

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 COMPANY, INC.,)
FOR APPROVAL OF A CHANGE IN)
CONTROL OF KENTUCKY-AMERICAN)
WATER COMPANY)

**LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT’S MOTION TO RECONSIDER AND
CLARIFY THE COMMISSION’S ORDER OF OCTOBER 16, 2002**

Comes now the Lexington Fayette Urban County Government (the “LFUCG”), by counsel, and moves the Commission to reconsider its Order of October 16, 2002 (the “Order”), limiting the scope of this proceeding to “reviewing TWUS’s qualifications and to determining whether transfer of control of KAWC to TWUS is consistent with the public interest” and to clarify certain provisions of the Order.

A. The Order Should Be Reconsidered

The Commission recognizes in relying upon the doctrine of *res judicata* to support the Order, that the actual legal doctrine at issue is also known as collateral estoppel.¹ See Order at p. 8; Yeoman v. Commonwealth, Ky., 983 S.W.2d 459, 465 f.n. 2 (1998). The LFUCG respectfully submits that a close reading of Kentucky law in which collateral estoppel is correctly applied to an administrative order indicates that it should

¹ The Commission cited Williamson v. Public Service Commission, Ky., 174 S.W.2d 526 (1943) in the Order for the proposition that *res judicata* applies to administrative orders and decisions. The LFUCG agrees that *res judicata* applies to administrative orders under certain circumstances, but would point out that Williamson is a classic claim preclusion case.

not act to limit the scope of the intervenors' inquiries under the circumstances of the instant case.

In Ward v. Commonwealth, Ky., 814 S.W. 2d 589 (1991) the Court of Appeals provided a specific standard for the application of collateral estoppel to a quasi-judicial administrative order. The court expressly held that a litigant is estopped to collaterally raise the same issue involving the same parties **if that litigant has already litigated that issue and has failed to avail itself of the right to appeal.** Ward at 591.

In the instant case the doctrine of collateral estoppel could be invoked against the Joint Applicants from Case No. 2002-00018, Thames Water Aqua Holdings GmbH ("Thames") and Kentucky-American Water Company ("Kentucky-American"), because they accepted the conditions that were listed by the Commission, and they failed to appeal the Commission's Orders from Case No. 2002-00018. However, it should not properly serve as a bar to any of the intervenors, as each has properly appealed the Commission's Orders from Case No. 2002-00018. The Commission errs in applying the concept against the interests of any of the intervenors in this proceeding, because the concept of collateral estoppel, **as defined by the Court of Appeals**, simply does not apply to those parties.

The Commission's reliance on collateral estoppel is of additional concern to the LFUCG because it is being utilized as a bar in a proceeding that was initiated by the Joint Applicants, and in which the LFUCG is merely asserting that the Commission must fulfill all of its responsibilities under KRS 278.020 as required by law; and because as

previously pointed out, of the Joint Applicants in this action, only Thames and Kentucky-American were actual parties to Case No. 2002-00018.²

B. The Order Should be Clarified

In addition, the LFUCG seeks clarification of the Order with respect to the scope of this proceeding. The Commission recognized that this Application involves additional parties, and that the “qualifications of these additional parties and whether their acquisition of control over KAWC is in the public interest are issues **that have not been previously addressed**. Clearly, KRS 278.020 requires us to address these issues.” See Order, at pp 6-7 (emphasis added). However despite this statement, the Commission has ruled that this proceeding is limited to “reviewing TWUS’s qualifications”. Order at p. 10. These statements appear to be inconsistent, and the LFUCG requests that the Commission clarify this issue.

Finally, the Commission has apparently acknowledged that even if *res judicata* applies to the intervenors, changes in conditions and circumstances may cause the Commission to reconsider certain issues that it believes were previously litigated in Case No. 2002-00018. See Order at p. 10. It also further states that “[t]o date, no showing of any such change has been made.” Id. The LFUCG respectfully submits that the Commission’s ruling limiting the scope of this proceeding to TWUS is at best premature, in that inquiry into such possible changes at the evidentiary hearing would presumably be beyond the scope of this proceeding. Therefore, the LFUCG also requests that the Commission clarify whether this was in fact the intent of the Commission and to further

² The LFUCG further notes the Joint Applicants in Case No. 2002-00018 controlled the timing of the filing of that case and have necessitated the filing of this action because they failed to finalize the corporate structure now being proposed in time to be duly considered as part of Case No. 2002-00018.

clarify whether the intervenors will be permitted to question the Joint Applicants at the hearing with respect to such issues.

WHEREFORE, the Lexington-Fayette Urban County Government respectfully requests that based upon the foregoing argument the Commission reconsider its October 16, 2002 Order narrowing the scope of this proceeding, and enter an order allowing inquiry by the intervenors of all of the Joint Applicants into all relevant issues pursuant to KRS 278.020; and that the Commission clarify its October 16, 2002 Order with respect to whether the intervenors may make inquiries of any Joint Applicant other than Thames Water Aqua US Holdings, Inc., and into areas that may lead to evidence of whether there have been changes of condition or circumstance.

Respectfully submitted,

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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 23rd day of October 2002:

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