

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]	Case No. 2002-00317
THAMES WATER AQUA US HOLDINGS, INC.,]	
APOLLO ACQUISITION COMPANY, AND AMERICAN]	
WATER WORKS COMPANY, INC. FOR APPROVAL]	
OF A CHANGE OF CONTROL OF KENTUCKY-]	
AMERICAN WATER COMPANY]	

NOTICE AND MOTION PURSUANT TO
KRS 278.020(4) & (5)
FILED BY BLUEGRASS FLOW, INC.

Now comes Bluegrass FLOW, Inc. (“BGFlow”, and tenders this Notice and Motion Pursuant to KRS 278.020(4) & (5) to advise the Commission that the transfer and change of control which occurred on January 10, 2003, as evidenced by the Notice of same filed by Applicants in Case No. 2002-00277, is void and of no effect under said statute for having occurred without the required prior and final approval of the Commission, and moves the Commission to withdraw and vacate its Order entered December 20, 2002, and withdraw and vacate its orders entered in Case No. 2002-00018, for the reason they have been rendered moot as a matter of law, and to enter any appropriate order herein. In filing this Notice and Motion, BGFlow joins in the Response filed by the Urban County Government this date.

In support whereof BGFlow states:

Definitions:

For purposes of this Notice and Motion, the following terms mean:

A “provisional order” as the term is used herein is any order of the Commission which is subject to the possibility of change, modification, vacation or affirmation by the Commission in response to one or more motions for rehearing filed pursuant to KRS 278.400. It means the same as a “determination” by the Commission after a hearing as described in KRS 278.400, but it is not a final order. A provisional order may become a final order if no motion for rehearing is filed, but upon the filing of a motion for rehearing under KRS 278.400, it becomes a mere determination of the Commission which may be changed, vacated, modified or affirmed upon the ruling on the motion for rehearing or, if rehearing is granted, following rehearing.

A “final order” is that order of the Commission which gives rise to a right to seek judicial review pursuant to KRS 278.410. The statute, in subsection (1), distinguishes between an “order” and a “final order.” This is consistent with the orders of the Commission in PSC Cases No. 93-434, An Investigation of the Sources of Supply and Future Demand of Kentucky-American Water Company, and No. 10201, An Adjustment of Rates of Columbia Gas of Kentucky, Inc, which describe the order which results from the Commission’s ruling on a motion for rehearing as a “final order.”

Applicable Provisions of KRS 278.020:

(4) No person . . . shall acquire or transfer ownership or control, or the right to control, any utility . . . without the prior approval of the commission.

(5) No . . . entity . . . shall acquire control, either directly or indirectly, of any utility . . . without having first obtained the approval of the commission. Any such acquisition of control without such prior authorization shall be void and of no effect.

Notice and Argument

The Commission entered its determination, styled an “Order,” on December 20, 2002. Within the statutory period of twenty (20) days, pursuant to KRS 278.400, the Attorney General, the Urban County Government and BGFlow each filed a Motion for Rehearing herein on January 9, 2003. The filing of said motions for rehearing reduced the status of said Order to a “determination” or provisional order. It no longer constituted an approval because the statute contemplates the possibility that the Commission may vacate the determination or provisional order and enter a different order “as it deems necessary.” Id.

“(A) rehearing prevents an order previously made from becoming final. If a rehearing is denied, the order to which the application was addressed becomes final. . . . The refusal constitutes a ratification of such order, even though it was prematurely made.” 73B CJS Public Utilities §96, p. 405.

On January 13, 2003, Applicants, with full knowledge of the three Motions for Rehearing, filed a Notice that the transfer and change of control over, *inter alia*, Kentucky-American, occurred on January 10, 2003.

As there was on that date no final order of the Commission approving the transfer and change of control over Kentucky-American, the only utility affected

thereby within the jurisdiction of the Commonwealth of Kentucky, said transfer and change of control is void and of no effect. KRS 278.020(5).

“The commission may legally exercise the power granted (to approve a transfer of control) except where the exercise of the power would have the effect of impairing some constitutional right, and a utility seeking to make such transfer must comply with the terms of the statute and first obtain the approval or consent of the commission.” 73B CJS Public Utilities §72, p. 337.

The Commission has no discretion in the matter as the statute is self-executing. It does not provide that the transaction and change of control is “voidable” or “subject to revocation,” nor does the statute provide any mechanism for the Commission to supply retroactive approval. The absence of a prior approval, which can only be a final order of the Commission, renders the transaction void and of no effect.

An order of the Commission is only final when no further rehearing may be had and the only remaining relief available to a party is review by the courts. “Broadly speaking, the order of the [Public Service] Commission is conclusive when made within the scope of its authority and binding upon all parties except as a review thereof may be had by the courts.” Frankfort Kentucky Natural Gas Co. v. City of Frankfort et al, Ky., 123 SW2d 270, at 272 (1939).

“Once a final Order on rehearing has been issued, any further relief must be sought from the court, not the Commission. The Commission also believes that granting a “rehearing on rehearing” would seriously undermine the finality of

Commission Orders.” An Investigation of the Sources of Supply and Future Demand of Kentucky-American Water Co., PSC Case No. 93-434 (1997), citing An Adjustment of Rates of Columbia Gas of Kentucky, Inc., PSC Case no. 10201 (1989).

Applicants cannot place any reliance on the Orders entered in the prior case No. 2002-00018 for two reasons. First, the Commission, in its Order entered December 20, 2002, determined that the proposed transfer of control was not consistent with the public interest unless a total of sixty-one (61) conditions were attached. Although the Commission has lost effective control over its Orders in No. 2002-00018 by reason of the pending judicial review of same, it effectively negated said Orders by determining that additional requirements were necessary to protect the public interest. Second, by executing and delivering their acknowledgments that they would be bound by the provisions of the provisional order of December 20th, done on January 8, 2003, the Applicants waived any right to rely on the earlier Orders by assenting to and agreeing to be bound by the additional conditions which are absent from the prior Orders.

It is not permissible for utility companies to undertake a "risk analysis" with respect to the likelihood that a change of control which has received provisional approval but which has not received prior and final approval will, in fact, ultimately be approved. To allow such activity guts the intent of the legislature in enacting the applicable provisions of KRS 278.020 (4) & (5).

In their rush to close on the transaction with such unseemly haste, the

Applicants have violated Kentucky law. The law provides its own remedy and is self-executing and does not provide for any discretion in the Commission. At the very moment of closing, the transfer of control as to Kentucky-American Water Company was void and of no effect.

BGFlow does not contend that the entire transaction between American Water Works Co. and RWE is void, as the vast majority of that transaction accomplished the transfer and change of control of utilities outside the jurisdiction of the Commonwealth. BGFlow does state that the transfer and change of control of Kentucky-American is void and of no effect.

Respectfully submitted,

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NOTICE AND CERTIFICATE OF SERVICE

Counsel gives notice that the original and three copies of this document have been filed with the Public Service Commission by sending same by first class mail, postage prepaid, to Mr. Thomas M. Dorman, Executive Director, Public Service Commission, 211 Sower Blvd., Frankfort, KY 40611, by uploading this document (together with the required Index and Read1st documents) to the file transfer protocol site designated by the Executive Director, and by service of a hardcopy of same upon the individuals listed below on this the 17th day of January, 2003. Counsel also certifies that 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.

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