

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

ORDER

On December 20, 2002, the Commission approved the application of Kentucky-American Water Company (“KAWC”), Thames Water Aqua Holdings GmbH (“Thames”), RWE Aktiengesellschaft (“RWE”), Thames Water Aqua US Holdings, Inc., (“TWUS”), Apollo Acquisition Company (“Apollo”), and American Water Works Company (“AWWC”) (collectively “Joint Petitioners”) for Commission approval of the transfer of control of KAWC to TWUS, Thames and RWE. When granting our approval, we prescribed 61 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 petitioned for rehearing of our Order of December 20, 2002. Having considered these petitions and all responses thereto, we deny the petitions.²

¹ On January 9, 2003, the Joint Petitioners acknowledged in writing their acceptance of these conditions.

² This Order does not address outstanding motions related to the Joint Petitioners’ closing the proposed transaction while petitions for rehearing were pending before the Commission. We anticipate addressing these motions by separate Order shortly.

Jurisdiction to Enforce Conditions

LFUCG argues that our Order of December 20, 2002 fails to adequately protect LFUCG's ability to protect its "legitimate statutory rights." To ensure our ability to enforce the conditions attached to our approval of the proposed transfer of control, we conditioned that approval upon the Joint Petitioners waiving any objection to Franklin Circuit Court's exercise of personal jurisdiction in any legal proceeding that the Commission brings to enforce such conditions.³ LFUCG asserts that the lack of a similar requirement for actions that any intervening party may bring leaves such parties subject to personal jurisdiction challenges when exercising their statutory right to challenge a Commission decision not to enforce a condition or unfavorable Commission interpretation of a condition.

We find no compelling basis to extend this condition to the actions of intervening parties. The purpose of the condition was to ensure and enhance the Commission's ability to enforce the provisions of our Orders. KRS Chapter 278 provides no independent right in any person or entity other than the Commission to enforce a Commission Order. The Commission must bring the action. In the unlikely circumstance where the Commission refused a party's request to enforce a Commission Order, KRS 278.410 permits the party to seek judicial review of that refusal. Moreover, a party may seek injunctive relief to compel our enforcement of such Orders.

Our refusal to extend this condition to the actions of intervening parties does not limit or diminish an intervening party's right under existing Kentucky law to bring an action against any of the Joint Petitioners. To the extent that a person has a right based

³ Condition No. 57.

upon the Joint Petitioners' commitments, KRS 454.210 provides an adequate means for obtaining personal jurisdiction over the Joint Petitioners.

Appointment of Agent for Service of Process

LFUCG and the AG assert that the condition that Joint Petitioners appoint service of process agents for the limited purpose of accepting service of process for any action that the Commission might bring to enforce the conditions of our Orders is inadequate. They argue that the Joint Petitioners should be required to appoint an agent for any action arising out of this proceeding. They argue that this condition is necessary in light of the Joint Petitioners' assertion in proceedings before Franklin Circuit Court that the Court lacks personal jurisdiction over them. They further note that the Joint Petitioners agreed to appoint agents for service of process in the state of Maryland as a condition for that state's approval of RWE's acquisition of control of AWWC.

Neither the AG nor LFUCG explains how the appointment of an agent for service of process for actions other than those that we bring to enforce our Orders will enhance the public interest. As previously noted, none of the intervening parties have a statutory right to enforce the provisions of any Commission Order. Moreover, the appointment of an agent will not significantly enhance either the AG's or LFUCG's ability to seek judicial review of any Order arising out of this proceeding.

While we acknowledge the Maryland Public Service Commission's decision to require the appointment of an agent of service of process for all actions, neither LFUCG nor the AG explains why that decision is relevant to this proceeding. They do not identify any similarities in Maryland and Kentucky law or in the states' regulatory

schemes to support the proposed condition.⁴ They also fail to explain why such condition is necessary when virtually every other state regulatory authority has failed to impose such condition.

Joint Petitioners' Authority to File Application

LFUCG asserts that the Joint Petitioners' application should be deemed void *ab initio* because none of the Joint Petitioners have received the approval of their governing boards to file such application. In support of its position, LFUCG refers to the Commission's action in proceedings involving the rate adjustment filings of municipal utilities. See, e.g., City of Pikeville, Ky., Case No. 2000-00540 (Ky.PSC October 8, 2001).

LFUCG misreads and misapplies our decisions in those cases. Our holdings in those cases were limited to involved municipal utilities and were based upon a specific statutory requirement that the city's legislative body must approve the rates of such utilities. See, e.g., KRS 96.170 ("The legislative body of any city of the third class may, by ordinance, provide the city and its inhabitants with water, light, power, and heat, by contract or by works of its own, located either within or beyond the boundaries of the city, make regulations for the management thereof, and fix and regulate the prices to private consumers and customers.") Such provisions are not applicable to private utilities nor has LFUCG pointed to any law that expressly requires such authorization

⁴ The condition in question was contained in a comprehensive settlement agreement. We have previously found that "[i]t is inappropriate to impose selected terms from such an agreement out of context and without consideration of the contents of the entire agreement or the circumstances of the parties." Order of December 20, 2002 at 24. Neither the AG nor LFUCG in their petitions discusses the context in which the settlement agreement before the Maryland Public Service Commission was reached.

before making an application to this Commission.⁵ According, we deny its petition for rehearing on this issue.

Standard of Review

LFUCG argues that the Commission erred when, in reaching our decision, we failed to disregard the benefits that would accrue to KAWC and its ratepayers as a result of RWE and Thames's acquisition of the water utility and focused solely upon TWUS. A new application, LFUCG argues, "requires new justification, and that the use of alleged benefits from a previous case to justify an order in a subsequent case is unreasonable and arbitrary." LFUCG Petition at 5.⁶

We find no merit in this argument. In previously addressing this argument, we stated:

This argument is myopic. The proposed transaction involves the transfer of control to TWUS and Thames and RWE. As control has yet to pass from AWWC to any other entity, we cannot view the creation of TWUS in isolation. It is part of a much larger and complex transaction. The focus of our examination, therefore, must be upon the entire transaction and any benefits that such transaction will bring to KAWC and its ratepayers. The record clearly shows that significant benefits will result from the entire transaction.

Order of December 20, 2002 at 13 - 14 (footnote omitted).

Our position remains unchanged. Nothing in the record of this proceeding shows that the benefits found to exist as a result of the transaction in its earlier form will be reduced or diminished as a result of TWUS directly acquiring AWWC. We find no legal

⁵ In its petition, LFUCG refers to KRS 271B.8-010(2) to buttress its position. This statute governs only Kentucky corporations. None of the parties that are acquiring or transferring control of KAWC, however, are Kentucky corporations.

⁶ In his petition for rehearing, the AG also objects to the standard of review set forth in the Order of December 20, 2002. He, however, did not present any specific arguments but merely reserve his right to seek judicial review on this issue.

support for the argument that relevant evidence must be ignored merely because it was developed in an earlier proceeding. Accordingly, we deny rehearing on this issue.

Waiver of Rights Under International Trade Agreements

The Intervenors request that the Commission condition our approval of the transaction upon the Joint Petitioners' waiver of any right or defense that Joint Petitioners may exercise under any international trade agreement. In support of their position, the Intervenors note the Joint Petitioners' recent agreement in proceedings before the West Virginia Public Service Commission to such conditions. FLOW further points to a request from the European Community to the United States for revisions in the General Agreement on Trade and Services ("GATS") to include "water collection purification, and distribution services through mains" within GATS coverage.

We remain unconvinced as to the need for the proposed condition. In our Order of December 20, 2002, we stated:

Our own examination indicates that neither NAFTA nor GATS presently presents a threat to our jurisdiction. NAFTA is an agreement between Mexico, Canada, and the United States. Only investors from these nations are entitled to bring a claim under the treaty. None of the Joint Applicants are from Canada or Mexico. Moreover, any claim that is brought by the investor is brought against the member-signatory. Assuming *arguendo* that any of the Joint Applicants could bring a claim, that claim is solely against the United States. Moreover, federal law would expressly prohibit the Joint Applicants from challenging any action of the Commission in any court of this country based upon the ground that such action is inconsistent with NAFTA.

We find nothing in the record to suggest that GATS would restrict or curtail our jurisdiction. GATS governs trade in goods and services, but does not address investments. Water is not considered to be either a service or a good; therefore, it does not currently fall within the scope of GATS.

Assuming *arguendo* that GATS addressed water services, it does not create any private right of action on

behalf of a foreign corporation. GATS is designed to prevent discrimination by a World Trade Organization (“WTO”) member state against other member states. Only members of the WTO can initiate dispute settlement proceedings against another member. If the Joint Applicants assert a violation of GATS based upon an action that we take, their only remedy is to request the European Union (which represents the interest of the United Kingdom and the Federal Republic of Germany) to initiate a dispute proceeding against the United States. Moreover, if a dispute panel were to find against the United States, it may not take any action against this Commission. Its only remedy is to direct the offending national government to remove the offending measure and to authorize “the claimant government to suspend an equivalent level of trade concessions, such as raising tariffs or suspending market access rights.”

Our Orders of May 30, 2002 and July 10, 2002 already contain conditions adequate to prevent a foreign regulator’s preemption of the Commission’s authority to review the reasonableness of any cost. Intervenors have failed to present a convincing case that additional conditions to the proposed merger are necessary to preserve the Commission’s jurisdiction over KAWC’s rates and services. In the absence of such case, we find the imposition of such conditions is unreasonable.

Order of December 20, 2002 at 17 – 18 (footnotes omitted).

Intervenors have presented no evidence to challenge this analysis. While the Intervenors refer to the possible adverse effects of GATS and other international trade agreements, they provide no specific instances of how the Commission’s jurisdiction is threatened. Fear of the unknown without identification of a specific threat is insufficient basis upon which to base a condition. Accordingly, we deny rehearing on this issue.

Waiver of KRS 278.020(6) Exemption

FLOW argues that the Commission should reconsider our refusal to condition our approval upon the Joint Petitioners’ waiver of their exemption from Commission

approval of any corporate reorganizations. In our Order of December 20, 2002, we addressed this proposed condition:

KRS 278.020(6)(b) expressly provides that corporate reorganizations in which a utility remains under the ultimate control of the same entity are not subject to the requirement of prior Commission approval of a transfer of control. LFUCG fails to explain why such a condition is necessary. The Commission finds that adequate protections are already in place to protect KAWC ratepayers from any corporate reorganization and declines to impose this proposed condition.

Order of December 20 at 24 – 25 (footnotes omitted).

Other than argue that ownership of KAWC could be transferred to a non-U.S. based RWE subsidiary, a possibility that we fully considered when entering our earlier Order, FLOW provides no new argument or evidence in support of its request. Equally important, it fails to explain why the Commission should disregard a clear directive of the General Assembly that such transactions are exempt from Commission review to impose the proposed condition. In light of our analysis of the effects of existing international trade agreements and given the other protections already contained in our Order of December 20, 2002, we deny rehearing on this issue.

Imposition of Other Conditions

In their petitions for rehearing, the AG and LFUCG request additional conditions be imposed upon the Commission's approval of the transfer of control on the sole basis that other regulatory commissions have imposed such conditions. See, e.g., LFUCG's Petition For Rehearing at 5 – 8. While some of these proposed conditions were previously considered in this proceeding, others are of first impression.

Another regulatory commission's imposition of a requirement as a condition for its approval of the transfer of control is not alone a sufficient basis for this Commission

to impose the same condition. There must be adequate basis in the record before this Commission for the imposition of such condition. The Intervenor has failed to provide any basis for imposition of the additional conditions that they propose in their petitions. Accordingly, we deny rehearing on these requests.

We note that Condition 51⁷ will extend to Kentucky ratepayers the benefits of certain conditions imposed upon the Joint Petitioners by other regulatory commissions. Our Order today does not address the conditions that Condition 51 imposes upon the Joint Petitioners. To the extent that any party wishes a declaratory ruling on whether a condition is applicable by virtue of Condition 51, it should apply for such ruling in Case No. 2002-00277.⁸

IT IS THEREFORE ORDERED that the Intervenor's Petitions for Rehearing are denied.

⁷ If any state regulatory commission, except the New Jersey Board of Public Utilities, imposes conditions on RWE, Thames, TWUS, 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.

⁸ Case No. 2002-00277, Compliance of Kentucky-American Water Company, American Water Works Company, RWE Aktiengesellschaft and Thames Water Aqua Holdings GmbH with the Provisions of the Orders Approving the Transfer of Control of Kentucky-American Water Company to RWE Aktiengesellschaft and Thames Water Aqua Holdings GmbH.

Done at Frankfort, Kentucky, this 29th day of January, 2003.

By the Commission

DISSENTING OPINION OF COMMISSIONER ROBERT E. SPURLIN

For the reasons set forth in my dissent to the Commission's Order of December 20, 2002 in this proceeding and to the Commission's Order of May 30, 2002 in Case No. 2002-00018, I would grant the Petitions for Rehearing. I therefore respectfully dissent.


Robert E. Spurlin, Commissioner

ATTEST:


Executive Director