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 ACQUISITION COMPANY AND AMERICAN WATER WORKS CO. INC., FOR APPROVAL OF A CHANGE IN CONTROL OF KENTUCKY-AMERICAN WATER COMPANY	)	**CASE NO. 2002-00317**

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT'S REJOINDER TO REPLY AND RESPONSE TO BLUEGRASS FLOW, INC.'S NOTICE AND MOTION, AND TO THE ATTORNEY GENERAL'S FILING

Comes now the Lexington-Fayette Urban County Government (the "LFUCG"), by counsel, and files this its Rejoinder to the Joint Petitioner's Reply to its Response to Notice and Response to Bluegrass FLOW, Inc.'s Notice and Motion Pursuant to KRS 278.020(4) & (5) and the Attorney General's January 22, 2003 filing. The Joint Petitioners argue that the LFUCG did not specifically request any relief from the Commission, and therefore the LFUCG's Response to the Notice should not be considered. The LFUCG disagrees. The LFUCG indicated in its Response that pursuant to KRS 278.020(5), the transfer of control of Kentucky-American Water Company ("Kentucky-American") is void *ab initio* Further, the LFUCG indicated that by closing, the Joint Petitioners also violated one of the conditions of previous Commission Orders from Case No. 2002-00018 (to which they agreed in order to gain approval of this transfer); and requested that the Commission consider that factor in its public interest determination. Further, both Bluegrass FLOW, Inc. ("FLOW") and the Attorney General have also sought relief on this

and similar points. The Commission should be most interested in why the Joint Petitioners have chosen such a slender reed upon which to support the closing of this transfer, ***while clearly on notice that the Commission retained jurisdiction over this action.*** However, in the event that it was not clear, the form of relief that the LFUCG is seeking is that the closing of the transaction (as to Kentucky-American) be deemed void and of no effect. See KRS 278.020(5)(Providing that any transfer of control without "prior authorization" from the Commission is ***void and of no effect*** (emphasis added)).

On January 10, 2003, the Joint Petitioners closed the transaction described in the Agreement of September 16, 2001 -- despite having Case No. 2002-00317 pending before the Commission.[1] The Joint Petitioners believe that the Commission's December 20, 2002 Order (the "Order"), represents "prior authorization" for the transfer of control. The meaning of the term "prior authorization" appears to be an issue of first impression.

I. Prior Authorization Does not Apply in the Context of this Case

The Joint Petitioners essentially argue that the Order is a prior authorization because KRS 278.390 ("Enforcement of Orders"), states that orders entered by the Commission continue in force until revoked or modified by the Commission. "Prior authorization" is not defined anywhere in KRS 278.020(5) or Chapter 278. The Joint Petitioners apparently extend the application of this limited statute to any order issued by the Commission, and would specifically apply it to instances in which the Commission still retains jurisdiction to revoke or modify the order pursuant to the filing of a petition(s) for rehearing. As shown infra, this interpretation makes no sense in the context of this case.

[1] All three intervenors filed timely Petitions for Rehearing of the Order.

Cases dealing with the issue of "orders in effect" are not directly applicable to this analysis, in that they normally involve rate orders.[2] The LFUCG acknowledges that when the Commission issues a rate order, the rate prescribed by such an order remains in effect until such time as it is superceded by a subsequent order of the Commission. Therefore, a utility is entitled to collect the prescribed rate while the case is under further review, and cannot normally be forced to refund money already collected if the Commission issues a new order prescribing a lower rate.[3]

However, this analysis should not apply to a transfer of control case, as KRS 278.020(5) specifically holds that a change of control without prior authorization is ***void and of no effect***. (emphasis added).[4] The "void and of no effect" language assumes that a change of control, even if actually complete, is void *ab initio* if the Commission later finds that such approval should not have been granted. This would be true even if "provisional" approval had been given in an earlier order.

The Goshen decision cited by the Joint Petitioners is particularly inapplicable to the immediate action. The language cited by the Joint Petitioners in their Response is preceded by clear representation by the Commission that it was responding to a claim that a timely filed petition for rehearing might entitle a party to ***retroactive rate relief.*** That issue has nothing to do with whether an order that has been timely petitioned for rehearing is a "prior authorization" for

[2] Including Commonwealth ex rel. Stephens v. South Central Bell Telephone Company, Ky., 545 S.W. 2d 927 (1976), and In re: Goshen Utilities, PSC Case No. 9151 (1981), cited by the Joint Petitioners in their Response to FLOW's Notice and Motion.

[3] Alternatively, a utility cannot retroactively collect a ***higher*** rate if the Commission ultimately finds that the original rate was too low.

[4] This is an unusual statutory remedy, in that ratemaking, for instance, is strictly prospective in nature.

the permanent transfer of control of a regulated utility, particularly when the statutory language of KRS 278.020(5) directly applies to change of control cases (***and not rate cases***).[5]

Logic requires that "prior authorization" in the context of a change of control case should require an order that is not subject to modification or revocation by the Commission. If further Commission action can render an order void *ab initio*, it makes no sense to rely on it as "prior authorization". Once a petition for rehearing is filed, the order at issue can no longer be appealed, as it remains under the jurisdiction of the Commission until it takes (or fails to take) further action with respect to the pending petitions. See KRS 278.410.[6] The Joint Petitioners' argument that the intervenors should have been required to seek injunctive relief (in Franklin Circuit Court) to prevent them from proceeding does not make sense when the action is void as a matter of law.[7]

As argued by the Attorney General in its filing, the prudent and responsible action for the Joint Petitioners to have taken in this situation was to have waited at least until such time as the Commission disposed of the pending petitions for rehearing and their failure to do so is unreasonable. However, having closed the merger, they are subject to the unambiguous

[5] By stating a specific remedy for transfers, the legislature has clearly distinguished a transfer of assets case from a rate proceeding. A rate order is not voided by a subsequent order. It is merely superceded. However, a ***transfer*** under KRS 278.020(5) is void *ab initio* if rejected, and the prohibition against retroactive ratemaking is meaningless.

[6] The legislature previously recognized an inherent problem that arose with respect to this jurisdictional issue by amending KRS 278.410 to provide for an additional period of time to file an action for rehearing (30 days), rather than having the time for filing such an action run concurrently with the deadline for filing a petition for rehearing (20 days). (Compare version of KRS 278.410 cited in Goshen to current version).

[7] With respect to the immediate action, the LFUCG has not filed for relief in Franklin Circuit Court in large part because it acknowledges that the Commission retains jurisdiction over this matter until the pending petitions for rehearing are resolved. In South Central Bell, the Court was deciding a case in which it already had jurisdiction, and the retention of jurisdiction over the action was simply not an issue. Further, had an intervenor decided to pursue relief in Franklin Circuit Court with respect to the immediate case, that party would then likely be facing an argument from the Joint Petitioners that the Circuit Court should not get involved until such time as the Commission has taken final action on the pending petitions for rehearing.

language of KRS 278.020(5) that such a transfer is **void and of no effect** without **prior authorization**. The Joint Petitioners claim that they had the Commissions' "prior authorization" to proceed is based on inapplicable statutes and precedents, and is not sustainable.

WHEREFORE, the Lexington-Fayette Urban County Government respectfully requests that the Commission find that the attempted transfer of Kentucky-American Water Company by the Joint Petitioners is void and of no effect.

Respectfully submitted,

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

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NOTICE AND CERTIFICATION

Counsel gives notice the original and three copies of the foregoing document have been filed by United States Mail, first class postage prepaid to Thomas M. Dorman, Executive Director, Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, Kentucky 40602-0615, and by uploading the filing to the file transfer protocol site designated by the Executive Director. The undersigned counsel hereby certifies that the electronic version is a true and accurate copy of the documents filed in paper, 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. Undersigned counsel also

certifies that a copy of the foregoing was served by first class U.S. Mail delivery, postage prepaid, on the following, all on this the 24th day of January 2003:

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