

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]

REPLY OF BLUEGRASS FLOW, INC.

Comes Bluegrass FLOW, Inc. (“BGFlow”), and in Reply to the Response of Joint Petitioners filed January 23, 2003, states as follows:

Joint Petitioners refer the Commission to two cases as authority for the improbable proposition that the circuit court has some interlocutory authority to issue an injunction over a non-final order of the Commission. Neither case is of any authoritative value as both were decided before the present change of control statutes were enacted. KRS 278.020(4)&(5). These statutes were added to the Commission's authority by the General Assembly after 1981, the date of the latest of the two cases. Therefore, the Commission did not have these provisions before it when considering the motion for a retroactive rate adjustment in the Goshen Utilities case.

Nor is there any provision in the statutes for an interlocutory appeal to the Franklin Circuit Court for intermediate relief. The Court only gains jurisdiction

when the Commission loses it -- and the Commission most certainly retains jurisdiction under KRS 278.400, until it issues its final order.

In fact, the Goshen Utilities case did not have the issue of the nature of Commission orders when a motion for rehearing is filed. The only issue before the Commission was a motion by certain complainants for a retroactive rate adjustment. The Commission properly ruled that it had no power to "go back and remedy past action." Goshen Utilities, Order, p. 2. The text quoted by Joint Petitioners is, as a matter of fact, pure *dicta* as it was written as a comment on "the possible argument" of the Attorney General which was not before the Commission.

This case does stand for the proposition that the Commission cannot "go back" and effect any cure for the premature and void closing here.

The Order of the Commission herein dated December 20, 2002, was provisional and conditional by its *own terms* until such time at the Joint Applicants might submit written acknowledgments thereto. If the conditions attached to the Order had been rejected and the acknowledgments had not been given, no one doubts there would have been no approval.

The acknowledgments were tendered January 8, 2003.

The several motions for rehearing were tendered January 9, 2003.

By operation of the provision of KRS 278.400, the Order of December 20th became a mere "determination" which the Commission has the power to change or withdraw, as well as affirm.

The statutes do not provide any interlocutory process to the circuit court. In fact, KRS 278.410 was amended in 1994 to make it clear that there are two different procedures. Prior to 1994, a party had twenty (20) days to *either* move for a rehearing *or* bring an action in Franklin Circuit Court. In 1994, the law was changed to provide for *thirty* (30) days in which to bring an action in court if there was no motion for rehearing. Clearly, the intended procedure authorized by the General Assembly is to give a party twenty days for move for rehearing (in which case the subject order becomes a determination subject to change under KRS 278.400) or thirty days to file an action. The statute does not authorize the filing of an action for an injunction during the pendency of a motion for rehearing.

To permit the procedure described by the Joint Applicants would require special legislation to be passed permitting jurisdiction to bounce back and forth between the Commission and the court. The other case cited by Joint Applicants in their Response, Comm. ex rel Stephens v. So. Central Bell Telephone Co., Ky., 545 SW2d 927 (1976) supports this point.

The "obvious as the acropolis" paragraph quoted in the Response ends with:

It [the circuit court] may grant injunctive relief *only* in the manner and upon the terms, "provided by law." (id., at 931, emphasis original to the Court.)

Immediately following, however, is the important text which the Response conveniently does not supply:

It is significant that the legislature used the phrase "provided by law." It did not write "according to the principles of equity jurisprudence." Id.

The Court goes on to make the point that it may only intervene in Commission procedure where there is a specific law authorizing it, or if required by the constitution. There is no statute authorizing the interlocutory procedure the Joint Applicants describe, no matter how much they wish it were to save them from the effects of their premature and now void closing.

In 1981, the law stood as Joint Applicants would like it: a transfer of control could occur with or without Commission approval and the only remedy was a *post hoc* petition to Franklin Circuit Court. To stop and prevent what the Joint Applicants want and tried to do, the General Assembly amended KRS 278.020 to provide that prior Commission approval was required, and said so twice, in both subsection (4) and (5). Then, to make the point plain and clear, the General Assembly made it law, and a self-executing law at that, any such attempted transfer of control was void and of no effect.

The purported closing on January 10, 2003, is void as a matter of law as to Kentucky-American and the Commission has no power to make a retroactive cure.

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 24th 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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