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 AKTIENSGESELLSCHAFT, 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 JOINT PETITIONERS TO LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT'S MOTION TO RECONSIDER AND CLARIFY THE COMMISSION'S ORDER OF OCTOBER 16, 2002

The Lexington-Fayette Urban County Government ("the LFUCG") has asked the Commission to reconsider its October 16, 2002 Order limiting the scope of this proceeding and to clarify certain portions of the Order. Joint Petitioners, Kentucky-American Water Company, Thames Water Aqua Holdings GmbH, RWE Aktiensgesellschaft, Thames Water Aqua US Holdings, Inc., Apollo Acquisition Company and American Water Works Company, Inc. urge the Commission to deny the Motion because the Commission made no errors in its application of the principles of res judicata upon which the Order was partially based. Contrary to the assertions of the LFUCG, the Commission did not misunderstand the jurisdictional limitations imposed upon it as a result of the appeal of PSC Case No. 2002-00018 and there are no inconsistencies in the Order requiring clarification.

1. The LFUCG Has Misconstrued the Principles of Res Judicata

The LFUCG premises its Motion to Reconsider upon a distortion of the doctrine of res judicata. It argues that it is excused from the preclusive effect of that doctrine because it has filed an appeal from the Commission's May 30, 2002 and July 10, 2002 Orders in PSC Case No. 2002-00018 ("the Appealed Orders"). Yet, Kentucky law does not, as the LFUCG contends, authorize a collateral attack for those who file an appeal. Nor does it limit the preclusive effect of res judicata to those who fail to seek an appeal. Such a result would render the appellate process completely unnecessary and would promote perpetual litigation thereby rendering the doctrine of res judicata meaningless.

The LFUCG has obviously lost sight of the very essence of the doctrine of res judicata which is grounded in the conviction that "there should be an end to litigation, and that questions once decided between the same parties, or their privies, should forever thereafter remain decided". McKenzie v. Hinkle, 271 Ky. 587, 112 S.W.2d 1019, 1021 (1938). Res judicata is in accordance with the "cherished rule that 'there should be a finality to litigation.'" Webb Transfer Line, Inc. v. Jones, Ky., 379 S.W.2d 444, 446 (1964), quoting Happy Coal Co. v. Hartbarger, 251 Ky. 779, 65 S.W.2d 977 (1933).

The fact that this issue is raised in the context of an administrative proceeding is of no consequence. "The doctrine of such an estoppel applies to orders and judgments of 'quasi judicial acts of public, executive, or administrative officers, and boards acting within their jurisdiction (the same) as to the judgments of courts having general judicial powers.'" Williamson v. Public Service Commission, 295 Ky. 376, 174 S.W.2d 526, 529 (1943). See also Happy Coal Co. v. Harbarger, 65 S.W.2d at 978 (Res judicata "is as applicable to the quasi judicial acts of public commissions and administrative boards, as it is to judgments of courts.").

Ward v. Commonwealth, Ky. App., 814 S.W.2d 589 (1991) does not hold otherwise. The isolated sentence from Ward v. Commonwealth, Ky. App., 814 S.W.2d 589 (1991) upon which the LFUCG relies certainly does not indicate either that the principles of res judicata are different in the context of an administrative proceeding or that such principles ever call for a bifurcated result depending upon which party is the appellant and which is the appellee. The Court of Appeals in Ward v. Commonwealth, 814 S.W.2d at 591 explained that the way to challenge an administrative decision is to file an appeal. (Obviously, the principles of res judicata do not bind the appellate court in its review of the appeal from the Order in question). If an appeal is not filed, the opportunity to challenge the administrative decision has thereby been forfeited. The Court of Appeals further clarified that the principles of res judicata serve to preclude a collateral attack of an administrative decision:

> The case before us is not an appeal from a circuit court judgment affirming the Secretary's order. That order became final when thirty days passed following its rendition and no appeal to Franklin Circuit Court was taken. Consequently, there is no occasion for us to consider Wards' argument that the trial court erred in failing to impose upon the Cabinet the burden of establishing the validity of its regulations according to KRS 13A.140. That issue could have been raised upon direct appeal, but it will not be considered in a collateral attack. Once having litigated an issue and having failed to avail one's self of the right to appeal, a litigant is estopped to collaterally raise the same issue involving the same parties . . .

Ward v. Commonwealth, 814 S.W.2d at 591.

The decision is not fairly cited in support of the argument that res judicata does not apply to a party who has filed an appeal.

The decision does not say that the doctrine is used to preclude appellate review of a judgment. The LFUCG is certainly entitled to a review of the Appealed Orders and will receive such review in the Franklin Circuit Court. However, the LFUCG seeks to bolster its appeal with

a collateral attack in this proceeding against the Appealed Orders. The Commission made no error in determining that the doctrine of res judicata prohibits such a collateral attack. The LFUCG will have its day in court when the Franklin Circuit Court reviews the appeal. The LFUCG is not entitled to a second bite at the apple from this Commission.

The result is the same regardless of which aspect of res judicata is in issue. As the Commission acknowledged, the term res judicata encompasses two subparts, claim preclusion and issue preclusion. Both subparts operate "to bar repetitious suits involving the same cause of action." Yeoman v. Commonwealth, Ky., 983 S.W.2d 459, 464 (1998). The Kentucky courts frequently use the broader term "res judicata" without distinguishing between which of the two subparts is at issue. Yeoman v. Commonwealth, 983 S.W.2d at 465 ("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."). The LFUCG's criticism that the Commission used the term "res judicata" rather than "collateral estoppel", the term frequently used for issue preclusion, is accordingly a distinction without a difference.

The LFUCG relies upon Yeoman v. Commonwealth, Ky., 983 S.W.2d 459 (1998) as the prevailing authority on issue preclusion. The Commission's October 16, 2002 Order contains a finding as to each of the elements of issue preclusion as set forth in Yeoman v. Commonwealth, 983 S.W.2d at 465:

- The court requires first that the issue in the second case be the same as the issue in the first case. Yeoman v. Commonwealth, 983 S.W.2d at 465. The Commission found: "the issues considered in Case No. 2002-00018 are the same as many of those in this proceeding. In the earlier proceeding, we considered the

managerial, technical and financial ability to Thames Holdings and RWE to provide reasonable utility service; we also considered whether the transfer of control of KAWC to these parties is in the public interest. We will not reconsider these issues." (October 16, 2002 Order, p. 8).

- The second element required in Yeoman v. Commonwealth, Ky., 983 S.W.2d 459, 465 (1998) is that the issue must have been actually litigated. The Commission found: "the Intervenors had ample opportunity to fully litigate the same issues that they now seek to relitigate." (October 16, 2002 Order, p. 9).
- As to the third element required by the court, that the issue be actually decided, Yeoman v. Commonwealth, 983 S.W.2d at 465, the Commission found: "after considering RWE's and Thames Holdings' qualifications and the proposed acquisition's consistency with the public interest, the Commission reached a final decision on the merits of the proposed transaction." (October 16, 2002 Order, p. 8).
- Finally, Yeoman v. Commonwealth, 983 S.W.2d at 465 requires that the decision on the issue must have been necessary to the judgment. The Commission found: "the Commission's findings regarding Thames Holdings and RWE were necessary to the Commission's ultimate decisions to approve the transaction." (October 16, 2002 Order, p. 9).

There can be no claim that the Commission failed to apply the proper elements of issue preclusion.

The presence of additional Joint Petitioners in this proceeding likewise is of no consequence to the application of the doctrine of res judicata. The interests of Thames Water Aqua US Holdings, Inc. and Apollo Acquisition Company are identical with those of the Joint Petitioners[1] in PSC Case No. 2002-00018. In the parlance of res judicata, the parties are in privy with each other. "Res judicata is binding upon privies as well as parties to the former action." Eversole v. Webb, Ky., 243 S.W.2d 490, 492 (1951). See also McKenzie v. Hinkle, 271 Ky. 587, 112 S.W.2d 1019, 1021 (1938) ("[T]he word 'parties' within that requirement was not necessarily confined to actual parties in the litigation in which the judgment was rendered, but . . . the term also embraced others strangers to the litigation, who were not formal plaintiffs or defendants, but who by their conduct bring themselves in such relationship to the litigation as to become bound by the judgment."). The fact that the named parties in this proceeding include additional Joint Petitioners therefore has no bearing on the application of res judicata.

There is accordingly no error in the Commission's reliance upon the doctrine of res judicata to prevent the use of this proceeding as a mechanism to collaterally attack the Appealed Orders. Such Orders are under appellate review and may be properly challenged therein. The LFUCG is quite simply not entitled to a second avenue of attack. Its Motion for Reconsideration should be denied.

[1]The Commission has already recognized that although RWE Aktiengesellschaft and American Water Works Company, Inc. were not named as Joint Petitioners in PSC Case No. 2002-00018, the proceeding included an extensive review of each. (May 30, 2002 Order, p. 12).

2. There Are No Inconsistencies in the October 16, 2002 Order

The LFUCG's contention that the October 16, 2002 Order contains an inconsistency is equally flawed. The Commission properly recognized that KRS 278.020 requires it to address the qualifications of Thames Water Aqua US Holdings, Inc. ("TWUS"). It also correctly noted that the proceeding cannot be expanded beyond those matters relevant to determining whether or not TWUS satisfies the requirements of KRS 278.020. There is nothing inconsistent about those two statements.

The purpose of this proceeding is obviously to allow the Commission to determine whether or not the addition of TWUS to the corporate hierarchy already carefully scrutinized by the Commission, changes the conclusion that the requirements of KRS 278.020 have been met. The additional examination of TWUS by the Commission does not mean, however, that the LFUCG can use this proceeding as a back-door to a collateral attack against either the Appealed Orders in total, or any of the Commission's determinations therein. Again, the Commission is without any jurisdiction over the matters under appellate review.

The LFUCG errs in its belief that the Commission can choose either to narrow the focus of this proceeding or permit a re-litigation herein of the issues currently under review by the appellate court. In fact there is no such choice. When the LFUCG filed an appeal with the Franklin Circuit Court it thereby divested this Commission of any jurisdiction to review the matters placed before the appellate court. The filing of the notice of appeal "transfers jurisdiction" to the appellate court and accordingly "deprives" the original tribunal of jurisdiction. Hoy v. Newberg Homes, Inc., Ky., 325 S.W.2d 301, 302 (1959). See also Louisville & N.R. Co. v. Paul's Adm'r, Ky., 235 S.W.2d 787, 793 (1951) and Johnson Bonding Co. v. Ashcraft, Ky., 483 S.W.2d 118, 119 (1972). Thus, no matter how the LFUCG

characterizes the efforts to have a two-pronged review of the Appealed Orders, it is not within the power of this Commission to grant a second challenge in this proceeding.

Likewise, the Commission's statement that the parties have failed to establish a change in conditions and circumstances requires no clarification. Again, the Commission does not have jurisdiction over the matters currently on appeal. It correctly recognized that new matters can arise which require review by the Commission; the doctrine of res judicata does not bar a first look at new matters, it only serves to bar a second look at old matters. Clearly, Joint Petitioners identified such a matter, the formation of TWUS. The LFUCG argues that the Commission's review of whether or not TWUS satisfies the requirements of KRS 278.020 must also include a second look at the remaining Joint Petitioners.[2] As the Commission properly concluded, a change in conditions and circumstances might warrant further scrutiny. However, as the Commission noted, the LFUCG has not identified any such change of condition or circumstances. The LFUCG simply wants to cover old ground in an effort to craft a more convincing argument the second time around. This is precisely what res judicata was designed to prevent.

The LFUCG cannot be permitted to collaterally attack the Appealed Orders under the guise of searching for a change in conditions and circumstances. If it knows of a specific change of conditions and circumstances which requires the Commission's attention, it must affirmative identify the change. See Angel v. Palmer-Ball, Ky., 461 S.W.2d 105, 106 (1970) ("There was no effort by the applicants, on the hearing of the 1969 application, to show any change of conditions since 1967."). Its motivation to discover such a change does not entitle the LFUCG to assert a

[2]The LFUCG argues that it is "merely asserting that the Commission must fulfill all of its responsibilities under KRS 278.020", but fails to cite any portion of KRS 278.020 which either requires or authorizes a second look at matters already adjudicated by the Commission.

collateral attack against the Appealed Orders. "[O]nce the rights of the parties have been finally determined, litigation should end." Slone v. R & S Mining, Inc., Ky., 74 S.W.3d 259, 261 (2002).

CONCLUSION

For these reasons, the LFUCG's Motion to Reconsider and Clarify the Commission's Order of October 16, 2002 should be denied.

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

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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 30, 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 30th of October, 2002.

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