Commission likes". Apparently he believes that the Commission wants to address the issues raised in the Petition to Modify Order, but has no personal interest in addressing matters outside the context of that pleading. The Attorney General purports to tutor

the Commission on the distinction between issue preclusion and claim preclusion¹ as if such distinction is pivotal to the issue of whether the Commission retained any jurisdiction over the matters currently under review by the Franklin Circuit Court. It is not. Regardless of the applicability of either claim preclusion or issue preclusion and regardless of the Commission's own likes or dislikes, the appeal of the Appealed Orders transferred jurisdiction over the matters set forth therein to the appellate court. Hoy v. Newberg Homes, Inc., Ky., 325 S.W.2d 301, 302 (1959).

The Attorney General argues that res judicata does not permit excluding any issue from this proceeding unless that issue is "actually decided in a prior action". The implication is obviously that the October 16, 2002 Order excluded from the scope of this proceeding certain issues which were not actually decided in PSC Case No. 2002-00018. Joint Petitioners would refer the Attorney General to the May 30, 2002 Order wherein it is documented that the following issues were "actually decided":

1. Thames Water Aqua Holdings GmbH and RWE Aktiengesellschaft "have the managerial, technical and financial ability to provided reasonable utility service." (May 30, 2002 Order, p. 1).
2. "The proposed merger will not impair or have any immediate effect upon KAWC's ability to provide reasonable utility service to its customers. The Acquisition Agreement requires no change in KAWC's management, labor force, operating practices, or financial structure." (May 30, 2002 Order, p. 13).

¹The Attorney General errs in criticizing the Commission for its use of the broader term res judicata. Such term is frequently used by Kentucky courts without distinguishing between which of the two subparts is at issue. Yeoman v. Commonwealth, Ky., 983 S.W.2d 459, 465 (1998) n. 2 ("Res judicata is the Latin term which encompasses both issue and claim preclusion and is not to be used as synonymous with either individually, but rather equally with both.").

3. "The proposed merger will enhance KAWC's ability to provide reasonable utility service at reasonable rates." (May 30, 2002 Order, p. 13).
4. "The proposed merger will allow KAWC to draw upon RWE's extensive borrowing power." (May 30, 2002 Order, p.13).
5. Acceptance of the conditions and commitments upon which the Commission premised its approval rendered the proposed merger in the public interest. "It will not result in any increase in utility rates or reduction in the quality of water service. By placing KAWC into a larger company system, the proposed merger will increase KAWC's access to capital, cutting edge technologies, and enhanced R&D. It will allow KAWC to draw upon Thames' experience in the area of security practices and to better protect its facilities at lower cost. It will permit greater employee training opportunities and should result in a better-trained work force." (May 30, 2002 Order, p. 29).

The Commission did not err in holding that these issues may not be revisited².

The Attorney General has failed to cite any authority which supports a re-litigation of such issues. To the contrary, the case law clearly provides that the Commission has lost its jurisdiction to the appellate court. Louisville & N.R. Co. v. Paul's Adm'r, Ky., 235 S.W.2d 787, 793 (1951); Johnson Bonding Co. v. Ashcraft, Ky., 483 S.W.2d 118, 119 (1972). No distorted construction of the doctrine of res judicata can change that result.

²In making this determination, the Commission made the appropriate findings that each of the four elements of issue preclusion were present. It noted which of the issues in this proceeding were the same as those presented in PSC Case No. 2002-00018. (October 16, 2002 Order, p. 8). It determined that those issues had actually been litigated (October 16, 2002 Order, p. 9), and decided. (October 16, 2002 Order, p. 8). Finally, the Commission determined that these issues were necessary to its ultimate decision. (October 16, 2002 Order, p. 9). There can be no claim that the Commission failed to apply the proper elements of issue preclusion. See Yeoman v. Commonwealth, Ky., 983 S.W.2d 459, 465 (1998).

2. **The Commission's Position is not Inconsistent with the Will of the Legislature**

In an equally twisted argument, the Attorney General contends that by recognizing that it cannot re-litigate PSC Case No. 2002-00018 the Commission has failed to follow the "will of the Legislature". The Attorney General has somehow leaped to the conclusion that the Commission will not include in its review of the pending Petition to Modify Order a consideration of the public interest as is required by KRS 278.020(5). The October 16, 2002 Order does not so provide.

The Commission has clearly announced its intention to follow the "will of the Legislature". It has stated that its review of the pending Petition will extend to the full scope required by KRS 278.020:

We find that the Joint Petition represents a new application. The applicants include several entities that were not applicants in the prior proceeding. The proposed transaction, moreover, differs from that previously presented to us. While RWE and Thames Holdings will ultimately obtain control of KAWC upon completion of the revised transaction, additional parties are now involved. The qualifications of these additional parties and whether their acquisition of control over KAWC is in the public interest are issues that have not been previously addressed. Clearly, KRS 278.020 requires us to address these issues.

(October 16, 2002 Order, pp. 6-7).

Again, the Attorney General has failed to cite any provision of KRS Chapter 278 which requires a more extensive review.

The Commission most certainly understands its obligations under KRS 278.020. It has not been asked by Joint Petitioners to shirk its responsibility to provide a full review of the matters raised in the Petition to Modify Order, nor has the Commission indicated that it has any intention of doing so. The Commission has done nothing more than acknowledge that it cannot

allow the issues currently under review in the appeal from PSC Case No. 2002-00018 to be re-litigated in this proceeding. That determination does not run counter to the will of the Legislature.

As previously stated herein, the Attorney General mentions specifically issues concerning the enforceability of the Commission's orders and the Joint Petitioners' status as two matters which the Attorney General contends the Legislature "mandates the Commission to examine in an application". Joint Petitioners do not read the Commission's October 16, 2002 Order to indicate that the Commission will refuse to entertain any challenges either as to the enforceability of the Commission's orders against TWUS or its legal status. It appears, however, that the Attorney General attempts to go further, seeking leave to re-address similar challenges against the remaining Joint Petitioners. Those challenges have already been asserted and ruled upon by the Commission in PSC Case No. 2002-00018.

The Commission has before it the record in PSC Case No. 2002-00018 and certainly if it needs to review the evidence presented therein to determine if such evidence has any bearing on the pending issues concerning TWUS, it may do so. There is, however, no need to unduly lengthen the hearing in this proceeding by repeating testimony which has already been presented to the Commission concerning the enforceability of the Commission's orders against, and the legal status of, Kentucky-American Water Company, Thames Water Aqua Holding GmbH, RWE Aktiengesellschaft, Apollo Acquisition Company, and American Water Works Company, Inc. Nor do the corresponding legal issues require further briefing in this proceeding. Such matters have been laid to rest and can be revisited only through the appeal pending in the Franklin Circuit Court.

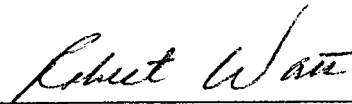
"Public policy, judicial orderliness, economy of judicial time, and the interest of litigants, as well as the peace and order of society, all require that stability should be accorded judgments, that controversies once decided on their merits shall remain in repose, that inconsistent judicial decisions shall not be made on the same state of facts, and that there be an end to litigation which, without the doctrine of res judicata, would be endless." Floyd County Board of Education v. Layne, Ky., 474 S.W.2d 397, 398-99 (1971), cert. denied, 92 S. Ct. 2062 (1972).

CONCLUSION

For these reasons, the Attorney General's Motion for Reconsideration should be denied.

Respectfully submitted on this the 30th day of October, 2002.

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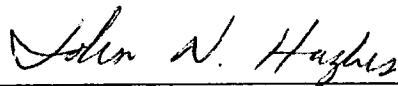
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CERTIFICATION

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 is a true and accurate copy of the Response filed in paper medium; that the Joint Petitioners have notified the Commission and all parties by electronic mail on October ~~21~~³¹, 2002 that the electronic version of this Response 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 ~~21~~³¹ day of October, 2002.



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