

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)	

* * * * *
**RESPONSE OF JOINT PETITIONERS TO
LFUCG'S MOTION TO COMPEL**

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 response to Lexington-Fayette Urban County Government's ("LFUCG's") Motion to Compel the Joint Petitioners to respond to certain of LFUCG's requests for information herein. The Joint Petitioners have responded as fully as necessary to the data requests of LFUCG and the information sought in the Motion to Compel is beyond the scope of this proceeding. Therefore, the Motion to Compel should be denied.

Scope of Proceeding.

The scope of this proceeding is set forth clearly in the Order of October 30, 2002, herein as follows:

The scope of this proceeding is limited to: reviewing TWUS's qualifications, determining whether transfer of KAWC to TWUS is consistent with the public interest, and determining whether any change in circumstances since the issuance of our Order of May 30, 2002 in Case No. 2002-00018 requires reconsideration of the findings contained in that Order.

Order of May 30, 2002, at 4-5. As the Commission very well knows, the transfer of KAWC to TWUS's parent corporation was determined to be consistent with the public interest in the Order of May 30, 2002, in Case No. 2002-00018. Since the data requests that are the subject of LFUCG's Motion to Compel relate to information outside the above-described scope, the Motion to Compel must be denied.

Jacobson Park.

LFUCG seeks further information about Jacobson Park in its Request Nos. 16, 17, 18 and 19. The Commission fully considered the concerns of LFUCG about Jacobson Park in Case No. 2002-00018. There, LFUCG asked one data request about the Park, which was fully answered by the Joint Petitioners. During the hearing in Case No. 2002-00018, LFUCG asked no questions about Jacobson Park. Roy Mundy, II and Jim McGivern responded fully to all the questions asked of them about Jacobson Park by the Attorney General and Bluegrass FLOW, Inc. When the briefs were filed, LFUCG requested the Commission to deny the application and direct the Joint Petitioners to refile and provide, among other information, "[d]efinitive answers as to future plans for such community assets as Jacobson Park." Case No. 2002-00018, LFUCG Brief at 20. It also requested the imposition of a condition to any approval of the change of control as follows:

2. The future of Jacobson Park as a public asset must be protected. The best way to accomplish this would be for Kentucky-American to deed Jacobson Park to the

LFUCG for perpetual use as a public park, with a provision for the reasonable use of the reservoir by Kentucky-American for legitimate water provision purposes; . . .

Id. at 20-21. The Commission considered the LFUCG proposals and rejected them in favor of the following commitment: “KAWC will obtain Commission approval prior to any transfer of control or ownership of the land upon which Jacobson Park is located.”

Case No. 2002-00018, Order of May 30, 2002, Appendix A at 2, Commitment No. 7.

LFUCG persisted. In its Motion for Rehearing in Case No. 2002-00018, LFUCG requested a modification of Commitment No. 7 to require Kentucky-American to deed Jacobson Park to LFUCG for permanent use as a park, with provisions for necessary water company uses. The Commission responded as follows:

We have previously rejected this condition and do so again now. This condition raises significant constitutional concerns involving the taking of property without compensation. To the extent that LFUCG wishes to acquire permanent property rights in Jacobson Park, it should exercise its statutory powers to acquire those rights.

Case No. 2002-00018, Order of July 10, 2002, at 12. LFUCG was given the opportunity to litigate fully the issue of Jacobson Park in Case No. 2002-00018 and the Commission dealt with the issue in both the May 30 and July 10, 2002, Orders in that case. The insertion of TWUS in the organizational structure of RWE does not require that ground to be re-plowed. Since the lease is between Kentucky-American and LFUCG, the identification of parties in this proceeding in addition to those in Case No. 2002-00018 does not make Jacobson Park an issue that needs rehashing.

LFUCG disingenuously argues that the offer by Kentucky-American to renegotiate the Jacobson Park lease is a change in circumstances requiring Commission reconsideration of its findings in Case No. 2002-00018. Proving that no good deed goes

unpunished, LFUCG summarily rejected Kentucky-American's offer and the condemnation proponents accused Kentucky-American of nefarious motives in its efforts to address concerns expressed by LFUCG regarding the lease of Jacobson Park. To the extent that LFUCG would like to discuss the terms of the lease of Jacobson Park, Kentucky-American remains willing to have such discussions, but it is unlikely that the Commission feels the need to referee those discussions. Thus, the lease renegotiations are not the kind of change in circumstances requiring the Commission to reconsider its findings in Case No. 2002-00018.

The Jacobson Park issue had little to do with the issues in Case No. 2002-00018, but it was fully addressed by the Commission. It has nothing to do with the issues in this proceeding and does not need to be addressed further. The Motion to Compel as it relates to Jacobson Park should be denied.

Defense Against Government Takeover.

In its Request No. 20, LFUCG seeks information about expenditures relating to the defense of Kentucky-American against the takeover of its business by LFUCG. The Joint Petitioners have stated time and again that these expenditures will not be borne by the ratepayers of Kentucky-American. LFUCG's central argument for access to this information is that it is "entitled to discover if some of the compensation currently being paid by ratepayers for employees to provide utility service is being spent on the 'anti-government takeover' campaign and if not, what accounting treatment is in place to prevent this from happening." Motion to Compel at 5-6. This argument is surprising given LFUCG's acknowledgement that it has reviewed the rate order in Kentucky-American's last case. *Id.* at 20. If it has done so, then it knows full well that there is no

provision for the recovery of such expenses in the rates currently being charged by Kentucky-American. The accounting treatment in place to prevent this from happening is the regulatory authority of this Commission over the rates of Kentucky-American. LFUCG does not need an accounting of expenditures in the defense against government takeover to satisfy its central “concern.”

As the Commission has noted on numerous occasions, the potential condemnation of Kentucky-American is not an issue that is within the scope of this proceeding. See, for example, Case No. 2002-00081, Order of May 30, 2002, at 8. The Commission will recall its admonition to Bluegrass FLOW, Inc. at pages 2-3 in the Order of September 16, 2002, herein:

We, however, caution Bluegrass FLOW that the public ownership of Kentucky-American Water Company’s facilities is not an issue in this proceeding and that any attempt to use this proceeding as a forum for advocating a position on that issue is inappropriate and will require us to revisit our decision to permit Bluegrass FLOW’s participation in this proceeding. There are other forums for Bluegrass FLOW and its members who desire to voice their opinions on the issue of public ownership. These forums, not this proceeding, should be used for discussion of that issue.

By its Motion to Compel, LFUCG seeks information that it believes will be helpful to those who support condemnation of Kentucky-American, its pretextual arguments to the contrary notwithstanding. The Commission is not the proper forum to advocate positions relating to the condemnation of Kentucky-American. The highest court in Kentucky has held that it is not proper to use the discovery process in one forum to obtain information for use in another forum. Carpenter v. Wells, 358 S.W.2d 524, 527 (Ky. 1962).

LFUCG seeks, in Request No. 20, information that it does not need, information that is beyond the scope of this proceeding and information that is for use in another

forum. Its Motion to Compel additional information in response to its Request No. 20 should be denied.

Goldman Sachs Opinion.

LFUCG seeks, in Supplemental Request No. 10, Joint Petitioners' view as to an opinion of Goldman Sachs about other RWE acquisitions. It is inconceivable that the Joint Petitioners' opinion of Goldman Sachs' opinion of other acquisitions by RWE could have any relevance to this proceeding. Nevertheless, Joint Petitioners state, in further response to Supplemental Request No. 10, that they do not agree with the Goldman Sachs analysis. The price that RWE paid for the acquired companies represents the value which RWE placed on the acquired companies at the time of the acquisition. Without knowing the valuation criteria applied by Goldman Sachs, Joint Petitioners are unable to explain why RWE's valuation differed from Goldman Sachs' valuation.

Conclusion.

The information sought by LFUCG pertaining to Jacobson Park and expenditures in the defense against government takeover are clearly outside the scope of this proceeding. It is improper to use the discovery processes of this proceeding to obtain information for use in another forum. Further response to the data request relating to the Goldman Sachs opinion is set forth above. Therefore, the Motion to Compel should be denied.

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 November 14, 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 14th day of November 2002.



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