

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)	
AKTIENSGESELLSCHAFT, 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

Bluegrass FLOW, Inc. (“Bluegrass”) and Lexington-Fayette Urban County Government (“LFUCG”) have moved for an Order declaring the transfer of control of Kentucky-American Water Company (“KAWC”) to Thames Water Aqua Holdings GmbH, RWE Aktiengesellschaft, and Thames Water Aqua US Holdings, Inc. (collectively “Transferees”) as void. The Attorney General (“AG”) has moved for an Order directing that KAWC’s status be returned to the condition that existed prior to the closing of the transaction between American Water Works Company (“AWWC”) and the Transferees. Finding no basis to grant the requested relief, we deny the motions.

On December 20, 2002, the Commission approved the proposed transfer of control of KAWC from AWWC to the Transferees subject to 61 conditions. In accordance with the terms of this Order, AWWC, KAWC and the Transferees filed written acknowledgements of their acceptance of these conditions on January 8, 2003. The following day, the AG, LFUCG, and Bluegrass petitioned for rehearing of our Order of December 20, 2002. On January 10, 2003, AWWC and the Transferees completed the transaction for which they sought our approval and that resulted in the transfer of

control of KAWC to the Transferee. At the time of the transfer, the Commission had not been asked to stay the Order of December 20, 2002, nor had any court vacated our Order or taken any other action to enjoin the operation of the Order or AWWC and the Transferees from completing the transaction.

Bluegrass and LFUCG have moved for an Order declaring that the purported transfer of control is void. In support of their motions,¹ they refer to KRS 278.020(5), which provides:

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. **Any acquisition of control without prior authorization shall be void and of no effect** [emphasis added].

They assert that, as petitions for rehearing on the Order of December 20, 2002 were pending before the Commission at the time AWWC and the Transferees completed their transaction, the Commission had not yet granted authorization for the transfer of control and that the transfer of control of KAWC is void as a matter of law. They argue that any Commission approval of a proposed transfer of control does not constitute "authorization" under KRS 278.020(5) until all proceedings before the Commission have been completed and all petitions for rehearing have been addressed. See LFUCG's Rejoinder at 4 ("Logic requires that 'prior authorization' in the context of a change of

¹ Although none of LFUCG's pleadings on this issue have been styled as a motion, we note that LFUCG's Rejoinder expressly requested that the transfer of control be declared void. We therefore will treat this request as a motion for the requested relief.

control case should require an order that is not subject to modification or revocation by the Commission.”)

As the Commission acts and speaks only through its Orders,² the Commission may authorize a transfer of control only through the entry of an Order. The reference in KRS 278.020(5) to “prior authorization,” therefore, must refer to an Order authorizing a transfer of control. In the absence of any provision in KRS 278.020(5) that defines “prior authorization” or is more specific than the general provisions dealing with Commission Orders, these general provisions must control.

KRS Chapter 278 makes no mention of any provisional or conditional orders. To the contrary, KRS 278.390 provides:

Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in the order, or until revoked or modified by the commission, unless the order is suspended, or vacated in whole or in part, by order or decree of a court of competent jurisdiction.

In Commonwealth ex rel. Stephens v. South Central Bell Telephone Company, Ky., 545 S.W.2d 927, 931 (1976), Kentucky’s highest court stated:

It is as obvious as the acropolis of Athens that an order of the commission continues in force until revoked or modified by the commission or unless suspended or vacated in whole or in part by the Franklin Circuit Court. The circuit court may vacate or set aside the order *only* if it is unlawful (confiscatory) or unreasonable. It may grant injunctive relief *only* in the manner and upon the terms, “provided by law.” (Emphasis in original).

² See Union Light Heat & Power Co. v. Pub. Serv. Com’n, Ky., 271 S.W.2d 361, 365 (1954) (“the commission, like a court, acts and speaks only through its written orders”).

Once we enter an Order, that Order is effective and is not conditional or provisional in any sense unless we provide otherwise in the Order. See Frankfort Kentucky Natural Gas Co. v. City of Frankfort, 276 Ky. 199, 123 S.W.2d 270, 272 (“Broadly speaking, the order of the 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.”).

While we agree that the prudent and responsible course of action in any transfer of control proceeding is to implement the transfer only after the Commission has acted upon all petitions for rehearing on the Order approving the transfer, KRS 278.020(5) does not require this course of conduct. It does not prohibit the completion of the transfer until all actions for review have been exhausted or until any petition for rehearing has been decided.

The Movants’ arguments that no transfer can occur until a petition for rehearing is decided appear contrary to the legislative intent of KRS 278.020(5). That statute prescribes a relatively short period for Commission review of the proposed transfer of control. “In the absence of that action within that period of time, any proposed acquisition shall be deemed to be approved.” If the Commission takes no action within this time period, then the “proposed transaction shall be deemed to be approved.” It is abundantly clear that the Legislature desired prompt action on applications for transfers of control and sought to restrict Commission review of such applications. Under the Movants’ interpretation, however, we would have an unlimited period of time to review the transaction because any petition for rehearing would effectively extend the time period for consideration.

The Movants’ contention that Commission authorization occurs only when an Order that is not subject to modification or revocation ignores that, absent the exercise

of judicial review over a Commission Order, the Order is always subject to Commission review and modification. See Union Light Heat & Power Co. v. Pub. Serv. Com'n, Ky., 271 S.W.2d 361, 365-366 (1954) (“An administrative agency unquestionably has the authority, just as has a court, to reconsider and change its orders during the time it retains control over any question under submission to it.”). Under the Movants’ interpretation, an Order would never constitute “authorization” unless an action for review is brought.

Our ruling today does not deny any of the intervening parties to this proceeding their right to due process. All had an opportunity to participate in a meaningful fashion in this proceeding and to present evidence upon their positions. Moreover, we have fully considered each party’s petition for rehearing and found no basis for granting their requested relief.

Finally, the Commission finds that our Order of January 29, 2003, in which we denied the intervening parties’ Petitions for Rehearing, renders moot the AG’s Motion that KAWC’s status be returned to the condition that existed prior to the closing of the transaction between AWWC and the Transferees. We therefore deny the AG’s Motion on that ground.

IT IS THEREFORE ORDERED that the motions of the intervening parties are denied.

Done at Frankfort, Kentucky, this 13th day of March, 2003.

By the Commission

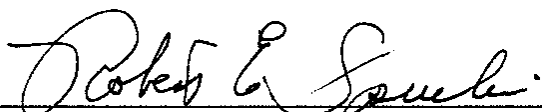
CONCURRING OPINION OF
COMMISSIONER ROBERT E. SPURLIN

As a matter of law, I agree with the majority that, pursuant to KRS 278.390, the Order authorizing the transfer of Kentucky-American to TWUS was effective on the date the transfer was consummated. Accordingly, the transaction was not void.

I write separately because I believe it should be made abundantly clear that the Commission retained full authority under KRS 278.400 to reverse its decision on rehearing. On January 10, 2003, the closing date of the proposed transfer, the joint applicants were fully aware that any decision approving the transfer of Kentucky-American to TWUS could be reversed. Indeed, the Commission's decision in Case No. 2002-00018 approving the first proposed transfer of Kentucky-American had already been appealed in Franklin Circuit Court. Moreover, the AG, LFUCG and Bluegrass had only recently filed motions for rehearing with regard to the second proposed transfer of Kentucky-American. When the Joint Applicants chose to transfer Kentucky-American despite the pendency of these motions for rehearing and judicial review, they did so at their own risk.

ATTEST:


Executive Director


Robert E. Spurlin, Commissioner
Kentucky Public Service Commission