

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
MOTION TO DISMISS AND MEMORANDUM ON THE ISSUES RAISED BY
THE COMMISSION IN ITS SEPTEMBER 13, 2002 ORDER**

Comes the Lexington-Fayette Urban County Government (the “LFUCG”), through counsel, and files this its Motion to Dismiss the Joint Petitioner’s Motion and Petition to Modify Order and its written memorandum on the issues raised by the Public Service Commission (the “Commission”) in its September 13, 2002 Order.

I. Introduction

This action is before the Commission as result of the document styled “Motion and Petition to Modify Order” (the “Motion”), which was originally filed by the Joint Petitioners, Kentucky-American Water Company (“Kentucky-American”), Thames Water Aqua Holdings GmbH, RWE Aktiengesellschaft, Thames Water Aqua U.S. Holdings, Inc., Apollo Acquisition Company, and American Water Works Co. Inc., (the “Joint Petitioners”) on or about August 28, 2002, and subsequently re-filed on September 11, 2002 as result of a deficiency identified by the Commission. The Motion, although

filed to include several parties who were not of record in PSC Case No. 2002-00018, apparently seeks to modify the Commission's Orders of May 30, 2002, and July 10, 2002 from that case (the "Orders").¹ In the Orders, the Commission majority approved, with conditions, a request from some (but not all) of the Joint Petitioners for a change of control of Kentucky-American.

The fundamental problem with the Motion is that it seeks modification of Orders over which the Commission no longer has jurisdiction, or seeks to limit the nature of this proceeding beyond that provided for in the law. The Orders are now before the Franklin Circuit Court in consolidated actions assigned to Civil Action No. 02-CI-1012. The Commission simply does not have the jurisdiction to directly or indirectly modify orders that are on appeal, as that ability lies exclusively with the court.

This issue becomes even more problematic when the Motion appears to include at least four entities - RWE Aktiengesellschaft ("RWE"), Thames Water Aqua U.S. Holdings, Inc., Apollo Acquisition Company, and American Water Works Co. Inc. - that were not parties to Case No. 2002-00018. To suggest that the scope of the proceeding should be limited when such entities were not parties to the original action raises significant questions regarding the due process that is afforded to intervenors coming before the Commission.

The Commission itself has long recognized that it does not have the authority to modify an order once it is on appeal. In its Order of September 29, 1997, in An

¹ The issue has been somewhat confused by this action being docketed as a new proceeding. However, the substance of the Motion attempts to modify the Orders, or, at the very least, provide for a limited proceeding that the Commission is not authorized to hold.

Investigation of the Sources of Supply and Future Demand of Kentucky – American Water Company, PSC Case No. 93-434, the Commission rejected a request by the Attorney General to modify an Order on Rehearing. In rejecting the request, the Commission stated:

KRS 278.410 provides that when rehearing has been granted, any party may, within 20 days after service of the final Order on rehearing, bring an action against the Commission in the Franklin Circuit Court. **Thus, once a final Order on rehearing has been issued, any further relief must be sought from the court, not the Commission** [emphasis added].²

The Commission has spoken clearly, and correctly, on this issue. The immediate action has been filed under KRS 278.020, but nothing in that section or anywhere else in the enabling statute gives the Commission the authority to grant the relief requested by the Joint Petitioners. The Motion is the only document that has been filed to initiate this docket. The only appropriate action for the Commission to take is to reject the Motion as beyond its jurisdiction or authority, and allow the Joint Petitioners the opportunity to file a new Application that allows for a full investigation of all issues related to a new change of control.

II. Responses to Commission Questions

a. Scope of Proceeding

As stated infra, the Commission should dismiss this action as an attempt by the Joint Petitioners to directly or indirectly modify the Orders or to limit this proceeding to

² Case No. 93-434 involved a rehearing request rather than a modification filed as a new proceeding. However, the principle stated by the Commission is general, not specific, and applies to the Motion, whether or not it is docketed to a new proceeding.

an extent beyond that provided for under the law³. However, should the Commission allow this action to continue without need for a re-filing, it must not be limited in scope. All intervenors must have the ability to ask all of the Joint Intervenors any and all questions related to the standards for approval of changes of control under KRS 278.020(4) and (5). In short, the Commission must consider the Motion to be a full application for a new change of control filed pursuant to KRS 278.020, and the only limitation on inquiry should be that of relevance to the findings that the Commission must make under the statute. Should the Commission act otherwise, by, for instance, granting a presumption as to the findings it made in the Orders, it will be merely modifying the Orders, which it has no jurisdiction or authority to do.

This is not to say that the Commission should ignore the record from Case No. 2002-00018 in the immediate action. To the contrary, the LFUCG understands the Commission's desire to avoid re-visiting every matter from Case No. 2002-00018, and does not object to incorporating by reference into this action the record from that case, as appropriate. Material previously provided to the Commission and the intervenors should not have to be supplied again. However, the Commission must treat this action on its own merits, and an effort to limit the scope of the proceeding or to carry forward presumptions that must be rebutted from the Orders would be merely an informal modification of the Orders, and beyond the Commission's authority, and would also serve to cut off the

³ The LFUCG has answered the questions posed by the Commission under the assumption that the Commission will treat this action as a new change of control application. This is not intended to waive the LFUCG's argument that the Motion, as filed, seeks relief which is beyond the Commission's authority to grant.

intervenors opportunity to obtain relevant information from entities that were not parties to the original proceeding.

b. Additional Evidence on Prior Findings

The parties to this action must be able to present additional evidence on issues related to the Commission’s prior findings, because under the law this action must be treated as a new application for a new change of control. Any effort to limit relevant evidence will result in this proceeding merely being a summary proceeding to modify the Orders, which is unlawful.

Although some information from the record in Case No. 2002-00018 may well be relevant and timely, it is likely that other information will need to be updated, and the updated information may provide a perspective that was not available at the prior proceeding. Further, additional relevant information may be available. The intervenors have not “waived” their right to make inquiry into any of the issues of this case. The Commission must allow for the development of an entire record in this action, and then use that record to make the findings necessary to approve or disapprove this application.

c. Is the Commission Bound by the Orders?

Regardless of how the Commission decides to proceed with this case, it is not limited to its prior findings contained in the Orders, and may make such orders on a going-forward basis that are justified by the evidence of record in the new action.⁴ Should the evidence of record present a sufficient basis for findings that are more stringent in

⁴ This issue is different from that of the legal effect of the Orders. The Orders are in effect until such time as the Franklin Circuit Court either amends them or the Commission does so upon remand.

protecting the public interest than the prior findings, the Commission would be justified in making new findings that are inconsistent with the prior findings, or in imposing additional conditions or modifications, or in rejecting the application.⁵

Information could be presented as to issues that have been decided in Case No. 2002-00018 that would cast new light on such findings on a going-forward basis. There are also apparently at least four new parties to this proceeding that were not parties of record in the last proceeding. If this proceeding is a mere summary modification, it must be dismissed. If it is treated as a legitimate new change of control application, the scope of the proceeding must be limited only by relevance to all of the issues that the Commission must decide. See KRS 278.020(4),(5).

d. Preclusion by Franklin Circuit Court Actions

The Commission is precluded from eliminating or lessening the conditions imposed in the Orders. These conditions were accepted by most of the Joint Applicants, were never appealed, and cannot be modified in a new proceeding. At the very least, this course of conduct is an admission that these conditions are necessary to protect the public interest.

It appears that the Commission could consider a new change of control application on its own merits, and require additional protections for the public or deny the requested change of control even if a prior order is pending in the Franklin Circuit Court,

⁵ However, it would be improper for the Commission to eliminate or lessen the conditions it imposed in the Orders, which have already been formally accepted by certain of the Joint Petitioners.

so long as the scope of the new proceeding is sufficient.⁶ It may not, however, directly or indirectly modify the Orders on appeal.

However, even if the Commission can consider a new application without first having the Orders that are before the Franklin Circuit Court voided, the Commission must justify a decision with respect to any further action on a complete record, and not on a summary “carry forward” of its findings in the case that is on appeal. It is at least as important in a case such as this to assure that all relevant issues are fully explored and that a full record on all issues is developed as it is in a normal application case. Otherwise, any action taken by the Commission will be legally suspect as a mere modification of the prior order.

III. Other Issues

The Commission has invited parties to raise “any issue directly related to the scope of this proceeding”. The LFUCG has already stated its position that if this proceeding is not dismissed as requesting relief beyond the Commission’s authority to grant, it must be treated as anew application with a full proceeding to develop a full and current record on all of the findings that the Commission is required to make pursuant to KRS 278.020. In light of numerous waiver allegations raised by defendants in the Franklin Circuit Court proceedings, the LFUCG expressly states that it is not by this response waiving its right to raise any issue which may be developed during the course of

⁶ The LFUCG was unable to find any law specifically precluding this course of action, although any consideration of this matter by the Commission while the Orders on appeal certainly raises questions with regard to the appropriateness of such action.

this proceeding through discovery, testimony, briefs or any other activity related to this proceeding.

a. Enforceability of a Potential Order

Without waiving its right to raise other relevant issues at the appropriate time, the LFUCG is concerned that none of the Joint Petitioners appear to be registered to do business in the Commonwealth of Kentucky pursuant to KRS 271B.015-010, or otherwise have a physical presence in the Commonwealth of Kentucky (with the exception of Kentucky-American), and therefore there is no readily enforceable means of bringing these entities before the jurisdiction of the Commission or the courts of the Commonwealth, if necessary.⁷

With the exception of Kentucky-American, the Joint Applicants that have filed pleadings in Franklin Circuit Court Case No. 02–CI–1012 have taken the position in that case that that they are not subject to the jurisdiction of the Court, that they cannot be served under Kentucky’s “long-arm” statute, and that they are only subject to the jurisdiction of the courts and, presumably, this Commission when they so choose. See Answers filed by various Joint Petitioner Defendants in Case No. 02–CI–1012. Until it is clear that the entities filing this action are required to subject themselves to the jurisdiction of the Commonwealth of Kentucky, the authority for them to bring such an application is doubtful, and the ability of the Commission or the parties to enforce any conditions that are imposed is uncertain at best.

⁷ It appears to the LFUCG, based upon the information that it had available at the time of this filing, that RWE is not registered to do business anywhere in the United States of America.

b. Procedural Schedule

The LFUCG has been left with the impression that the Commission has already determined that the immediate case will conclude within sixty days. The LFUCG believes that this is unrealistic and will force the Commission into making this a limited scope proceeding, regardless of the decision it makes on this motion. KRS 278.020 expressly provides for additional time if necessary, and the Commission's chief concern should be the full development of the record in this proceeding, and not an arbitrary time constraint.

WHEREFORE, the Lexington-Fayette Urban County Government respectfully requests that the Joint Applicant's Motion and Petition to modify Order be dismissed, without prejudice to re-filing as a new application; or in the alternative, that the Commission enter an order clarifying that this proceeding is to be treated as a new application with a scope of discovery which is appropriate to such a proceeding, but providing for the incorporation and use of the record from PSC Case No. 2002-00018.

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 18th day of September 2002:

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