

**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
REPLY AND MOTION TO STRIKE A PORTION OF THE RESPONSE**

Comes now, the Lexington-Fayette Urban County Government (the “LFUCG”), by counsel, and files this its reply to the Response of Joint Petitioners to Lexington-Fayette Urban County Government’s Motion to Supplement the Record; and the LFUCG’s Motion to Strike a Portion of the Response.

I. Relevance

The only issue that is properly before the Commission is whether the Letter is relevant evidence to be considered by the Commission.¹ The Letter illustrates the type of communication the Joint Petitioners believe is “functionally related” to utility service. At the hearing, the LFUCG sought clarification of what witness James McGivern (“McGivern”) meant by his use of the term “functionally related” to utility service.² Such

¹ For the purposes of this reply, the “Letter” refers to the December 2002 letter from Roy W. Mundy, II to “[O]ur valued water customers” and the enclosures sent therewith, which was attached to the LFUCG’s Motion to Supplement the Record as Exhibit No. 1.

² This discussion originally arose in the context of provision of information to affiliates. However, further discussion, including questions deferred by Mr. McGivern to Mr. Mundy, went to the use of such information for communications to customers in general, with Mr. Mundy defending the Company’s prior use of customer information to direct specific, nonperiodic mailings to customers. While the Joint

clarification was not forthcoming, and McGivern referred numerous questions to witness Roy Mundy, who defended a very broad range of communications with customers as “functionally related” to utility service.

The LFUCG has recommended that the Commission adopt McGivern’s “functionally related” term for all such uses of private customer information as a condition of approval.³ This is necessary given the monopoly status of water service in Central Kentucky, where Kentucky-American Water Company’s (“Kentucky-American”) customers otherwise apparently have no choice but to receive and review whatever information the Joint Petitioners feel is appropriate.

The LFUCG believes that some definition must be given to the concept of “functionally related” – for if it means any speech arguably afforded First Amendment protection, the limitation is meaningless. The necessity for definition is even more apparent when the Joint Petitioners are defending the practice of sending “special” mailings to customers, with no indication that the mailing is Kentucky-American’s lobbying update -- as opposed to information actually related to the customer’s water service.

It is noteworthy that the Joint Petitioners have assumed that customer information is their “property” and can apparently be used in any manner they see fit so long as the customers don’t have to directly pay for the production or dissemination of the information. This assumption is incorrect. Customer information is not the utility’s property for all purposes. This flawed reasoning must be rejected. The only appropriate

Petitioners would now have the discussion limited to affiliate transactions, such a limitation is unnecessary, unwise, and would be an improper limitation on the discussion of the public interest. See KRS 278.020(5).

³ See LFUCG’s Brief.

use of this information is the provision of utility service -- because the Company only “owns” this information for this specific and limited purpose.

II. First Amendment

There is no First Amendment issue involved in the LFUCG’s Motion to Supplement. The Motion to Supplement will not suppress the Joint Petitioners’ words – it will give them broader distribution. The Joint Petitioners’ arguments regarding the First Amendment are an attempt to file a reply brief, an action that they have not been given leave by the Commission to do. Thus, this portion of the Response should be stricken. If it is not stricken, the Commission must establish a schedule for reply briefs on the new Joint Petitioners’ brief, to afford the LFUCG a reasonable opportunity to respond to the Joint Petitioners’ additional argument.

III. Conclusion

The LFUCG respectfully suggests that no utility should be given carte blanche to use its customer information in the manner evidenced by the Letter. The condition previously suggested by the LFUCG is: (i) limited, (ii) protective of the Joint Petitioners’ legitimate rights, and (ii) in the public interest. However, regardless of its decision with respect to this condition, the Commission should not refuse to consider the Joint Petitioners’ own words (in the form of the Letter) in making its decision on this case. The acceptance of the Letter into the record does not result in a deprivation of the Joint Petitioners’ First Amendment rights -- indeed, their words are given broader distribution than if they were not in the record.

WHEREFORE, the Lexington-Fayette Urban County Government respectfully requests that the Commission grant its Motion to Supplement the Record, and consider

the Letter as relevant evidence in this case; and further that it Strike the Portion of the Joint Petitioner's arguments directed to the First Amendment.

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 December 2002:

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