

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]	

BLUEGRASS FLOW, INC.
MEMORANDUM

The only action available to the Commission is starkly clear: it must dismiss this Application for lack of jurisdiction.

The reason this is the only choice is grounded in the opinion of the Commission that it had jurisdiction *over the transaction*, not the parties.¹ “KRS 278.020 confers jurisdiction over the transaction regardless of the parties.” PSC Order, Case No, 2002-00018, May 30, 2002, p. 11. When the actions were filed in Franklin Circuit Court contesting the Orders in Case No. 2002-00018, the Commission lost jurisdiction over that Case and the transaction.²

¹ For purposes of this argument, Bluegrass FLOW adopts the position of the Commission; however, it specifically reserves and does not waive the positions it has taken in prior motions, memoranda and other filings with the Commission in No. 2002-00018, and with the Franklin Circuit Court, nor does it waive any issues.

² The Commission cannot now decide that its jurisdiction is over parties (and thus accept the theory that it need only address Thames US) without conceding that it erred in denying BGFlow’s motion to dismiss No. 2002-0018 for failure to include essential parties. Such a concession would lead to a reversal or vacation of the Orders therein.

The Commission has no legal authority, and the Joint Applicants will not be able to supply any legal authority, to take the action requested in the new application: to modify a prior Order on appeal. To do so renders the statutory scheme meaningless and the statutory time limits void as “applications to modify” could then be filed on the 121st day, and the 242nd day, and the 363rd day, etc.

Having approved a change of control over the utility, which has been appealed, the Commission has no power to consider a different change of control over that utility so long as the appeal is pending. The procedural reasoning is obvious: if the Franklin Circuit Court upholds the Commission’s decision in Case No. 2002-00018, then the *next* change of control case would be from Thames Water to Thames USA; if the Court vacates the prior decision, then the change of control would be from AWW to Thames USA – but the Commission will not know which until the appeal is concluded.

The Commission ought to be very cautious, if not wary, of the procedure this modification application asks it to endorse. It is absolutely contrary to established concepts of jurisprudence and substantive due process to allow a party to seek modification of an order during the pendency of an appeal of that order. Jurisdiction over the transaction is with the Franklin Circuit Court.

Any other decision by the Commission other than dismissal will result in a complete waste of time as the Commissioners, staff and parties execute a mad dash through the statutory time period only to result in appeals/actions to the Franklin Circuit Court based, solely or in part, on the jurisdictional and

procedural issues so clearly presented at the outset.

The inclusion of the additional entities as Joint Applicants in Case No. 2002-00317 is equivalent to a judicial admission that their absence was a fatal flaw, which will ultimately lead to a reversal and vacation of the Orders in Case No. 2002-00018 on at least that issue. If the Commission ventures out onto the thin ice of its prior orders and does anything less than dismiss, it risks the invalidation of its orders in this second case based on vacated or reversed components of its Orders in the first case. The result would be the requirement of a *third* case to straighten out the mess; an incredible and unnecessary waste of time, energy and expense.

The law recognizes a distinction between *subject matter* jurisdiction and *in personam* or *personal* jurisdiction. The statutes assign the Commission authority over the change in control of a utility, as well as other matters of utility regulation. This is the Commission's subject matter jurisdiction. By statute, in a proposed change of control, the Commission must address that subject within a maximum of 120 days and render a decision. Once that decision is appealed to the Franklin Circuit Court, the subject matter jurisdiction is transferred to the Court together with the transaction and the rights of the parties therein.³

³ It is true that KRS 278.390 provides that an order of the Commission shall "continue in force" until the occurrence of certain events. However, the subsections of KRS 278.020 pertaining to changes in control of a utility, subsections (4) and (5), were enacted well after KRS 278.390 and there is a question of law as to whether this continuity of effect is intended to be given to a change of control order. The text of KRS 278.390 is substantively unchanged from that of its predecessor Stt. 3952-13, save to sever the jurisdictional provisions of the old statute and incorporate those provisions in what is now KRS 278.040. Because a change of

Personal jurisdiction is a matter of a person or entity, or its agent, being or acting within the geographic boundaries of the Commonwealth and subject to service of process or voluntarily submitting to the jurisdiction of the Commission or court. In the present Case No. 2002-00317, Thames USA voluntarily has submitted, or attempted to submit, to the Commission's jurisdiction; although for the limited purpose of the application only. However, this submission to limited personal jurisdiction does not recover the lost subject matter jurisdiction.

The foreign Joint Applicants have told the Franklin Circuit Court that it has no personal jurisdiction over them (unless they want to come and appear at their election), despite having "signed" the Commission's Orders, a posture which ought to alarm the Commission and raise serious concerns about its ability to enforce its Orders and the conditions thereto under KRS 278.390.

It should be noted that the Commission and the Intervenors did not create this situation. The proposed buyers and sellers of Kentucky-American Water Company made certain filing choices and adopted certain defensive postures which created this jurisdictional debacle.

control carries with it the possibility of removal of assets, for example, and authority for other substantial changes to the utility, it is a reasonable argument to make that, in fact, an order approving a change in control does not continue in effect in order to protect the assets of the utility and the public interest pending judicial review. This is a different matter than an order approving a certain rate, which ought to be effective in order not to risk an interruption in service, or provision of service without compensation to the utility, and for which adjustments can be made if ordered by the Court. Bluegrass FLOW specifically reserves this issue.

Issues presented by the Commission

Bluegrass FLOW, Inc., will now address the issues and questions presented by the Commission in the context of the above analysis. In doing so, at the request of the Commission, Bluegrass FLOW, Inc. specifically reserves and does not waive all other issues, including without limitation, the ability to respond to the eventual rulings by the Commission on these issues.

1. Should the scope of this proceeding be limited to reviewing the qualifications of Thames Water Aqua US Holdings, Inc. (“Thames USA”) and determining whether the modifications to the proposed transaction approved in Case No. 2002-00018 are consistent with the public interest?

The Commission has lost jurisdiction over the transaction.

By itself, Thames USA is a mere shell, newly incorporated with no operating history. By itself, it has no assets, no source of income, no tangible existence, no office or agent in Kentucky, and no hope of satisfying the statutory demands on a control acquiring entity. It is a puff of smoke. Consideration of Thames USA in isolation from the transaction is meaningless.

The “modifications to the proposed transaction” cannot be reviewed because the Commission does not have jurisdiction over the transaction to consider modifying it. Whether the modifications are consistent with the public interest raises the question of the standard of review, and that question is also on appeal.

2. May the parties properly present additional evidence regarding issues on which the Commission issued findings in Case No. 2002-00018?

No. The Commission has lost jurisdiction over Case No. 2002-00018 and may not rely upon its findings in that case as they could be altered through the appeal to Franklin Circuit Court.⁴ Jurisdiction has been transferred to the Court.

After judicial consideration of Case No. 2002-00018 is concluded, the Commission will have the ability, then, to take jurisdiction over a new change of control case from the entity deemed to have approved control, in which instance all issues may be fully addressed and all evidence may be submitted as with any other case.

⁴ The Court could, for example, remand Case No. 2002-00018 with directions to make a certain finding or change a particular finding consistent with the Court's orders.

3. Assuming that the parties may properly present additional evidence regarding issues on which the Commission issued findings in Case No. 2002-00018, to what extent is the Commission bound by those earlier findings and under what conditions may the Commission issue findings that are contrary to the earlier filings?

There does not appear to be any law or judicial decision which imposes a *res judicata* effect on prior Commission decisions such that the Commission would be bound in a new case by a finding or conclusion in a prior related case. Once the Commission regains jurisdiction over the transaction, newly presented evidence can result in a different finding; in fact, the same evidence reconsidered could be seen in a different light and result in a different finding.

The absence of a complete set of substantive rules of procedure governing practice and proceedings before the Commission is a further substantive due process defect which is a subject of the appeals. However, even if there were a “local rule” on point, the prior case is not final by reason of the appeal and no finding could have any binding effect.

The conditions under which the Commission regains jurisdiction over the transaction will determine the rest of the answer. If by remand by the Franklin Circuit Court, the order remanding will govern. If by revocation of its orders and the institution of a new case, then there would be no prior findings. Until there is final judicial determination, the limitations, if any, on the Commission cannot be known.

4. To what extent, if any, is the Commission precluded from considering any issue in this proceeding as a result of the actions pending before the Franklin Circuit Court in 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)?

Consider the following: the Commission decided in Case No. 2002-00018 that the proper standard of review was “no harm” to the public. Assume it is asked to and does consider that issue again in this case, reaches the same conclusion and makes its decision based thereon. Subsequently, the Court concludes that “no harm” is not the correct standard. The result will be a reversal of this new case on appeal.

Another example is the argument on appeal of whether a foreign corporation must have a valid certificate of authority to do business in Kentucky in order to apply to the Commission for an approval. Those foreign Applicants without such a certificate have answered in the Franklin Circuit Court that they do not intend to ever obtain such a certificate. Proceeding under those circumstances in the current case is subject to the risk that the Court will decide a certificate for authority to do business is a necessary prerequisite to an application; again, resulting in a reversal of this new case on subsequent appeal.

The Commission is precluded from considering all issues involved in the appeal, including those which the Franklin Circuit Court could raise *sua sponde*, because it has lost jurisdiction over the case and the transaction.

The Joint Applicants in Case No. 2002-00018 argued and the Commission agreed that a change of control case is a “transaction case” and the Commission only needed jurisdiction over the transaction to the exclusion of certain parties.⁵ The Commission has lost jurisdiction over the transaction, its prior Orders and the rights of the parties therein, and cannot regain jurisdiction so long as the appeal is pending.

Incorporation of a new shell holding company and its proposed injection into the RWE corporate hierarchy does not and cannot confer any new jurisdiction because the subject matter is control. This Commission has lost jurisdiction over this change of control transaction, regardless of the existence or nonexistence of new corporations.

⁵ Bluegrass FLOW, Inc., does not waive its position that the Commission must have personal jurisdiction over all of the selling and all of the acquiring entities in addition to subject matter jurisdiction over the transaction.

Conclusion

The Commission should sweep the decks clear of the debris and detritus of this procedurally and jurisdictionally flawed case, dismiss for lack of jurisdiction and await final determination by the courts.

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 18th day of September, 2002. 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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