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 AKTIENSGESELSCHAFT, 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	)))))))))	CASE NO. 2002-00317

O R D E R

Lexington-Fayette Urban County Government ("LFUCG") and the Attorney General ("AG") have moved for reconsideration and clarification of our Order of October 16, 2002 in which we addressed the scope of this proceeding. Their motions present the following issue: Is a Commission Order pending judicial review considered a final decision for purposes of applying the doctrine of issue preclusion? Finding in the affirmative, we deny the motions for reconsideration, but clarify our Order of October 16, 2002.

In our Order of October 16, 2002, we held that the scope of this proceeding is limited to consideration of Thames Water Aqua US Holdings, Inc.'s ("TWUS") ability to provide reasonable utility service and to the question of whether the proposed transfer of control to TWUS is in the public interest. We found that, as we had previously reviewed and made specific findings upon the qualifications of Thames Water Aqua Holdings GmbH ("Thames Holdings") and RWE Aktiengesellschaft ("RWE") in Case

No. 2002-00018,[1] the doctrine of issue preclusion precluded further review of those issues in this proceeding. "[T]he principles of res judicata," we stated, "bar us from considering issues already litigated and addressed in Case No. 2002-00018 unless conditions or circumstances have changed such that the Commission should reconsider these issues."[2] Order at 10.

LFUCG and the AG argue that the Commission has misapplied the doctrine of issue preclusion. They assert that the doctrine may only be applied where a final judgment or adjudication has been entered. The Commission's Order of May 30, 2002 in Case No. 2002-00018, they argue, is not a final Order because several actions for review of that Order are currently pending before the Kentucky judiciary.[3] See, e.g., AG's Motion for Reconsideration at 3, n. 4 ("It is patently premature to assert the application of res judicata when the underlying orders remain in litigation subject to change in a direct challenge in a judicial review allowed under statute.").

Existing case law, however, directly contradicts the Movants' position. See Stemler v. City of Florence, 126 F.3d 856, 871 (6th Cir. 1997) ("the pendency of an

[1] Case No. 2002-00018, Application for Approval of the Transfer of Control of Kentucky-American Water Company to RWE Aktiengesellschaft and Thames Water Aqua Holdings GmbH (Ky.PSC May 30, 2002).

[2] In our Order of October 16, 2002, we noted that issue preclusion was a component of the doctrine of res judicata. To avoid confusion, we refer in this Order only to issue preclusion.

[3] 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); Bluegrass FLOW, Inc. v. Pub. Serv. Com'n, No. 02-CI-001020 (Franklin Cir. Ct. Ky. filed July 30, 2002); Lexington-Fayette Urban County Government v. Pub. Serv. Com'n, No. 02-CI-001024 (Franklin Cir. Ct. Ky. filed July 30, 2002). Franklin Circuit Court has consolidated these actions.

appeal does not destroy the finality of the judgment for the purposes of issue preclusion under Kentucky law"); Roberts v. Wilcox, Ky.App., 805 S.W.2d 152 (1991) (the pendency of a criminal appeal did not nullify the finality of a conviction). See also 46 Am. Jur.2d § 496 Judgments (May 2002) ("The pendency of an appeal does not alter the preclusive effect of a judgment or order, whether the judgment or order is rendered by a trial court or an administrative agency, unless what is called an appeal actually consists of a trial de novo.").

LFUCG and the AG further assert that the Commission has prematurely limited the scope of this proceeding without allowing the parties to present evidence on changes in conditions and circumstances. They argue that, by limiting the scope of the proceeding to TWUS's qualifications, we have effectively barred inquiry into possible changes.

The mere fact that Movants have made such argument indicates that we failed to clearly state our decision in our Order of October 16, 2002. By that Order, we did not intend to prohibit any party from inquiring into possible changes in circumstances that have occurred since May 30, 2002 and that may affect the findings contained in our Order of May 30, 2002. Such inquiry is relevant and permissible. In our Order of October 16, 2002, we merely noted that discovery had yet to produce any significant evidence of such changes. To the extent our earlier statements regarding the scope of this proceeding have created any confusion, we have by this Order resolved such confusion.

The AG argues that by our Order of October 16, 2002, we have acted contrary to the will of the Legislature by narrowing the scope of this proceeding. He asserts that

the Legislature has mandated that the Commission review the qualifications of all persons seeking to acquire a utility and determine whether the proposed acquisition is in the public interest. He further asserts that "[t]he Commission's role is to execute the will of the [L]egislature" and that the Legislature has provided no basis for the Commission to narrow the scope of the review.

Contrary to the AG's argument, the Commission has complied with the requirements of the statute. In the last proceeding, which concluded only 4 months ago, we conducted an exhaustive review into RWE and Thames Aqua's qualifications and the question of whether their proposed acquisition was in the public interest. A new proceeding dealing with modifications to that proposed transaction does not require that we repeat that review. We do not believe the Legislature intended that we engage in duplicative and unnecessary proceedings to reexamine issues that were decided only a few months earlier. Moreover, the AG has failed to present any legal authority, nor have we found any, for the proposition that recent amendments to KRS 278.020 reflected a legislative intent to abolish or curtail the use of well-accepted and longstanding doctrine of issue preclusion in Commission proceedings involving the transfer of control of a utility.

IT IS THEREFORE ORDERED that:

1. The motions of LFUCG and the AG to reconsider the Order of October 16, 2002 are denied.

2. Ordering Paragraph 2 of the Commission's Order of October 16, 2002 is modified to read:

> The scope of this proceeding is limited to: reviewing TWUS's qualifications, determining whether transfer of

control of KAWC to TWUS is consistent with the public interest, and determining whether any change in circumstances since the issuance of our Order of May 30, 2002 in Case No. 2002-00018 requires reconsideration of the findings contained that Order.

3. All other provisions of the Commission's Order of October 16, 2002 shall remain in effect.

Done at Frankfort, Kentucky, this 30th day of October, 2002.

By the Commission

ATTEST:

Executive Director