

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

IN THE MATTER OF:

| | | |
|---|---|----------------------------|
| THE JOINT PETITION OF KENTUCKY- |) | |
| AMERICAN WATER COMPANY, |) | |
| THAMES WATER AQUA HOLDINGS |) | CASE NO. 2002-00317 |
| GmbH, RWE AKTIENGESELLSCHAFT, |) | |
| THAMES WATER AQUA US HOLDINGS, |) | |
| INC., APOLLO ACQUISITION COMPANY |) | |
| AND AMERICAN WATER WORKS CO. INC., |) | |
| FOR APPROVAL OF A CHANGE IN |) | |
| CONTROL OF KENTUCKY-AMERICAN |) | |
| WATER COMPANY |) | |

**LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT’S PETITION FOR REHEARING**

Comes now the Lexington–Fayette Urban County Government (the “LFUCG”), by counsel, and pursuant to KRS 278.400, submits the following Petition for Rehearing.

I. Procedural History

On December 20, 2002, the Commission issued an Order approving the transfer of control of Kentucky-American Water Company (“Kentucky-American”) to Thames Water Aqua Holdings GmbH (“Thames”), RWE Aktiengesellschaft (“RWE”) and Thames Water Aqua U.S. Holdings, Inc. (“TWUS”) (the “Order”). The majority of the Commission found that Thames, RWE and TWUS have the managerial, technical and financial ability to provide reasonable utility service, and that the transfer is in the public interest, subject to certain conditions.¹

¹ Commissioner Spurlin filed a separate dissenting opinion.

On January 3, 2003, the Joint Petitioners filed into the record copies of final decisions from the states of Maryland, New York, New Jersey, Indiana, Arizona and California.²

II. Issues for Rehearing

The LFUCG has already raised numerous issues in this case and requested, in the event of Commission approval, that certain minimum conditions be placed on the Joint Petitioners. See the LFUCG's Brief, which is incorporated by reference herein. Rather than rearguing all of these issues before the Commission, the LFUCG respectfully suggests that the following specific issues related to the Order warrant rehearing or reconsideration by the Commission.³

A. Franklin Circuit Court Jurisdiction⁴

The Commission has required RWE, Thames, TWUS and American Water Works Company ("AWWC") to agree that the Franklin Circuit Court has personal jurisdiction to hear and consider any legal action **the Commission** may bring against them to enforce the provisions and conditions set forth in the Commission's Orders in this case and those in Case No. 2002-00018. These aforementioned Companies must also agree to waive any objections or defenses based upon personal jurisdiction to any action that **the Commission** might bring to enforce the provisions and conditions set forth in those orders. See Appendix A to the Order, Condition No. 57 (emphasis added).

² In addition, on January 3, 2003, the West Virginia Commission entered an order adopting the terms and conditions included in a Joint Motion for Further Order. A copy of this order and the Joint Motion are attached hereto as the LFUCG's Exhibit No. 1, and are incorporated herein by reference.

³ The LFUCG still maintains all legal positions and arguments it has previously raised in PSC Case No. 2002-00018 and Consolidated Civil Action No. 02-CI-1012, or in this action; and does not waive directly or by implication its right to challenge a final order of the Commission with respect to all such issues, or any other issue that may be properly raised in an Action for Review.

⁴ The jurisdictional arguments made in this section are in addition to those made in Section E., infra, although there may be some overlap. The LFUCG does not object to the Commission adopting broader conditions that address the limited concerns raised in the immediate section.

The LFUCG respectfully submits that the Commission should not protect its own interests in enforcing its orders while failing to protect the legitimate statutory rights of parties to its proceedings. Therefore, at a minimum this condition should be amended to include a waiver of any such claim as to the parties to this case and Case No. 2002-00018, and for any action which is related to the orders issued in these cases. Otherwise, the intervening parties to this case, including the statutory intervenor (the Attorney General) and the largest governmental subdivision affected by these conditions (the LFUCG), will still be subject to personal jurisdiction challenges by the Joint Petitioners should they exercise their statutory right to challenge a Commission decision not to enforce a condition, or to interpret a condition in a manner that does not protect the interests of the intervenors.

B. Service of Process Agents

The Commission has also required that RWE, Thames, TWUS and AWWC appoint service of process agents for the limited purpose of accepting service of process for any action that the **Commission** might bring to enforce the conditions in this Order or those in Case No. 2002-00018. See Appendix A to the Order, Condition No. 58 (emphasis added). This condition is likewise unreasonable, as such agents should be appointed for any litigation legitimately related to this case or Case No. 2002-00018, including statutory actions by the parties to this case.⁵ This is particularly necessary in light of the claims previously made by certain of the Joint Petitioners in Franklin Circuit Court that the court does not have personal jurisdiction over such entities, and that proper service cannot be achieved through the Secretary of State. See e.g.,

⁵ For example, Maryland has ordered Thames and RWE to appoint an unrestricted service of process agent. This should be done in Kentucky as well, as it will remove any service of process issues for all parties. See condition No. 12 to Maryland Order filed by the Joint Petitioners on January 3, 2003. An agent for TWUS and AWWC should similarly be appointed.

Answers of Thames Water Aqua Holdings GmbH and RWE AG filed in Consolidated Civil Action No. 02-CI-1012.

C. Authority to File Application

The LFUCG has pointed out that none of the Joint Petitioners have ever received approval from their respective governing boards to file the Application in this case. See LFUCG's Brief, page 9, f.n. 7. The Commission failed to address this issue in the Order, and the LFUCG respectfully requests a rehearing to have a ruling from the Commission as to this issue. In a similar situation, the Commission has held that applications by municipal utilities that are not duly authorized by their governing boards are void *ab initio*, and not properly before the Commission. See City of Pikeville, PSC Case No. 2000-00540, Order of October 8, 2001. KRS 271B.8-010(2) further provides that "All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation." As the boards of the Joint Petitioners have not properly authorized the filing of this Application, it should be deemed void *ab initio*.⁶

D. Attributing "Benefits" From a Prior Decision to This Transaction

The Commission has gone to great lengths to narrow the scope of this proceeding, so as to avoid any "spillover" of issues already decided in case No. 2002-00018. Both the LFUCG and the Attorney General have pointed out that this transaction admittedly has no benefit to ratepayers and the public (either quantifiable or unquantifiable). See LFUCG's Brief and

⁶ Indeed, the Joint Petitioners asserted that there are no Board minutes or other written board memoranda discussing the formation of TWUS. See Response to LFUCG First Request, Item No. 3. There is no evidence in the record of this case that the requisite governing boards ever approved the formation of TWUS, let alone approved this Application.

Attorney General's Brief. This is significant, as the Commission held in Case No. 2002-00018 that some benefit must be present for a transfer to be in the public interest.

Despite its decision not to revisit the findings made in Case No. 2002-00018, the Commission then proceeded to bootstrap the unquantifiable benefits from the previous case into this proceeding as the justification for its approval of the application in this case. The LFUCG respectfully submits that a new application requires new justification, and that the use of alleged benefits from a previous case to justify an order in a subsequent case is unreasonable and arbitrary. The immediate Application did not seek approval of this transaction and the previous transaction. To the contrary, both the Commission and the Joint Petitioners demanded a complete separation of the two actions.

For these reasons the Application should be denied as not being consistent with the public interest.

E. Additional Conditions

Since the hearing in this action, other information has come to light from other jurisdictions that warrants consideration by the Commission and serves as a basis for a rehearing in this case. On or about December 31, 2002, RWE, Thames, TWUS and AWWC entered into an agreement with the West Virginia Attorney General to settle disputes with respect to West Virginia's merger proceeding. This Agreement was approved by the West Virginia Public Service Commission on January 3, 2003, and includes the following provisions⁷:

1. Intermediate Holding Companies: It is anticipated by the Existing Orders that an intermediate holding company, TWUS, will become the owner of the common stock of AWW pursuant to the Acquisition. TWUS is domiciled in the United States and is

⁷ See LFUCG Exhibit No. 1 attached hereto. The LFUCG has left the numbering from the Agreement in place.

wholly owned by Thames. No other intermediate holding company or other company shall acquire a controlling interest in Thames, TWUS, AWW, or WVAWC without first seeking and obtaining the approval of the Commission.

3. International Law:

A) WVAWC, AWW, Thames, RWE, and any other company owned or controlled, directly or indirectly, by any of the above companies shall not invoke the provisions of any international trade agreement or treaty, including those hereafter ratified or executed, to challenge the jurisdiction or authority of the Commission or any other State or local regulatory agency having jurisdiction to regulate WVAWC;

B) Nor shall any such company invoke the provisions of any such international trade agreement or treaty to challenge or defend against the orders or actions of any State or local governmental body or regulatory agency exercising power or authority with respect to WVAWC that is granted by statute or by the Constitution of West Virginia, including the exercise of the power of eminent domain;

C) Nor shall any such company invoke the provisions of any such international trade agreements or treaties to seek damages or other remedies in any international tribunal panel founded on any such orders issued, actions taken, or powers exercised with respect to WVAWC by the Commission or any other such State or local regulatory or governmental body having jurisdiction to regulate WVAWC;

D) Nor shall any such company invoke the provisions of any such international trade agreements or treaties as grounds in support of expanding WVAWC's service territory, or as grounds for challenging the Commission's jurisdiction to approve or disapprove any expansion by WVAWC or any other water or wastewater utility regulated by the Commission;

E) Nor shall any such company invoke the provisions of any such international trade agreement or treaty to challenge or defend against the orders or actions of the Commission or any State or local governmental body or regulatory agency having jurisdiction to regulate WVAWC with respect to the ownership or control of public water resources, or take any position with respect to this issue that is different from the positions set forth in paragraph 4 below; and

F) Nor shall any such company rely on any standards now or hereafter developed by the International Organization of Standards (or any similar organization) to challenge or defend against the application of stricter or more onerous standards imposed by State or local law on the operations of WVAWC.

4. Ownership and Control of Water Resources:

A) RWE, Thames, TWUS, AWWC and WVAWC affirmatively represent that the water sources for all of WVAWC's treatment plants are streams in West Virginia, and that they do not own and do not seek to gain ownership or control of the beds, banks or flow of these streams or the water or water resources associated with these streams.

B) RWE, Thames, TWUS, AWWC and WVAWC believe that if presented with an appropriate legal question on the subject, the Supreme Court of Appeals of West Virginia would adopt the legal principle, established in the decisional law of other jurisdictions, that the ownership of water and water resources in West Virginia is vested in the State of West Virginia for the benefit of the public. RWE, Thames, TWUS, AWWC and WVAWC affirmatively commit that if the issue of water ownership is ever presented in any forum - including the Supreme Court and the West Virginia Legislature - they will publicly support this understanding.

C) RWE, Thames, TWUS, AWWC and WVAWC agree that they would affirmatively support the enactment of any legislation that would establish by statute the public ownership, regulation and control of the water sources in West Virginia.

D) RWE, Thames, TWUS, AWWC and WVAWC agree that they will forever waive any right to assert that any of them owns or controls the water or water resources in West Virginia or exercises any property right with respect thereto not specifically conferred by West Virginia law.

5. Exports of Water. Except as to current arrangements for the sale of water to customers in Virginia and Ohio, RWE, Thames, TWUS, AWWC and WVAWC agree that WVAWC will not make any other sales of water outside West Virginia without the Commission's prior consent and approval, together with any additional approvals which may hereafter be required by law. In recognition of the State's ownership, dominion, and control over its water resources, RWE, Thames, TWUS, AWWC and WVAWC agree that WVAWC shall hereafter pay a user fee for any such water sold outside the State of West Virginia in the amount of 3% of the gross revenues received by WVAWC from its sales of such water (or such other amount as may hereafter be lawfully determined by an agency or instrumentality of the State having appropriate authority), including sales made outside the State pursuant to current arrangements, the cost of which shall not be reflected in the rates charged by WVAWC to its West Virginia customers nor otherwise passed through, either directly or indirectly, to said customers. Any amount so paid may be considered by the Commission as a cost of service item for providing water service to

customers outside of the State of West Virginia. Until otherwise determined by an agency or instrumentality of the State having appropriate authority, such amount shall be paid at least quarterly to the State Treasurer to be deposited in the West Virginia drinking water treatment revolving fund established pursuant to West Virginia Code § 16-13C-3, subject to reimbursement of the Attorney General's Office for legal services.

The LFUCG respectfully requests that the Commission grant a rehearing regarding the foregoing provisions or adopt them (with appropriate changes to reflect the Commonwealth of Kentucky's, rather than West Virginia's interests) in order to ensure that this transaction is consistent with the public interest and to meet the intent and spirit of the "most favored nations clause" provision adopted by the Commission in Case No. 2002-00018.

In addition, the administrative decisions from other jurisdictions filed by the Joint Petitioners also include additional conditions that merit rehearing of this action or that should be imposed as conditions on the Joint Petitioners in the immediate case. These conditions include:

1. Maryland, Case No. 8944, Conditions Nos. 11 and 12;
2. New Jersey, Case No. WM01120833, Conditions Nos. (y), (ee), (gg) and (hh);
and
3. Ratepayer benefits provisions from all states (except New Jersey), in accordance with the "Most Favored Nation" condition adopted by the Commission in Case No. 2002-00018.

III. Conclusion

Pursuant to KRS 278.400, a rehearing is warranted in this case based upon the jurisdictional, service of process, corporate authority, lack of benefit, and additional benefits from other jurisdictions issues raised above. For the foregoing reasons, the approval of the

application in this case is not consistent with the public interest, and should be denied. Should the Commission deny the LFUCG's Petition for Rehearing of these issues, it respectfully requests that, at a minimum, the additional conditions requested herein be placed on the Joint Petitioners.

WHEREFORE, the Lexington-Fayette Urban County Government respectfully requests that the Commission grant its Petition for Rehearing; or in the alternative, place additional and sufficient additional conditions on the Joint Petitioners to address the concerns raised herein.

Respectfully submitted,

LEXINGTON-FAYETTE URBAN
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NOTICE AND CERTIFICATION

Counsel gives notice the original and three copies of the foregoing document have been filed by United States Mail, first class postage prepaid to Thomas M. Dorman, Executive Director, Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, Kentucky 40602-0615, and by uploading the filing to the file transfer protocol site designated by the Executive Director. The undersigned counsel hereby certifies that the electronic version is a true and accurate copy of the documents filed in paper, the electronic version has been transferred to the Commission, and the Commission and other parties have been notified by electronic mail that the electronic version has been transmitted to the Commission. Undersigned counsel also certifies that a copy of the foregoing motion was served by first class U.S. Mail delivery, postage prepaid, on the following, all on this the 9th day of January 2003:

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PSC/Case No. 2002-00317/Rehearing