

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 LEXINGTON-  
FAYETTE URBAN COUNTY GOVERNMENT'S MOTION  
TO SUPPLEMENT THE RECORD**

The Lexington-Fayette Urban County Government ("LFUCG") has moved the Commission to supplement the record to include a tendered December 2002 letter from Roy W. Mundy, II to the customers of Kentucky-American Water Company ("Kentucky-American"). The Motion should be denied inasmuch as the letter is not relevant to any of the issues pending before the Commission. Furthermore, the LFUCG's apparent efforts to broaden the Commission's review to include scrutiny of communications made by the utility to its customers have serious First Amendment ramifications.

These proceedings require that the Commission make two determinations, first, whether Thames Water Aqua US Holdings, Inc. ("TWUS") satisfies the requirements of KRS 278.020 (i.e., whether TWUS has the ability to provide reasonable utility service and whether the proposed transfer of control to TWUS is in the public interest) and second, whether there has been any change in circumstances which would warrant a reconsideration of the May 30, 2002 Order. (October 16, 2002 Order, p. 1, as modified by October 30, 2002 Order, p. 5). The communication between Kentucky-American and its customers is not relevant to any of these issues.

The letter tendered by the LFUCG is nothing more than an update, intended by Kentucky-American to advise its customers of recent developments.<sup>1</sup> Such an update cannot be considered evidence of the ability of TWUS to provide reasonable utility service. Nor does it prove or disprove whether or not the proposed transfer of control to TWUS is in the public interest. Finally, the update is completely unrelated to whether or not there has been any change in circumstances which would warrant a reconsideration of the May 30, 2002 Order. Accordingly, no legitimate purpose would be served in allowing the letter to be included in the record.

Nonetheless, LFUCG attempts to craft a connection between the letter and the proof presented at the hearing by arguing that during the November 21, 2002 hearing an issue was raised concerning the use of customer lists and the term "functionally related" was used by one of Joint Petitioners' witnesses. The matter initially addressed at the hearing was whether or not the Joint Petitioners would agree to refrain from disclosing Kentucky-American's customer lists to other RWE affiliates. The term "functionally related to a utility service" arose during a discussion about the circumstances under which the disclosure of such lists would be appropriate. (Transcript of Hearing, p. 75, lines 3-25; p. 76, lines 1-25; p. 77, lines 1-24).

When Counsel for the LFUCG attempted to turn the dialogue about why some affiliates should have access to customer lists into an inquiry as to what kinds of communications could be made by the utility to its customers, Joint Petitioners promptly invoked their First Amendment rights. (Transcript of Hearing, p. 110, lines 19-25; p. 111, lines 1-25; p. 112, lines 1-3). Notwithstanding Joint Petitioners' reliance upon the protections afforded by the United States Constitution, it appears that the LFUCG is again implicitly taking the position that Kentucky-

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<sup>1</sup>As the Commission knows, the cost of the December 2002 letter will not be borne by Kentucky-American's ratepayers.

American's communications with its customers are either improper or must in some manner be monitored or restricted by the Commission. Both contentions have already been directly rejected by the Commission. In the Matter of: An Investigation of the Sources of Supply and Future Demand of Kentucky-American Water Company, Case No. 93-434.

In In the Matter of: An Investigation of the Sources of Supply and Future Demand of Kentucky-American Water Company, Case No. 93-434, the Commission addressed the contention that Kentucky-American should not be permitted to utilize a bill insert to communicate with its customers about a proposed pipeline. It was alternatively argued that Kentucky-American should be forced to include within its bill inserts materials supplied by those who opposed Kentucky-American's position on the pipeline. The Commission soundly rejected both contentions, correctly holding:

Kentucky-American has an absolute right under the first amendment to the United States Constitution to express its opinions on the pipeline issue to its ratepayers and the public. Further, courts have held that it is a violation of a utility's right to free speech to be compelled to distribute a bill insert expressing views and opinions of others. See Pacific Gas and Electric Company v. Public Utilities Commission of California, 475 U.S. 1, 89 L. Ed. 2d 1 (1986).

(March 3, 1995 Order, Case No., 93-434, p. 2).

The protections afforded to a utility under the First Amendment with regard to its communications with its customers were recognized by the United States Supreme Court decades ago. In Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980) a challenge was raised to an order by the Public Service Commission of the State of New York which prohibited an electric utility from distributing bill inserts that discussed the future development

of nuclear power. The Court found the order to infringe upon the utility's First Amendment rights:

In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of nuclear power. The Commission has limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak.

Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York, 100 S. Ct. 2326, 2332 (1980).

The Court concluded that "[t]he Commission's suppression of bill inserts that discuss controversial issues of public policy directly infringes the freedom of speech protected by the First and Fourteenth Amendments." Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York, 100 S. Ct. at 2337.

This holding was reaffirmed in Pacific Gas and Electric Co. v. Public Utilities Commission of California, 475 U.S. 1, 89 L. Ed. 2d 1, 106 S. Ct. 903 (1986) wherein the Court found that a Commission order compelling a utility to include in its billing envelopes materials supplied by a third party was unconstitutional. It held that the state must further its interest in fair and effective utility regulation through a means that does not violate the utility's First Amendment rights. Pacific Gas and Electric Co. v. Public Utilities Commission of California, 106 S. Ct. at 913.

So too herein, the First Amendment firmly stands as a barrier to any efforts to have the Commission monitor or restrict Kentucky-American's communications with its customers. "The First and Fourteenth Amendments remove 'governmental restraint from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . .'" (citation omitted). Consolidated Edison Company of New York, Inc. v. Public Service

Commission of New York, 100 S. Ct. at 2331. These constitutional protections proscribe any monitoring of, or restrictions upon, Kentucky-American's communications with its customers.

**CONCLUSION**

For these reasons the Motion of the Lexington-Fayette Urban County Government to supplement the record should be denied. The tendered document is not relevant to the issues currently pending before the Commission. Any efforts to broaden the Commission's review to include scrutiny of communications made by Kentucky-American to its customers would run afoul of the First Amendment.

Respectfully submitted on this the 13<sup>th</sup> day of December, 2002

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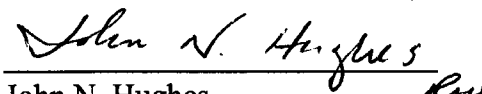
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**CERTIFICATION**

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 of Joint Petitioners to Lexington-Fayette Urban County Government's Motion to Supplement Record 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 December 13, 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 13 day of December, 2002.



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