

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) CASE NO. 2002-00317
ACQUISITION COMPANY AND AMERICAN)
WATER WORKS COMPANY, INC. FOR)
APPROVAL OF A CHANGE OF CONTROL OF)
KENTUCKY-AMERICAN WATER COMPANY)

ORDER

Having been advised of significant disagreements between the parties on the scope of this proceeding, the Commission, on its own motion, directed the parties to brief several questions related to this issue. After reviewing these briefs and carefully considering the parties arguments, we find that the scope of this proceeding is limited to consideration of Thames Water Aqua US Holdings, Inc. s (TWUS) ability to provide reasonable utility service and to the question of whether the proposed transfer of control to TWUS is in the public interest.

BACKGROUND

On January 31, 2002, Kentucky-American Water Company (KAWC) and Thames Water Aqua Holdings GmbH (Thames Holdings) applied to the Commission for approval for the proposed transfer of control of KAWC to Thames Holdings and

RWE Aktiengesellschaft (RWE).¹ KAWC and Thames Holdings represented to the Commission that the proposed transfer of control would occur as a result of the proposed merger of American Water Works Company, Inc. (AWWC), KAWC s parent company, and Apollo Acquisition Company (Apollo), a wholly owned subsidiary of Thames Holdings. After Commission Staff and intervening parties conducted extensive discovery, the Commission held public hearings on the proposed transaction and received written briefs on the evidence and issues. On May 30, 2002, we approved the transfer, finding that Thames Holdings and RWE had the managerial, technical, and financial ability to provide reasonable utility service and that, provided certain conditions are met, the proposed transfer is in the public interest.² The Commission also found that, subject to certain conditions, the proposed transfer was consistent with the public interest.

Following the issuance of our Order of July 10, 2002, the Attorney General (AG), Lexington-Fayette Urban County Government (LFUCG), and Bluegrass FLOW

¹ Case No. 2002-00018, Application for Approval of the Transfer of Control of Kentucky-American Water Company to RWE Aktiengesellschaft and Thames Water Aqua Holdings GmbH (Ky.PSC May 30, 2002). According to its application, Thames applied for Commission approval of the transfer of control on its own and RWE s behalf. Thames Holdings is a wholly owned subsidiary of RWE.

² Id. at 3.

brought separate actions for review of our Orders of May 30, 2002 and July 10, 2002. These actions are currently pending before Franklin Circuit Court.³

Since our approval of the proposed transfer of control, Thames Holdings and RWE modified the nature of the proposed transfer of control. They created TWUS, a Delaware corporation, and announced their intention to transfer all of the stock of Apollo to TWUS prior to the merger of Apollo and AWWC. As a result, upon the merger of Apollo and AWWC, TWUS will acquire control over AWWC and KAWC.

On September 11, 2002, KAWC, AWWC, Thames Holdings, RWE, TWUS, and Apollo (collectively Joint Petitioners) applied to the Commission to approve the proposed transfer of KAWC.⁴ At an informal conference held the same day, the parties expressed their disagreement over the proper scope of this proceeding.⁵ Noting that such disagreement could delay the Commission's review of Joint Petitioners application, we directed all parties to address certain issues pertaining to the scope of this proceeding. All parties submitted written memoranda on these issues on September 18, 2002.

³ Commonwealth of Kentucky, ex rel. A.B. Chandler, Attorney General v. Pub. Serv. Com'n, No. 02-CI-001012 (Franklin Cir. Ct. Ky. filed July 29, 2002); Bluegrass FLOW, Inc. v. Pub. Serv. Com'n, No. 02-CI-001020 (Franklin Cir. Ct. Ky. filed July 30, 2002); Lexington-Fayette Urban County Government v. Pub. Serv. Com'n, No. 02-CI-001024 (Franklin Cir. Ct. Ky. filed July 30, 2002). Franklin Circuit Court has consolidated these actions.

⁴ Joint Petitioners tendered their application to the Commission on August 28, 2002. The Commission's Executive Director found the application deficient in certain respects and refused to accept the application for filing. On September 11, 2002, Joint Petitioners cured these deficiencies.

⁵ Memorandum from Gerald Wuetcher, Assistant General Counsel, Public Service Commission, to Case File No. 2002-00317 (Sept. 11, 2002).

DISCUSSION

KRS 278.020(4) and (5) provide that no person may acquire or transfer control or ownership of a utility without the Commission's prior approval. These statutes direct us to approve such a transfer if the acquirer has the financial, technical, and managerial abilities to provide reasonable service and the proposed transfer is in the public interest. When examining the proposed transfer of a utility, the Commission has broad authority to conduct a full investigation into the acquirer's qualifications. See Public Service Commission v. Cities of Southgate, Highland Heights, 268 S.W.2d 19, 21 (Ky. 1954). If the acquirer is a wholly owned subsidiary, the Commission will also consider the qualifications of the acquirer's parent company.⁶

Joint Petitioners argue that the scope of the present proceeding is limited to an examination of the qualifications of TWUS to hold the stock of the merged Apollo-AWWC and to the analysis of whether the proposed transfer of control, as modified by TWUS's creation, is consistent with the public interest. They note that the Commission extensively examined the qualifications of all other parties to the transaction in Case No. 2002-00018 and determined that RWE and Thames Holdings met the statutory criteria. They assert that no logical reason exists to examine any party's qualifications, save those of TWUS, and that the principles of *res judicata* bar consideration of any additional evidence of those parties' qualifications. Finally, they note that the extensive record of Case No. 2002-00018 has been incorporated by reference into the record of this proceeding.

⁶ See generally Case No. 2001-00399, Petition of ALLTEL Corporation to Acquire the Kentucky Assets of Verizon South, Inc. (Ky. PSC Feb. 13, 2002).

The AG argues that the earlier proceeding does not restrict our review in the current proceeding. He asserts that the Joint Petitioners' application represents a new proceeding and that, therefore, the scope of this proceeding is not limited by the earlier one. The Joint Petitioners, he argues, may not merely tack on TWUS to the Commission's earlier Orders approving the transfer of control. AG's Memorandum at 5. A new review of the Joint Petitioners' qualifications must be conducted and all parties, he asserts, may present new or additional evidence on issues raised in the earlier proceeding.

LFUCG also argues that the Joint Application must be treated as a new application with a full proceeding to develop a full and current record of all of the findings that the Commission is required to make. LFUCG's Motion to Dismiss at 7. Accordingly, it asserts, the scope of review in this proceeding should be unrestricted. While recognizing that the Commission may incorporate the record from, and rely upon the record of, the original proceeding, LFUCG argues that restricting the scope of review to matters not discussed in earlier proceedings would effectively transform this proceeding into an effort to indirectly modify our Orders in Case No. 2002-00018. These Orders are presently under judicial review and are no longer within the Commission's jurisdiction.⁷

LFUCG further asserts that the Commission may not rely upon the findings set forth in the Orders of May 30, 2002 and July 10, 2002 in Case No. 2002-00118. It

⁷ 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. LFUCG's Motion to Dismiss at 6.

argues that 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 intervenors' opportunity to obtain relevant information from entities that were not parties to the original application. Id. at 4 - 5.

Bluegrass FLOW argues that any discussion over the scope of the current proceeding is meaningless as the Commission has no authority to consider the Joint Petition. It asserts that the Joint Petition represents merely an attempt to modify the Commission's Orders of May 30, 2002 and July 10, 2002 in Case No. 2002-00018. As these Orders are currently pending judicial review, the Commission has no jurisdiction to consider modifications to those Orders. Bluegrass FLOW argues that our only recourse pending completion of judicial review of those Orders is dismissal of the Joint Petition.

We find that the Joint Petition represents a new application.⁸ The applicants include several entities that were not applicants in the prior proceeding.⁹ The proposed transaction, moreover, differs from that previously presented to us. While RWE and Thames Holdings will ultimately obtain control of KAWC upon completion of the revised transaction, additional parties are now involved. The qualifications of these additional

⁸ Joint Applicants style their Petition as Motion and Petition to Modify Order. We have considered their Petition as a new application as evidenced by our refusal to accept the tendered document for filing until the requirements of Administrative Regulation 807 KAR 5:001 for the filing of an application had been met.

⁹ In Case No. 2002-00018, only KAWC and Thames Holdings were signatories to the application. Thames Holdings asserted in the application that it was making application on its own behalf and that of RWE. Neither AWWC nor Apollo were applicants in the following case. TWUS did not exist when Case No. 2002-00018 was pending before the Commission.

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.

The Commission finds no merit in Bluegrass FLOW and LFUCG s argument that we lack jurisdiction to consider the Joint Petition. The actions for review of our Orders of May 30, 2002 and July 10, 2002 deprive us of any jurisdiction to modify or amend those Orders, but do not deprive us of jurisdiction over other transactions that will result in a change of control of KAWC or its assets. The proposed transaction will result in a transfer of control to TWUS, a transaction that was not the subject of our earlier Orders.

While the Commission must review the qualifications of all parties that will acquire control of KAWC as a result of the revised transaction and determine whether the revised transaction is in the public interest, the parties are not required to relitigate every factual issue necessarily decided in prior proceedings before this Commission. The doctrine of *res judicata* bars the adjudication of issues that have already been litigated or should have been litigated in a prior case between the same or similar parties.¹⁰ Kentucky courts have long held that the doctrine of *res judicata* applies to quasi-judicial acts of public executives, or administrative officers and boards acting within their jurisdiction, unless there has been a significant change of conditions or circumstances that has occurred between two successive administrative hearings. Williamson v. Public Service Commission, Ky., 174 S.W.2d 526, 529 (1943); Bank of Shelbyville v. Peoples Bank of Bagdad, Ky., 551 S.W.2d 234, 236 (1977).

¹⁰ 46 Am. Jur.2d Judgments § 514.

The doctrine encompasses two sub-parts: claim preclusion and issue preclusion. Yeoman v. Commonwealth, Ky., 983 S.W.2d 459,464 (1998). Issue preclusion, also known as collateral estoppel, prevents parties from re-litigating any issue actually litigated and decided upon in an earlier action. Id. at 465. Issue preclusion bars further litigation when the issues in the two proceedings are the same, the adjudicator in the previous proceeding reached a final decision or judgment on the merits of the case, the estopped party had a fair opportunity to litigate the issue, and the issue in the prior action was necessary to the adjudicator's final decision. Newman v. Newman, Ky., 451 S.W.2d 417 (1970).

All of the elements of issue preclusion exist in this proceeding. First, the issues considered in Case No. 2002-00018 are the same as many of those in this proceeding. In the earlier proceeding, we considered the managerial, technical and financial ability of Thames Holdings and RWE to provide reasonable utility service; we also considered whether the transfer of control of KAWC to these parties is in the public interest.¹¹ We will not reconsider these issues.

Second, after considering RWE's and Thames Holdings' qualifications and the proposed acquisition's consistency with the public interest, the Commission reached a final decision on the merits of the proposed transaction. In determining that the

¹¹ At the outset of our Order of May 30, 2002 in Case No. 2002-00018, we defined the issue in that case as:

whether Thames and RWE have the managerial, technical and financial ability to provide reasonable utility service and whether the proposed transfer of control is in the public interest.

Order of May 30, 2002 at 1.

transaction was consistent with the public interest, the Commission reasoned that RWE's and Thames Holdings' acquisition of control over KAWC would increase KAWC's access to capital and cutting edge technologies.¹² Moreover, Thames Holdings' security expertise, RWE's access to world capital markets, and the commitment of both companies to research and development were just some of the factors the Commission considered in approving the transfer in the previous case.¹³ Clearly, the Commission carefully weighed the merits of the case before rendering its decision.

Third, the Intervenors had ample opportunity to fully litigate the same issues that they now seek to relitigate. The Commission extended the review period to the maximum permitted under law to ensure that all parties had adequate time to conduct discovery. The Commission held two days of lengthy hearings at which the Intervenors had full opportunity to cross-examine opposing witnesses and present their own witnesses. We also provided Intervenors the opportunity to submit written briefs.

Fourth, the Commission's findings regarding Thames Holdings and RWE were necessary to the Commission's ultimate decision to approve the transaction. Indeed, the controlling issues in any decision to approve the transfer of a utility are whether the acquiring company has the managerial, technical, and financial ability to provide reasonable utility service and whether the transfer is consistent with the public interest. See KRS 278.020(4) and (5).

¹² Id. at 30.

¹³ Id. at 16.

Based upon the above, we conclude that the principles of *res judicata* bar us from considering issues already litigated and addressed in Case No. 2002-00018 unless conditions or circumstances have changed such that the Commission should reconsider these issues. To date, no showing of any such change has been made.

IT IS THEREFORE ORDERED that:

1. The motions of Bluegrass FLOW and LFUCG to dismiss these proceedings are denied.

2. The scope of this proceeding is limited to reviewing TWUS's qualifications and to determining whether transfer of control of KAWC to TWUS is consistent with the public interest.

Done at Frankfort, Kentucky, this 16th day of October, 2002.

By the Commission

ATTEST:


Executive Director