

**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 COMPEL**

Comes now the Lexington Fayette Urban County Government (the “LFUCG”), by counsel, and moves the Commission to compel the Joint Applicants (the “Applicants”) to respond to certain requests for information previously propounded by the LFUCG. On October 30, 2002, the Commission amended its October 16, 2002 Order to specify that inquiry “. . . into possible changes in circumstances that have occurred since May 30, 2002 and that may affect the findings contained in our Order of May 30, 2002 . . .” is relevant and permissible. See Commission Order of October 30, 2002, page 3 (the “Order”).¹ Therefore, the LFUCG moves to compel responses to the following requests for information.²

¹ The Commission also reaffirmed its prior finding that the intervenors may not inquire into areas that would otherwise be at issue under KRS 278.020 due to the application of collateral estoppel. The LFUCG does not waive its objection to this ruling or its right to contest that ruling in the future.

² This motion includes four requests for information related to Jacobson Park -- the LFUCG’s Initial Requests for Information, Nos. 16-19. In the LFUCG’s Supplemental Requests for Information, No. 11, the LFUCG again sought responses to these questions. The Applicants failed to respond, instead asserting that “The examination of TWUS in this case does not require further inquiry into Jacobson Park.” The Requests for Information referenced herein are the corresponding numbers for the LFUCG’s First Request for Information unless otherwise noted.

I. Jacobson Park

A. Request No.16. This question seeks information regarding the Applicants current and future plans for Jacobson Park (the “Park”). The Applicants’ response refers to a separate response to a Bluegrass FLOW, Inc. (“FLOW”) request for information, which is non-responsive to the question posed by the LFUCG. This information is relevant and discoverable in this case for several reasons.

First, this case involves parties which were not involved in Case No. 2002-00018, and the LFUCG is entitled to a responsive answer on this question from these new parties. Second, although the party Applicants to PSC Case No. 2002-00018 asserted that as of the time the information requests in that case were answered, no discussions had been held between those party Applicants as to the future of the Park, the American Water Works Company, Inc. (“AWW”) has subsequently proposed sweeping changes to the current lease with the LFUCG for the Park in the form of a suggested Amended Lease Agreement (the “Proposed Amended Lease”).³ This proposal contains a number of provisions which appear to substantially change the substance of the existing lease agreement, and which constitute a proposal for a major change in conditions with respect to this important community asset. For the foregoing reason, the Applicants should be required to respond to the LFUCG’s inquiry.

B. Request No. 17. This question sought all internal memoranda by or for any of the Applicants that discuss future plans for the Park. Pursuant to the Order, the LFUCG is entitled to

³ The LFUCG attaches hereto as Exhibit “A” and incorporates herein by reference the cover letter accompanying the Proposed Amended Lease as well as those pages of that document that it believes to be relevant to this case (pages 24 –27). It has not attached the entire Proposed Amended Lease but does not object to the Commission reviewing the entire document if necessary.

discover at least those memoranda, if any, which were not disclosed or in existence during the pendency of PSC Case No. 2002-00018.

C. Request No. 18. This question sought the Applicants' estimate of the current market value of the Park, including all assumptions contained in such an estimate. The Applicants refused to answer, and when the LFUCG repeated the request in its supplemental requests for information, the Applicants asserted their unsupported and mistaken belief that this question was intended to be used by "those in favor of condemnation of Kentucky-American . . .". See Applicant's Response to the LFUCG's Supplemental Information Request No. 11. This speculative contention is both false and illogical. As noted in Section I (A), supra, AWW held a press conference in July 2002, in which it announced the Proposed Amended Lease. The Proposed Amended Lease was sent to the Mayor of the LFUCG with a cover letter dated July 3, 2002. See LFUCG Exhibit "A", cover letter. Among other items, the Proposed Amended Lease contained a new provision which would allow Kentucky-American Water Company ("Kentucky-American") to sell the Park when it had "secure[d] an additional alternative water supply for the customers of its system . . ." Id. at page 26, lines 8-9. This section also contains a new definition of fair market value, defined as the "highest and best use as if raw land . . .", which appears to be the valuation method that would be used to determine how much the LFUCG would have to pay to purchase the Park in the event that it is found to be no longer used and useful for utility service. Id. at line 13.

In addition, on October 23, 2002, the West Virginia Public Service Commission issued its Order on the proposed takeover by RWE AG ("RWE") of AWW and the West Virginia American Water Company in Case No. 01-1691-W-PC. A copy of the relevant pages of that

Order is attached hereto as Exhibit “B” and incorporated herein. The West Virginia Commission noted that one mechanism being considered by RWE to earn a reasonable return on the premium it is paying for AWW is to “(D) identify current and future surplus property and dispose of it. This may include the sale of \$100 million in land holdings.” See LFUCG Exhibit “B”, page 13.

The LFUCG and the public are entitled to know how the Applicants are valuing the Park in light of the possibility that the Applicants intend to sell real property, at least in part to justify the premium that is being paid for AWW. This information is relevant to the public interest considerations of this Commission and is useful outside the context of a condemnation. Furthermore, the Applicants and their “Coalition Against a Government Takeover” have been publicly arguing for months that their assets, including the Park, are worth far more than the valuations that have been placed on them by various preliminary estimates. While it is true that an actual valuation of the Park would be subject to rational scrutiny, that does not prejudice the Applicants, and the market value placed on the Park by the Applicants could just as easily bolster their lobbying efforts by substantiating their position on the value of the Park.

The future of the Park is central to the Commission’s public interest determination, and denial of this discovery will detract from the record in this case. The information requested will illuminate this issue, and will not unduly prejudice any party. It is sought for a proper purpose, and the Applicants’ apparent fears that this information may harm their lobbying efforts is not a sufficient basis for denying its production. Therefore, the Applicants should be required to provide this information

D. Request No. 19. This question seeks a response as to whether the Applicants would accept a proposed condition with respect to the Park, and if not, why not. The answer is totally unresponsive and the Applicants should be required to respond.

II. Other Requests for Information

A. Request No. 20. This question seeks an accounting as to expenditures to date by the Applicants in their campaign against a “government takeover”, including the source of the funds for this campaign and the accounting procedures being used to assure that the ratepayers will not be responsible for such expenditures. The Applicants’ response referred to a response to FLOW’s first requests for information, which stated that public ownership of Kentucky-American is not an issue in this case. When the LFUCG again requested this information in its supplemental requests for information (No. 12), the Applicants again refused to answer.

The LFUCG is not asking this question for the reason suggested by the Applicants and is entitled to the information requested. The campaign undertaken by the Applicants has tied together their views with respect to a possible government purchase of Kentucky-American with a public relations effort supporting the proposed RWE transaction. In addition, AWW has tied its proposal for a new lease for the Park to its anti-condemnation campaign. See LFUCG Exhibit “A”, cover letter.

Further, the LFUCG has reviewed the rate order in Kentucky-American’s last rate case (PSC Case No. 2000-120), and has not found any indication that any portion of employee time is to be spent on such lobbying efforts. The LFUCG and Kentucky-American’s customers are entitled to discover if some of the compensation currently being paid by ratepayers for

employees to provide utility service is being spent on the “anti-government takeover” campaign, and if not, what accounting treatment is in place to prevent this from happening.

Moreover, the LFUCG and the public are entitled to have concrete information regarding the Applicants’ priorities on public interest issues. Kentucky-American has used its customer mailing lists to directly apprise its customers of its position with respect to the RWE takeover and the perceived “government takeover” effort. Kentucky-American only has these mailing lists because most of its customers in Fayette County must obtain their water from Kentucky-American -- or go without. Customers should not have to receive (or pay for employee time to prepare) such literature simply by virtue of their captive customer status.

How the Applicants conduct themselves with respect to these public interest issues is a legitimate concern for the LFUCG, and for this Commission.⁴ The resources put into the Applicants’ lobbying efforts, as compared to other potential public interest investments, is a fair question. For example, the Commission has deemed relevant information regarding Kentucky-American’s charitable donations, even though such donations are not a proper ratemaking expense, and has even included conditions regarding the level of such expenditures. See May 30, 2002 Order from Case No. 2002-00018, Commitment and Assurance No.’s 45 and 46. Information regarding the Applicants’ joint “anti-government takeover/pro-RWE takeover” campaign is relevant to the public interest aspect of a KRS 278.020 investigation, and so is the amount spent by the Applicants to lobby for their position on these issues.

The Applicants’ primary concern in not providing this information again appears to be that if the public knew how much the Applicants were spending on this lobbying campaign, there

⁴ See e.g., Commitment and Assurance No. 47 to the Commission’s May 30, 2002 Order in Case No. 2002-00018 “RWE and Thames will maintain and support the relationship between KAWC and the communities that it serves.”

would be an adverse public reaction. It is not the function of the Commission to protect utilities from the consequences of their own actions. It is the function of the Commission to assure that the employees of regulated utilities are spending their ratepayer-paid time and using captive customer information to provide utility service. The questions posed by the LFUCG in this area are legitimate, relevant and reasonable, and the Applicants should be required to respond.

B. Supplemental Request No. 10. This question seeks the Applicants' view as to an analysis by Goldman Sachs (the merger advisor to AWW), in which Goldman Sachs opines that RWE has consistently overpaid for acquired assets. The analysis was subsequent to Case No. 2002-00018, and was not provided or of record in that case. The question specifically asks whether the Applicants agree with this analysis, and if not, to state the value which they place on the acquired companies. The answer does not address the question.

WHEREFORE, the Lexington-Fayette Urban County Government respectfully requests that the Commission grant this motion and enter an order requiring the Joint Applicants to provide the requested information prior to the November 21, 2002 public hearing.

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 _____ day of November 2002:

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