

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF LEXINGTON-FAYETTE URBAN)
COUNTY GOVERNMENT FOR AN ORDER) CASE NO. 2012-00203
APPROVING A TRANSFER OF OWNERSHIP AND)
CONTROL)

ORDER

Lexington-Fayette Urban County Government ("LFUCG") has applied for an order declaring that its proposed acquisition of the facilities of Blue Sky Sewer Service Company, Inc. ("Blue Sky Sewer") does not require Commission approval, or in the alternative, for Commission approval of the transfer. Having reviewed the application and being otherwise advised, the Commission finds that:

1. Blue Sky Sewer, a Kentucky corporation organized pursuant to KRS Chapter 271B,¹ owned and operated facilities used to provide sewage collection and treatment services to approximately 137 customers in southeast Fayette County, Kentucky.²

2. In September 2000, Blue Sky Sewer entered into an agreed order with the Natural Resources and Environmental Protection Cabinet ("NREPC")³ that required Blue Sky Sewer to make certain repairs and additions to its treatment facilities and

¹ See <https://app.sos.ky.gov/ftshow/%28S%28tvahdf3i3qesr4ituuwhtrl%29%29/default.aspx?path=ftsearch&id=0115118&ct=09&cs=99999> (last visited July 18, 2012).

² *Annual Report of Blue Sky Sewer Service Company to the Public Service Commission for the Calendar Year Ended December 31, 2002 ("Annual Report")* at 8. No financial and statistical report for Blue Sky Sewer's operations has been filed with the Commission since the filing of report for the calendar year ended December 31, 2002.

³ This agency has since reorganized and is now the Energy and Environmental Cabinet.

provided for civil penalties⁴ if it failed to make these repairs or meet the requirements of its Kentucky Pollution Discharge Elimination System (“KPDES”) Permit.⁵

3. On September 17, 2001, NREPC initiated an action in Franklin Circuit Court to enforce the agreed order.⁶ It asserted that Blue Sky Sewer had failed to make the required repairs and that Blue Sky Sewer’s facilities were not meeting the requirements of its KPDES permit.⁷ It requested that, in addition to the award of civil penalties, the Court require Blue Sky Sewer to cease providing sewer service or, in the alternative, the appointment of a receiver to operate Blue Sky Sewer’s facilities.

4. On June 26, 2002, Franklin Circuit Court entered summary judgment against Blue Sky Sewer.⁸ The Kentucky Court of Appeals subsequently upheld this judgment.⁹

5. On August 13, 2003, Blue Sky Sewer filed for relief under Chapter 7 of the U.S. Bankruptcy Code.¹⁰

⁴ The Agreed Order provided that Blue Sky Sewer would pay \$75 per day for each parameter of its KPDES permit in which it was not in compliance.

⁵ Andy Mead and Geoff Mulvihill, *Blue Sky Agrees to State Terms*, Lexington Herald-Leader, Sep. 12, 2000, at A1. See also *Blue Sky Sewer Co. v. Commonwealth, Natural Resources and Environmental Protection Cabinet*, No. 2002-CA-001591-MR, slip op. at 2 (Ky. Ct. App. Nov. 7, 2003).

⁶ *Natural Resources and Environmental Protection Cabinet v. Blue Sky Sewer Co.*, No. 01-CI-01262 (Franklin Cir. Ct. Ky. filed Sept. 17, 2001).

⁷ *State Taking Sewage Plant to Court*, Lexington Herald-Leader, Sep. 26, 2001, at B3.

⁸ *Natural Resources and Environmental Protection Cabinet v. Blue Sky Sewer Co.*, No. 01-CI-01262 (Franklin Cir. Ct. Ky. June 26, 2002).

⁹ *Blue Sky Sewer Service Co. v. Commonwealth, Natural Resources and Environmental Protection Cabinet*, No. 2002-CA-001591-MR (Ky. Ct. App. Nov. 7, 2003).

¹⁰ *In Re: Blue Sky Sewer Service Co.*, No. 03-52759 (Bankr. E.D.Ky. filed Aug. 13, 2003).

6. On August 20, 2003, LFUCG entered into a contract with the bankruptcy trustee who had taken possession and control of Blue Sky Sewer's assets.¹¹

7. On April 7, 2004, the Bankruptcy Trustee abandoned Blue Sky Sewer's sewage treatment and collection facilities, effectively returning control of these facilities to Blue Sky Sewer.¹²

8. On October 26, 2004, Franklin Circuit Court appointed LFUCG receiver of Blue Sky Sewer's property, including its sewer collection and treatment facilities.¹³ LFUCG has continuously operated Blue Sky Sewer's facilities since its appointment.

9. On November 1, 2008, the Kentucky Secretary of State administratively dissolved Blue Sky Sewer.¹⁴

10. On July 5, 2011, Blue Sky Sewer's designated agent for service of process resigned.¹⁵

11. On October 27, 2011, Shield Environmental Associates, Inc. ("Shield") obtained a judgment against Blue Sky Sewer in the amount of \$451,851.¹⁶ Payment of this judgment was secured by a lien and security interest on Blue Sky Sewer's personal

¹¹ Application ¶ 5. See Andy Mead, *City Takes Reins of Sewage Plant*, Lexington Herald-Leader, Aug. 26, 2003, at B1.

¹² *Id.* at ¶ 6.

¹³ *Environmental and Pub. Protection Cabinet v. Blue Sky Sewer Service Co.*, No. 01-CI-0162 (Franklin Cir. Ct. Oct. 26, 2004).

¹⁴ See <https://app.sos.ky.gov/corpscans/18/0115118-09-99999-20081101-ADS-3307211-PU.pdf> (last visited July 17, 2012).

¹⁵ See <http://apps.sos.ky.gov/ImageWebViewer/%28S%28ttv5mcyl25rtlsacwmcrgzx%29%29/OBDBDisplayImage.aspx?id=4838133> (last visited July 17, 2012).

¹⁶ *Shield Environmental Associates, Inc. v. Blue Sky Sewer Service Co.*, No. 09-CI-05419 (Fayette Cir. Ct. Ky. Oct. 27, 2011).

property. Fayette Circuit Court directed that Blue Sky Sewer's sewage collection and treatment facilities be offered at public sale.

12. On December 5, 2011, the Fayette Circuit Court Master Commissioner sold Blue Sky Sewer's collection and treatment facilities to Shield for \$140,000.

13. On December 6, 2011, the LFUCG Council enacted Resolution 607-2011 that authorized and directed the Mayor of Lexington to execute a Certificate of Consideration, and any other documents necessary, and to accept a Deed for Blue Sky Sewer's sewage treatment facilities, and authorizing payment in the amount of \$250,000, plus usual and appropriate closing costs.¹⁷

14. On January 5, 2012, Fayette Circuit Court confirmed the sale of Blue Sky Sewer's collection and treatment facilities to Shield.¹⁸

15. On January 12, 2012, Shield conveyed Blue Sky Sewer's collection and treatment facilities to LFUCG for \$250,000.¹⁹

16. Shield's actions were part of a single coordinated transaction to transfer legal ownership and control of Blue Sky Sewer's collection and sewer facilities to LFUCG.²⁰ Shield agreed to foreclose on its mortgage and obtain a deed from the Fayette County Master Commissioner for the sole purpose of transferring Blue Sky's real estate and waste water treatment plant to LFUCG.²¹

¹⁷ Minutes of LFUCG Council Meeting at 13 (Dec. 6, 2011), available at <http://lexingtonky.gov/Modules/ShowDocument.aspx?documentid=18852>.

¹⁸ *Shield Environmental Associates, Inc. v. Blue Sky Sewer Service Co.*, No. 09-CI-05419 (Fayette Cir. Ct. Ky. Jan. 5, 2012). See also Fayette County Clerk Deed Book 3050, Page 341.

¹⁹ Fayette County Clerk Deed Book 3051, Page 229.

²⁰ Application, ¶ 11.

²¹ *Id.*, ¶ 10.

17. As part of its consent agreement with the U.S. Environmental Protection Agency, LFUCG agreed to purchase and eliminate the Blue Sky Sewer's sewage treatment facilities.²²

18. LFUCG has applied to and received approval from the Kentucky Infrastructure Authority for a grant of \$600,000 and a loan of \$1,930,000 to eliminate Blue Sky Sewer's sewage treatment facility and install a sanitary pumping station and force main.²³

19. LFUCG is an Urban County Government organized pursuant to KRS Chapter 67A.

20. As of June 30, 2011, LFUCG had total assets of 1,726,700,000 and total liabilities of \$589,907,000.²⁴

21. For the year ended June 30, 2011, LFUCG's sanitary sewer system had operating revenues of \$48,803,403, operating expenses of \$39,413,420, and non-operating revenues of (\$2,486,197).²⁵

22. As of June 30, 2011, LFUCG's Division of Water Quality had 151 employees.²⁶ This total includes 13 licensed professional engineers, 23 Class III

²² *U.S. v. Lexington-Fayette Urban County Government*, No. 5:06-cv-386 (E.D Ky. Jan. 3, 2011). Appendix K-1 to the Consent Agreement required LFUCG to "design and construct a sanitary pumping station and force main for the express purpose of eliminating the Blue Sky Wastewater Treatment Plant." LFUCG agreed to spend at least \$1,300,000 for this project.

²³ For the project profile, see <http://wris.ky.gov/portal/CwPrjData.aspx?PNUM=SX21067007>. Minutes of KIA Board Meeting of Mar. 1, 2012 at 7, available at <http://kia.ky.gov/NR/rdonlyres/748F881A-3B11-4473-8EC1-8C7F556AA7E7/0/030112minutesexecuted.pdf>.

²⁴ Lexington-Fayette Urban County Government, *Comprehensive Annual Financial Report for the Year Ended June 30, 2011* ("LFUCG Annual Report") at 17, available at <http://www.lexingtonky.gov/Modules/ShowDocument.aspx?documentid=19465>.

²⁵ *Id.* at 45-46.

²⁶ *Id.*, Table 22.

wastewater treatment plant operators, 3 Class III wastewater collection system operators, and 6 electricians holding a minimum master electrician's license.²⁷

23. LFUCG operates a state-recognized laboratory that performs analyses on wastewater samples taken from its facilities.²⁸

24. LFUCG's system includes 81 pump stations, almost 1,400 miles of sewer line, over 28,000 manholes, and two wastewater treatment plants with a total treatment capacity of 64 million gallons per day.²⁹

25. For the year ended June 30, 2011, LFUCG's sanitary sewer system treated an average of 41 million gallons of wastewater daily.³⁰

Based upon these findings, the Commission makes the following conclusions of law:

1. Blue Sky Sewer is a utility that is subject to Commission jurisdiction.³¹
2. As an urban-county government, LFUCG is a body corporate and exercises "the constitutional and statutory rights, powers, privileges, immunities and responsibilities" of a city of the second class.³²

²⁷ Application, ¶¶ 12.

²⁸ *Id.*

²⁹ See <http://lexingtonky.gov/index.aspx?page=676> (last visited July 18, 2012); *LFUCG Annual Report*, Table 24.

³⁰ *LFUCG Annual Report*, Table 23.

³¹ KRS 278.010(3)(f).

³² KRS 67A.060(1). Lexington was the largest city in Fayette County at the effective date of LFUCG. It is a city of the second class. KRS 81.010(2).

3. As a “city”, LFUCG is not a utility and is not generally subject to Commission jurisdiction.³³

4. LFUCG is a “corporation”³⁴ and a “person”³⁵ for purposes of KRS Chapter 278.

5. KRS 278.020(5) provides that “[n]o person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission . . . without prior approval by the commission.” As LFUCG is a person and is acquiring ownership of Blue Sky Sewer’s sewage treatment facilities, this statute is applicable to and requires prior Commission approval of Blue Sky Sewer’s acquisition.

6. KRS 278.020(6) provides that “[n]o individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an ‘acquirer’), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission.” As LFUCG is an entity³⁶ and a person and is acquiring control of Blue Sky Sewer’s utility operations through its

³³ KRS 278.010(3); KRS 278.200; *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460 (Ky.1994); *McClellan v. Louisville Water Co.*, 351 S.W.2d 197 (Ky.1961).

³⁴ See KRS 278.010(1) (providing that a corporation “includes private, quasipublic, and public corporations, and all boards, agencies, and instrumentalities thereof, associations, joint-stock companies, and business trusts”). Urban-County governments represent a consolidation of county and city governmental entities. Counties are generally considered public or quasipublic corporations. See 20 C.J.S. *Counties* § 6 (2012); 56 Am. Jur. 2d *Municipal Corporations* § 8 (2012). Cities are municipal corporations. See, e.g., *Wilson v. Central City*, 2012 WL1450136 at *2 (Ky. Apr. 26, 2012) (“a city is both a ‘municipality’ and a ‘municipal corporation’”).

³⁵ See KRS 278.010(2) (providing that a person includes “includes natural persons, partnerships, corporations, and two (2) or more persons having a joint or common interest”).

³⁶ Black’s Law Dictionary 612 (9th ed. 2009) (defining entity as “[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members or owners.”).

acquisition of Blue Sky Sewer's sewage treatment and collection facilities, this statute is applicable to and requires prior Commission approval of the transfer of those facilities.

7. KRS 278.020(6) further provides that "[a]ny acquisition of control without prior authorization [of the Commission] shall be void and of no effect."

8. In view of its financial assets, LFUCG has sufficient financial integrity to ensure the continuity of utility service.

9. LFUCG has the financial, technical, and managerial abilities to provide reasonable service to those persons that Blue Sky Sewer currently serves.

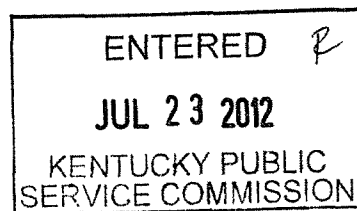
10. KRS 224A.300(1) provides that the regionalization and consolidation of water and wastewater systems should be encouraged.

11. LFUCG's acquisition of Blue Sky Sewer's sewage treatment and collection facilities is in accordance with law and for a proper purpose.

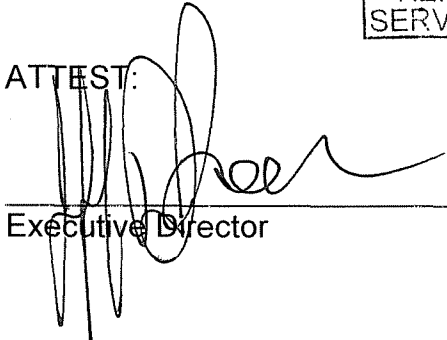
12. Upon LFUCG's acquisition of Blue Sky Sewer's sewage treatment and collection facilities, those facilities will no longer be subject to Commission jurisdiction.

IT IS THEREFORE ORDERED that the proposed transfer of ownership and control of Blue Sky Sewer's facilities to LFUCG is approved.

By the Commission



ATTEST:



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