

**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 ACQUISITION COMPANY)
AND AMERICAN WATER WORKS CO. INC.,)
FOR APPROVAL OF A CHANGE IN)
CONTROL OF KENTUCKY-AMERICAN)
WATER COMPANY)**

CASE NO. 2002-00317

**LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT’S REPLY**

Comes now the Lexington-Fayette Urban County Government (the “LFUCG”), by counsel, and files this its Reply to the Joint Petitioners’ Response to the LFUCG’s Petition for Rehearing.¹ The arguments are addressed in the order made by the Joint Petitioners. The LFUCG has nothing to add in reply to the Joint Petitioners’ argument regarding the attribution of the benefits from Case No. 2002-00018 to this case, and therefore merely incorporates herein its previous arguments made on that issue.

1. POTENTIAL JURISDICTIONAL CHALLENGES

The Joint Petitioners’ argument regarding jurisdictional challenges misstates the LFUCG’s argument. The Joint Petitioners claim that the LFUCG is trying to “promote the particularized interests of the LFUCG”, and that the “Commission’s purpose and duties do not entail promoting the isolated interests of the LFUCG.” See Joint Petitioners’ Response at page 2.

¹ The LFUCG hereby incorporates by reference its Petition for Rehearing and the arguments contained therein.

This tactic is used to obscure and avoid addressing the actual argument raised by the LFUCG (and also the Attorney General, the statutory representative of consumers in the Commonwealth of Kentucky). The actual issue regarding jurisdiction raised by the LFUCG in its Petition for Rehearing is clear, compelling -- and if left unaddressed by this Commission -- extremely problematic to the general public. The transfer of Kentucky-American Water Company (“Kentucky-American”) to Thames Water Aqua Holdings GmbH (“Thames”), RWE AG (“RWE”), Thames Water Aqua Holdings U.S., Inc. (“TWUS”) (and/or any future subsidiaries to be named later), *creates* new jurisdictional and service defenses for the parties to this and related actions that did not exist when Kentucky-American was owned directly by American Water Works Company.²

The relief requested by the LFUCG in its Petition for Rehearing will maintain the status quo with respect to the ability of *all parties* to exercise their statutory right to seek review of Commission orders pursuant to KRS 278.410.³ By way of contrast, the failure to grant such relief will create *new* opportunities for certain of the Joint Petitioners to frustrate such actions by mounting personal jurisdiction and service of process challenges to such actions, merely because of their status as foreign corporations.

² Including, as one example, the “compliance docket” created by the Commission to oversee the implementation of the conditions contained in Case No. 2002-00018.

³ With all due respect to the Commission (and as further argued *infra*), it would not be consistent with the public interest to in any way limit any parties legal ability to challenge an action of the Commission, or the failure of the Commission to take an enforcement action. Likewise, it is not consistent with the public interest for any legal right or remedy that was available to any member of the public on any issue (when Kentucky-American was owned by American Water Works Company) to in any way become harder to obtain or enforce by virtue of new ownership. As these defenses end up costing significant resources to address, whether or not they ultimately end up being without merit is irrelevant.

That this is not merely a hypothetical problem is demonstrated by the response of the Joint Petitioners that they are accepting process and acceding to jurisdiction in the current consolidated appeals case (Franklin Circuit Court, Case No. 02-CI-1012) *voluntarily*, and by implication, that they will pick and choose those actions in which they willingly participate. See Joint Petitioners' Response at page 4.

Further, the Joint Petitioners' argument that "[e]ven if one of the beneficiaries of a Commission order took the position that it would not participate in the appeal, that stance would not impede the court's jurisdiction over the Commission whose Order is being challenged . . ." also misses the point (see Joint Petitioners' Response at page 5); as the Commission has also required parties other than Kentucky-American to comply with certain conditions of its orders from Case No. 2002-00018.⁴ KRS 278.410 requires that *all* parties to a Commission action be given notice of the filing of an action for review. This section has previously been interpreted to mean that all parties should be *joined as parties*, and that any lesser action could result in the Action for Review being *dismissed*, without an opportunity for cure. See, Energy Regulatory Commission v. Kentucky Power Company, Ky., 605 S.W. 2d 46, 51-52 (1980)("It behooves those who seek review of administrative agencies to include all necessary parties when an appeal is undertaken. It is their responsibility to give notice by means of the issuance of a summons of process, or to demonstrate by other concrete evidence the receipt of notice, so that all proper parties are fully apprised before the reviewing court . . ."). Thus, the failure to properly bring RWE, Thames or TWUS before the court, whether due to service or jurisdictional problems,

⁴ And the question is begged that if "[i]t would not be logical for a prevailing party to refuse to appear and defend the Order during a statutory appeal", why do the Joint Petitioners so steadfastly maintain their position that the LFUCG's recommendation would somehow harm them?

provides a colorable argument that an Action for Review be dismissed.⁵ This is apparently the option that the Joint Petitioners seek to preserve.

The Joint Petitioners also appeal to the Commission's self-interest by arguing that reasonable service and jurisdictional conditions would "assist the LFUCG in its efforts to overturn a Commission Order." See Joint Petitioners' Response at page 4. The LFUCG is confident that the Commission recognizes its duty to protect the statutory rights of *all* parties to its proceedings, and not merely those of the regulated utility.⁶ The adoption of the reasonable conditions suggested by the LFUCG in its Petition for Rehearing, *which other states have already required (and which the Joint Petitioners have already agreed to)*, will merely protect the status quo, and will prevent new and unreasonable defenses that would not otherwise exist.

2. AUTHORITY TO FILE APPLICATION

The Joint Petitioners' response on the issue of proper authority concedes the necessity of proper authorization for the filing of an application by regulated utilities under KRS 278.020, and further concedes that no board authorizations have been made for the creation of TWUS, or the filing of this application. The authorizations cited in the Response are insufficient for this application, in that they relate only to approval of the original transaction agreement, and not to the filing of any action before this Commission. They are also insufficient because the original transaction agreement makes no mention of TWUS. See Joint Petitioners' Response at pages 5 - 6.

⁵ This argument should in no way be construed as a waiver of the LFUCG's argument and position in the current appeals case.

⁶ Left unstated by the Joint Petitioners is their obvious interest in protecting *themselves* from the appeal of Commission orders they believe favor them. In fact, the particular interest advocated in their response is their own self-interest, and not that of the public.

The strict liability rule for proper authorization of applications to this Commission as applied by the Commission in its In re City of Pikeville, Case No. 2000-540 (Order of October 8, 2001) decision does not permit “cure” or “implied authorizations”. In the Pikeville case, the Commission ultimately *voided* the application on the basis that lacked “proper authorization” eleven months after it was filed -- even though the customers who raised the issue had been fully participating for months prior to raising the argument.

The Joint Petitioners’ further argue that the international notoriety of the merger makes the authorization issue “almost comical”. See Joint Petitioners’ Response at page 6. However, the notoriety of an action is no defense to the lack of proper authorization, unless the Commission intends to hold for-profit corporations to a lower standard than municipal utilities. The Joint Petitioners’ argument is perilously close to an assertion that their size and prominence exempts them from the rules that apply to relatively small and obscure entities. Based upon the record before the Commission and the admission of the Joint Petitioners, there is no board authorization to even *create TWUS, let alone file an application with this Commission to approve the transfer of control of Kentucky-American to that entity*. Therefore, unless the Commission is prepared to overturn its Pikeville decision, the immediate action should be voided.

3. ADDITIONAL CONDITIONS

The LFUCG is very concerned by the Joint Petitioners’ interpretation of the “Most Favored Nations” clause as stated in their response. Apparently, having closed the merger, the

Joint Petitioners now intend to severely limit the scope of this condition.⁷ In contrast to the ephemeral and unquantifiable benefits used to justify the proposed application, the Joint Petitioners now argue that the burden is on the LFUCG or the other intervenors to show what proportionate net benefits are to be gained by Kentucky-American's ratepayers by the adoption of any condition imposed by any other Commission as part of its regulatory approval of the transaction. See Joint Petitioners' Response at page 9.

The Commission should also be concerned by this refusal of the Joint Petitioners to consider or accept reasonable and necessary conditions that have been agreed to by the Joint Petitioners in other states (some of which have even been previously admitted by the Joint Petitioners to not have any immediate or ascertainable effect), particularly in light of the Joint Petitioners "agreement" to accept the clause. Further, the Joint Petitioners position on the Most Favored Nations Clause reinforces the LFUCG's argument that conditions to be imposed from other states must be set forth *with particularity* as conditions of approval, and not merely discussed later in a subsequent proceeding.

The LFUCG respectfully requests that the Commission grant rehearing to state *with specificity* the conditions from other states that are to be imposed in Kentucky, and if some conditions *are not to be imposed*, the reasons why conditions that have been found to be necessary to the public interest in other states are not necessary to protect the public interest in Kentucky. This can and should be done *prior to final approval*, now that the proceedings in all other states are complete and final. This will remove any uncertainty as to what conditions are in

⁷ On January 13, 2003, the Joint Petitioners filed a Notice in Case No. 2002-00277 informing the Commission of the closing on January 10, 2003, of the transaction described in the Agreement and Plan of Merger of September 16, 2001. The LFUCG has indicated to the Commission in its Response to the Notice filed on January 17, 2003 that it believes that this action (at least as to Kentucky-American) should be void.

fact found necessary by the Commission for this transaction to be consistent with the public interest.

WHEREFORE, the Lexington-Fayette Urban County Government respectfully requests that the Commission grant its Petition for Rehearing based on the arguments made in said petition and in this Reply to the Joint Petitioners' Response.

Respectfully submitted,

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

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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 22nd day of January 2003:

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