

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION FOR APPROVAL OF THE)	
TRANSFER OF CONTROL OF KENTUCKY-)	
AMERICAN WATER COMPANY TO RWE)	CASE NO. 2002-00018
AKTIENGESELLSCHAFT AND THAMES)	
WATER AQUA HOLDINGS GMBH)	

O R D E R

On May 30, 2002, the Commission approved the application of Kentucky-American Water Company (KAWC) and Thames Water Aqua Holdings GmbH (Thames Aqua) (collectively Joint Applicants) for approval of the transfer of control of KAWC to Thames Aqua and to RWE Aktiengesellschaft (RWE), Thames corporate parent. When granting our approval, we prescribed 56 conditions necessary to ensure the protection of the public (merger conditions).¹

The Attorney General (AG), Bluegrass FLOW, Inc. (FLOW), and Lexington-Fayette Urban County Government (LFUCG) (collectively Intervenors) have applied for rehearing of our Order of May 30, 2002. The AG and FLOW have also moved for additional relief related to this Order. Having considered these pleadings and the Joint Applicants responses, we grant rehearing for the limited purpose of clarifying certain portions of that Order. We further grant the AG s Motion for the Establishment of a Compliance Proceeding. All other requested relief is denied.

¹ On June 6, 2002, the Joint Applicants, American Water Works Company (AWWC), and RWE acknowledged in writing their acceptance of these conditions.

FLOW S MOTION TO DENY APPLICATION

FLOW has moved for denial of the Joint Applicants Application for their alleged failure to comply with the Commission s Order of May 30, 2002. In support of its motion, FLOW contends that Thames Water Plc has not executed and filed the acknowledgement and acceptance of the merger conditions as the Order of May 30, 2002 requires. It further contends that the Joint Applicants, AWWC, and RWE failed to comply with that Order when they submitted written statements from their chief executive officers accepting the merger conditions without acknowledged signatures.

We deny the motion. In our Order of May 30, 2002, we did not require Thames Water Plc to submit any evidence of its acceptance of the merger conditions. Our Order clearly refers only to Thames Aqua.² Moreover, as Thames Water Plc is a subsidiary of Thames Aqua, is subject to Thames Aqua s control, and will have no authority over KAWC after the merger except that which Thames Aqua grants to it, it makes little sense to require Thames Water Plc to execute any document evidencing its acceptance of the merger conditions.

As to its contention that we required acknowledged signatures, FLOW has misinterpreted the intent of our Order. We expected and required only written

² Ordering Paragraph 2 states:

The transfer of control of KAWC from AWWC to RWE and Thames through Thames acquisition of ownership and control of AWWC is approved, subject to the filing, within 7 days of the date of this Order, of the written acknowledgements on behalf of RWE, Thames, AWWC, and KAWC by each entity s chief executive officer that these entities each accept and agree to be bound by the commitments set forth in Appendix A to this Order.

documents from the chief executive officers of Joint Applicants, RWE, and AWWC in which they stated their respective entity's acceptance of the merger conditions. A more formal document was not necessary.

MOTION TO RESCIND BASED UPON NEWLY
DISCOVERED EVIDENCE

Citing RWE and Thames Aqua's recent decision to form an intermediary holding company between Thames Aqua and AWWC, Intervenor³ seek rescission of the Order of May 30, 2002. On June 19, 2002, Thames Aqua disclosed to the Illinois Commerce Commission its intention to form Thames Water Aqua US Holdings, Inc. (TWUS).⁴ Upon completion of the merger of AWWC and Apollo Acquisition Company (Apollo), TWUS will hold all of the surviving corporation's stock. Thames Aqua is establishing TWUS to permit the filing of a consolidated U.S. tax return. The decision to establish TWUS came only after changes in German law made TWUS's creation desirable.

In support of its motion, FLOW argues that the proposed transaction involving KAWC is not yet a mature transaction, but is still evolving and has now evolved into a new control-acquiring entity.⁵ The entity that will now acquire control of KAWC, FLOW argues, has not formally appeared before the Commission and does not yet exist. FLOW argues that these changes in the proposed transaction require Commission approval and new proceedings.

³ Only FLOW moved for rescission. The AG and LFUCG submitted responses in support of the motion.

⁴ TWUS will be incorporated under the laws of Delaware.

⁵ FLOW's Motion to Rescind at 1.

The AG and LFUCG make similar arguments in support of FLOW's motion. They assert that KRS 278.020(5) requires an acquirer of control of a utility to obtain Commission approval and thus requires Commission approval of TWUS's acquisition of control of KAWC. They note that TWUS has not applied for such approval and argue that new proceedings are required to review TWUS's qualifications.

We find that the creation of an intermediate subsidiary does not require rescission of our Order of May 30, 2002. The possibility that Thames Aqua would create an intermediate holding company has existed since the inception of this proceeding. Joint Applicants noted in their application that the creation of an intermediate holding company between KAWC and Thames Aqua was a potential feature of the proposed transaction⁶ and continued to acknowledge such possibility in their responses to discovery requests.⁷ They, however, never emphasized this possibility or acknowledged that specific plans existed for the creation of such entity.

The creation of TWUS does not alter the final result of the proposed transaction. While TWUS will own all the outstanding shares of the survivor of the AWWC-Apollo merger, Thames Aqua will own and control TWUS. Thus RWE and Thames Aqua will retain ultimate control over the AWWC-Apollo merger survivor. Thames Water Plc, which operates all of Thames Aqua's water holdings, will operate and manage TWUS.

⁶ Joint Application at 10 and Exhibit 5.

⁷ See, e.g., Joint Applicants' Response to the AG's Initial Data Request, Item 101 at 1028; Joint Applicants' Response to the AG's Second Data Request, Item 21.

The members of TWUS s board of directors will be identical to the board of directors of the survivor of the AWWC-Apollo merger.⁸

The Commission has just conducted an extensive review of Thames Aqua and RWE s qualifications and concluded that they have the requisite abilities to provide reasonable utility service. The Intervenors have not suggested, nor do we find, any basis for concluding that the changes to the proposed transaction will alter these qualifications. The Intervenors also fail to state how the public interest will be adversely affected by the modifications to the proposed transactions if the ultimate control of KAWC is still transferred to Thames Aqua and RWE.

While we find no reason to rescind our Order, we note that our approval extends only to the transfer of control of KAWC to RWE and Thames Aqua. We have not approved any transfer involving another RWE or Thames Aqua subsidiary.⁹ When entering our Order of May 30, 2002, we fully expected the Joint Applicants to advise us promptly of any changes in the proposed transaction. Except to respond to the Intervenors pleading, however, they have yet to advise us of any changes.

Clearly the transfer of AWWC-Apollo stock to TWUS constitutes a transfer of control.¹⁰ The Commission, however, lacks sufficient information to determine whether

⁸ FLOW s Motion to Rescind, Exhibit A at 1 - 4 .

⁹ We approved only [t]he transfer of control of KAWC from AWWC to RWE and Thames through Thames acquisition of ownership and control of AWWC. Order of May 30, 2002 at 30.

¹⁰ KRS 278.020(5) defines control as the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a utility, whether through the ownership of voting securities, by effecting a change in the composition of the board of directors, by contract or otherwise.

the transfer of control of KAWC to TWUS requires our approval. See KRS 278.020(6). If the transfer occurs after that RWE and Thames Aqua acquire control over the survivor of the AWWC-Apollo merger, our approval does not appear to be required. If a different arrangement exists, then TWUS must also obtain Commission approval of the transfer. As it is part of the overall transaction involving RWE and Thames Aqua s acquisition of control of KAWC, this approval may be obtained by requesting modifications to the Order of May 30, 2002.

PETITIONS FOR REHEARING

The Intervenors raise several issues in their petitions for rehearing. We address those issues of significance below. All other issues not expressly addressed are hereby denied.

Lack of Essential Parties

The Intervenors argue that we erred in our analysis of the need for RWE and AWWC to apply for Commission approval of the proposed transaction. They assert that both entities are essential parties to the transaction and, without their application to the Commission, we lack the authority to approve the proposed transaction. The Intervenors assert that KRS 278.020(5) requires any party acquiring control of a utility to apply to the Commission for our approval of the transfer. The AG further asserts that without such application, RWE cannot invoke the Commission s jurisdiction.

The Commission has closely examined KRS 278.020(4) and (5) and cannot discern any express requirement that a transferor or an acquirer must specifically apply for Commission approval of the acquisition of control. KRS 278.020(4) provides only 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 by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. KRS

278.020(5) states:

No 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.

We find no requirement in either statute that requires an acquirer or transferor to invoke the Commission's jurisdiction by personally filing an application for approval of the acquisition or transfer.

The Intervenors contend that our interpretation renders enforcement of the merger conditions problematic. They assert that we cannot prescribe and subsequently enforce merger conditions on RWE and AWWC as these parties did not personally appear before us. This argument ignores the clear statutory grant of jurisdiction to the Commission contained in KRS 278.020. That statute confers jurisdiction over the transaction regardless of the parties. This jurisdiction is based upon KAWC's status as a utility and the nature of the proposed transaction. Commission approval of the transaction must be obtained. Regardless of whether an entity associated with the transaction personally appears before us, the failure of that entity to accept reasonable conditions that we attach to our approval will deprive the transaction of our approval.

Moreover, we find that actions of RWE and AWWC are sufficient to constitute an appearance before us and confer jurisdiction to enforce the provisions of the Order of

May 30, 2002.¹¹ The application for Commission approval was filed on RWE s behalf by its subsidiary Thames Aqua. During the course of the proceeding, RWE made available documents under its control to the Commission and to parties in response to discovery requests. It made available its officers at hearing to appear as witnesses to answer questions regarding its operations. It filed formal documents on its own behalf in response to the Order of May 31, 2002. AWWC acted in a similar fashion.

We find no merit to LFUCG s argument that our approach on jurisdiction prejudices intervening parties or shifts the burden of proof to those parties. Clearly, the parties filing the application must still demonstrate that the acquirer has the requisite abilities to provide reasonable utility service and that the proposed acquisition is in the public interest. To the extent that an applicant fails to adequately respond to reasonable discovery requests or to produce essential witnesses, including officials or representatives of the acquirer, for cross-examination, the Commission retains the authority to deny the application because of this failure.

None of the Intervenors have demonstrated any prejudice resulting from RWE or AWWC s limited participation in this proceeding. They have not identified any relevant area of inquiry that they were prevented from pursuing. They and Commission Staff questioned the Joint Applicants extensively about AWWC s and RWE s operations. They were provided with documents that were in RWE s or AWWC s sole control and were provided the opportunity to question AWWC and RWE officials regarding their

¹¹ In our Order of May 31, 2002, we noted AWWC s and RWE s failure to appear. Order of May 30, 2002 at 12. After further review of the record, we find our earlier statement is incorrect. Given the level of both entities participation in these proceedings, we conclude that they did in fact make an appearance before the Commission.

operations. The record indicates that no intervenor requested the appearance or testimony of any AWWC or RWE employee or official.

In summary, we find no basis in the Intervenors arguments that will support rehearing on this issue and, therefore, deny their petitions for rehearing on this issue.

Public Interest Standard

The AG asserts that the public interest standard set forth in our Order of May 30, 2002 is unclear and requests clarification. He asserts that the public interest requires a demonstration of actual, affirmative benefit and that the Joint Applicants have not met this standard. LFUCG argues that the standard set forth in our Order of May 30, 2002 is inadequate. It asserts that we failed to adopt a standard that requires a showing of a quantifiable benefit to ratepayers resulting from the transaction and that the record contains no evidence of any quantifiable benefit.

In our Order of May 30, 2002, we clearly stated the standard of proof necessary to demonstrate that a transfer of control is in the public interest:

[A]ny party seeking approval of a transfer of control must show that the proposed transfer will not adversely affect the existing level of utility service or rates or that any potentially adverse effects can be avoided through the Commission's imposition of reasonable conditions on the acquiring party. The acquiring party should also demonstrate that the proposed transfer is likely to benefit the public through improved service quality, enhanced service reliability, the availability of additional services, lower rates, or a reduction in utility expenses to provide present services. Such benefits, however, need not be immediate or readily quantifiable.

Further clarification of this standard is not required.

As to the AG's and LFUCG's assertions that a transfer of control must produce readily quantifiable benefits to be in the public interest, we find no authority to support

such a proposition. Such a standard runs counter to existing Commission precedent. Moreover, while this standard may be achievable in limited instances, most transfers of control that are presented to this Commission would be unable to meet this standard. The standard set forth our Order of May 30, 2002 is higher than that of many other states.¹²

Contrary to the AG s and LFUCG s contentions, the record contains substantial evidence that the proposed transfer of control is likely to result in benefits to KAWC s ratepayers. Upon completion of the transaction, KAWC will have access to Thames Aqua s resources and expertise. It will allow KAWC to share best operating practices, increase KAWC s access to technical resources, enhance KAWC s access to capital markets, and derive the benefits of Thames Aqua s research and development programs. It will allow KAWC to draw upon RWE s extensive borrowing power and should reduce KAWC s cost of capital. The proposed transfer of control allows KAWC to access Thames Aqua s experience in the area of security. Clearly, the proposed merger is likely to enhance KAWC s ability to provide reasonable utility service at reasonable rates.

We find no basis to disturb our findings regarding the benefits that are likely to result from the transfer of control and deny the Intervenors petitions for rehearing on this issue.

¹² See, e.g., Re Valleyfield Water, Inc., 2001 WL 1568388 (N.H.PUC July 20, 2001) at 1 (Under the public interest or public good standard to be applied by the Commission where an individual or entity seeks to acquire a jurisdictional utility, the Commission must determine that the proposed transaction will not harm ratepayers.).

Newly Discovered Evidence

FLOW¹³ argues that rehearing is required in this matter as a result of recently discovered newspaper accounts regarding fines assessed against Thames Water Plc in the United Kingdom for environmental violations. Its argument implies that such evidence requires further investigation to determine the fitness of Thames Aqua and RWE to provide reasonable utility service.

Opposing the FLOW's petition, the Joint Applicants argue that none of the evidence is newly discoverable and that it was readily available prior to the hearing.¹⁴ They further argue that the fines in question were assessed against a Thames Aqua subsidiary and are of minimal materiality when viewed with the large number of customers that the subsidiary serves.

We find that the evidence in question was readily available prior to the hearing. The newspaper accounts appeared before the hearing in this matter and were readily available on the Internet. Moreover, these accounts dealt with environmental violations that occurred and for which penalties had been assessed a year ago. These violations were not recent and records of these violations were not hidden from public view.

We agree that the information submitted has limited relevance and materiality. The violations involve the operation of wastewater facilities, not water treatment or

¹³ FLOW also argues that rehearing is required because of Thames Aqua's recent filings with Illinois Commerce Commission regarding the creation of TWUS. We have addressed that argument earlier in this Order and found that the formation of TWUS is not sufficient grounds to rescind our Order of May 30, 2002. For the same reasons, we find those facts insufficient to require a rehearing in this matter.

¹⁴ KRS 278.400 permits the introduction of additional evidence at rehearing if the evidence could not with reasonable diligence have been offered on the former hearing.

distribution facilities. Given the size of Thames Aqua's customer base and facilities, the fines appear to be relatively small. FLOW has not suggested nor presented any evidence to demonstrate a pattern of recurring misconduct to require us to revisit our earlier findings. Accordingly, we deny FLOW's petition for rehearing on this ground.

Jacobson Park

LFUCG argues that the Commission should modify Condition 17¹⁵ to deed Jacobson Park to LFUCG for permanent use as a park, with appropriate and perpetual provisions for necessary water company uses. We have previously rejected this condition and do so again now. This condition raises significant constitutional concerns involving the taking of property without compensation. To the extent that LFUCG wishes to acquire permanent property rights in Jacobson Park, it should exercise its statutory powers to acquire those rights.

Annual Meetings with Commission

LFUCG requests that the parties to this proceeding be included in any meeting between RWE or Thames Aqua officers and the Commission or Commission Staff held to comply with Commitment 17.¹⁶ We agree that in most circumstances those parties

¹⁵ KAWC will obtain Commission approval prior to any transfer of control or ownership of the land upon which Jacobson Park is located.

¹⁶ RWE and Thames will take an active and ongoing role in managing and operating KAWC in the interests of customers, employees, and the Commonwealth of Kentucky, and will take the lead in enhancing KAWC's relationship with the Commission, with state and local governments, and with other community interests, and to advance these goals shall, among other things, arrange for meetings between RWE's and/or Thames' chief executive and the Commission and/or its Staff at least twice a year.

that regularly participate in Commission proceedings involving KAWC should be invited to attend such meetings and will invite them to such meetings whenever appropriate.

Mechanism for Merger Savings

The AG requests clarification of Condition No. 18. This condition requires RWE, Thames Aqua, AWWC, and KAWC to develop and implement a mechanism to track the savings and costs resulting from the proposed merger and a methodology to allocate such savings and costs and submit to the Commission in writing a detailed description of that methodology.¹⁷ The AG argues that the condition should require the submission of the actual mechanism. Arguing that no modification is necessary and that a description is sufficient, the Joint Applicants oppose the request.

The Commission finds that clarification is necessary. We assumed that any description of the mechanism would include the actual mechanism. Given the confusion among the parties, we find that Condition No. 18 should be revised to state clearly that any description of the mechanism filed with the Commission should include the actual mechanism.

Payment of Retained Earnings

LFUCG requests modification to Condition No. 32,¹⁸ which addresses the transfer of funds from KAWC to any RWE-related entity. It argues for a prohibition upon

¹⁷ Order of May 30, 2002, Appendix A at 4.

¹⁸ RWE, Thames, AWWC and KAWC will obtain Commission approval prior to KAWC's payment of any dividend or transfer of any funds representing more than 5 percent of KAWC's retained earnings to RWE, Thames or any other entity related to RWE.

such transfers for a significant period of years. In the alternative, it requests that the Commission clarify the limits placed upon such transfers.

We find any prohibition on the payment of dividends or transfer of funds to be unreasonable. KAWC's corporate owner is entitled to a reasonable return of its investment through the payment of reasonable dividends. We believe that Condition No. 32 strikes the appropriate balance between this entitlement and the protection of KAWC's customers from excessive and unreasonable transfers of funds that would threaten KAWC's financial stability and quality of service.

Upon review of Condition No. 32, we find that modifications are necessary to clarify the limitation upon the transfer of funds from KAWC. As currently stated, this limitation is vague and subject to various interpretation. We find that this limitation should be an annual limit based upon KAWC's current retained earnings at the end of the previous calendar year and have revised Condition No. 32 accordingly.

Local Control

LFUCG argues that Condition No. 49, which requires that 40 percent of the members of KAWC's Board of Directors be residents of KAWC's service area and not be employees or officers of KAWC or any RWE-related entity, is inadequate to ensure responsiveness to local concerns and to guard against control by faceless bureaucrats within RWE's corporate hierarchy. It argues that this condition should be modified to require a majority of the members of KAWC's Board of Directors to meet this requirement.

The purpose of Commitment No. 49 was to ensure KAWC's responsiveness to local concerns. Local members provide KAWC's Board of Directors with a local and

independent perspective of the ratepayers needs and concerns. While the proposed modification might increase KAWC s responsiveness to these concerns, it will severely limit RWE and Thames Aqua s ability to manage and control KAWC s affairs. It intrudes too deeply into an owner s legal rights and raises significant constitutional concerns. For these reasons, we find that requested modifications should be denied.

Most Favored Nations Clause

LFUCG argues that Condition No. 51¹⁹ requires modification in 4 respects. First, LFUCG proposes to modify the condition to include conditions imposed by other state regulatory commissions to protect the environment. Second, it proposes to amend the exclusion of benefits imposed by state regulatory commissions that regulate both Thames Aqua and AWWC subsidiaries to specifically the states where such instances occur. Third, LGUCG proposes that approval in Kentucky be suspended if any jurisdiction refuses to approve the proposed transaction and remain suspended until such approval is obtained. Fourth, it proposes that the Joint Applicants be required to immediately report when such benefits or conditions or refusals take place in other states and include a specific plan for providing additional benefits and conditions for Kentucky ratepayers.

The Commission finds that Condition No. 51 should be modified to name the state regulatory commissions that currently exercise jurisdiction over Thames Aqua and

¹⁹ If any state regulatory commission, except for a commission that presently exercises jurisdiction over both AWWC and Thames operating subsidiaries, imposes conditions on RWE, Thames or AWWC as a condition for its approval of the proposed merger and those conditions would benefit ratepayers in any other jurisdiction, proportionate net benefits and conditions will be extended to KAWC ratepayers.

AWWC subsidiaries. We agree that this modification will clarify the intent of our earlier condition and will prevent any litigation on this issue.

We find that LFUCG's second and fourth proposals are unnecessary and decline to amend Condition No. 51 to include them. As currently written, Condition No. 51 requires consideration of any environmentally-related conditions that benefit ratepayers in other states. As to the fourth proposal, the Commission has already directed the Joint Applicants to report to the Commission on the final regulatory action on the proposed transaction by any other state within 20 days of that action. The new docket that we will establish to monitor compliance with our Order will address the benefits issue.

We also decline to accept LFUCG's third proposal. Every state commission reviewing the proposed transaction must judge the transaction based upon the specific facts before it and the laws of its state. Each review is separate and involves different AWWC subsidiaries and different local concerns. KRS 278.020 requires us to review the proposed transaction as it affects KAWC ratepayers and to apply the standard of review that the Kentucky General Assembly has established. The actions of other states in this regard should have little bearing on our decision and should not be grounds for suspending our approval.

Negotiations with LFUCG

LFUCG argues that Condition No. 54²⁰ should not be limited solely to existing contracts, but should require KAWC to negotiate in good faith with LFUCG with respect to all current and future issues. The Commission agrees that, whenever KAWC negotiates with LFUCG, it should negotiate in good faith. We do not believe that an unlimited obligation or duty to negotiate with LFUCG should be imposed. Any duty to negotiate that is imposed as a merger condition should be limited to existing transactions between KAWC and LFUCG. To the extent that KAWC refuses to negotiate with LFUCG on future matters that fall within our jurisdiction, LFUCG retains the right to seek redress from the Commission through the formal complaint process. See KRS 278.260.

Surrogate SEC Filings

LFUCG urges the Commission to require RWE and Thames Aqua to file reports with the Commission that contain the information found in annual and quarterly reports that AWWC must currently file with the U.S. Securities and Exchange Commission. It argues that these reports are necessary to obtain a complete picture of those entities operations.

The Commission is of the opinion that reporting requirements set forth in the Order of May 30, 2002 are adequate to monitor the operations of RWE and Thames Aqua for the purposes of protecting KAWC's ratepayers and ensuring compliance with

²⁰ RWE, Thames, AWWC and KAWC will honor all existing KAWC contracts, easements or other agreements with the LFUCG, and will negotiate with the LFUCG in good faith regarding the renewal of those agreements.

the merger conditions. LFUCG has failed to explain why these existing reporting requirements are inadequate or insufficient. In the absence of such explanation, we deny its request.

Prohibition of Acquisition Adjustments

LFUCG argues that KAWC should be prohibited from requesting any acquisition adjustment in future rate-making proceedings as a condition for Commission approval of the proposed transaction. We find this proposal unreasonable and deny LFUCG's request. Each requested acquisition adjustment must be judged upon its own merits.²¹ We have established clear and stringent criteria for allowing an acquisition adjustment for rate-making purposes²² and will apply those to any requests that KAWC submits in a rate proceeding.

AG'S MOTION FOR THE ESTABLISHMENT OF A COMPLIANCE PROCEEDING

Noting the large number of conditions imposed upon the transaction and the variety of additional actions that the Joint Applicants, RWE and AWWC must undertake as a result of the Order of May 30, 2002, the AG has moved for the establishment of a new docket to monitor compliance with the Order. This docket, he argues, would serve to ensure compliance with the Order and to permit all parties access to all required

²¹ See Case No. 9059, An Adjustment of Rates of Delta Natural Gas Company, Inc. (Ky.PSC Sep. 11, 1985) at 3 (This Commission has concluded that plant acquisition adjustments should not be denied as a matter of rigid rate-making policy but that each instance should be evaluated on its own merits and, if it is demonstrated that the acquisition at a cost above book value is in the public interest, the utility should be allowed to recover its investment.).

²² Id. at 3 4.

filings. It would further allow interested parties to review, critique, and challenge the actions of RWE, AWWC, and the Joint Applicants.

The Joint Applicants oppose this motion. They argue that no reason for the establishment of such a docket exists and note that in previous transfer of control proceedings no docket to monitor compliance was established. All documents filed with the Commission, they further note, will be available for public inspection under the Open Records Act.

We find that the establishment of a docket to monitor compliance is appropriate and reasonable. Several provisions of the Order of May 30, 2002 require actions on the part of the Joint Applicants and RWE. Some of these actions, such as the development and implementation of a merger savings tracker, will have implications in future rate proceedings. Rather than postpone decisions related to these actions, we find that a compliance proceeding would aid in their immediate resolution. Such a docket would also allow the Commission to monitor the efforts of AWWC, RWE and Thames Aqua to obtain regulatory approval of and implement the proposed transaction. Accordingly, we find the AG's motion should be granted.

Having considered the Intervenors' motions and being otherwise sufficiently advised, the Commission HEREBY ORDERS that:

1. FLOW's Motion to Deny Joint Application for Failure to Comply with May 30, 2002 Order is denied.
2. FLOW's Motion to Rescind Order is denied.
3. FLOW's Motion for Rehearing is denied.

4. AG's Request for Rehearing and LFUCG's Application for Rehearing are granted in part and denied in part.

5. AG's Motion for Establishment of a Compliance Proceeding is granted.

6. Our prior approval of the transfer of control of KAWC from AWWC to RWE and Thames Aqua through Thames Aqua's acquisition of ownership and control of AWWC is affirmed, subject to the conditions set forth Appendix A to the Order of May 30, 2002, as amended in this Order, and the filing, within 7 days of the date of this Order, of the written acknowledgements on behalf of RWE, Thames Aqua, AWWC, and KAWC by each entity's chief executive officer that these entities each accept and agree to be bound by the commitments set forth in Appendix A to the Order of May 30, 2002, as amended in this Order.

7. Condition No. 18 as set forth in Appendix A of our Order of May 30, 2002 is amended to read as follows:

No later than March 16, 2003, RWE, Thames, AWWC, and KAWC will develop and implement a mechanism to track the savings and costs resulting from the proposed merger and a methodology to allocate such savings and costs and will submit to the Commission in writing that mechanism and a detailed description of that allocation methodology.

8. Condition No. 32 as set forth in Appendix A of our Order of May 30, 2002 is amended to read as follows:

RWE, Thames, AWWC and KAWC will obtain Commission approval prior to KAWC's payments of any dividend or transfers of any funds within a calendar year that collectively represent more than 5 percent of KAWC's retained earnings as of December 31 of the prior calendar year to RWE, Thames or any other entity related to RWE.

9. Condition No. 51 as set forth in Appendix A of our Order of May 30, 2002 is amended to read as follows:

If any state regulatory commission, except the New Jersey Board of Public Utilities, imposes conditions on RWE, Thames or AWWC as a condition for its approval of the proposed merger and those conditions would benefit ratepayers in any other jurisdiction, proportionate net benefits and conditions will be extended to KAWC ratepayers.

10. All provisions of the Commission's Order of May 30, 2002 not in conflict with the provisions of this Order are affirmed and remain in full force.

11. A new docket shall be established to monitor RWE, AWWC, and the Joint Applicants' compliance with the provisions of the Order of May 30, 2002 as amended by this Order.

Done at Frankfort, Kentucky, this 10th day of July, 2002.

By the Commission

DISSENT OF COMMISSIONER ROBERT E. SPURLIN

For the reasons set forth in my dissent to the Commission's Order of May 30, 2002, I would grant the Intervenor's applications for rehearing. Accordingly, I dissent.


Robert E. Spurlin, Commissioner

ATTEST:


Executive Director