

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 ]

---

---

MOTION OF BLUEGRASS FLOW, INC.  
FOR REHEARING

---

---

Comes Bluegrass FLOW, Inc. ("BGFlow"), and moves the Commission for a rehearing in the above styled case, as follows:

1. BGFlow adopts and joins in the motions for rehearing filed herein by the Lexington-Fayette Urban County Government and the Attorney General.

2. BGFlow specifically reserves, and does not waive directly or by implication its full rights to seek review of the final order(s) of the Commission with regard to any issue, whether raised by it or another party, for which review may be sought. Further, incorporated by reference are its objections, motions and briefs filed herein and in Case No. 2002-00018.

3. For the reasons set forth below, BGFlow further requests rehearing on the following two issues:

- A. Proposed waiver of KRS 278.020(6) exemption.
- B. Protections against the potential impact of internal treaties  
WAIVER OF KRS 278.020(6) EXEMPTION

The Commission in its Order of December 20, 2002, declined to impose this

condition as requested by LFUCG, stating that an explanation of why such a restriction is needed had not been provided. (Order, p. 24.)

In response to discovery requests, Joint Applicants stated that, post-transaction, the RWE family of corporations would include twenty-eight (28) Canadian or Mexican subsidiaries. (Responses to BGFlow's Second Requests, No. 2.) Absent a condition waiving the KRS 278.020(6) exemption, the stock of AWW or TWUS could be transferred to one of those subsidiaries without Commission oversight, thus bringing the utility under the ambit of the North American Free Trade Agreement (NAFTA).

The Commission appears to misunderstand the characterization of water when it states, at p. 18, that "water is not considered to be either a service or a good. . . ." A careful review, as may be presented on rehearing, will show clearly that water *in its natural state* is not a good. However, once it is removed and treated for consumption, it is a good and is sold as such. Further, it is the performance of its obligations by a utility under its franchise which is the provision of water supply service.

It is unreasonable not to include such a condition under the circumstances and unlawful for the Commission to knowingly diminish its own authority.

PROTECTIONS AGAINST THE  
POTENTIAL IMPACT OF INTERNAL TREATIES

Without regard to whether there may be found expertise in disciplines and professions other than that of law, certain facts were testified to and not rebutted which warrant rehearing on this issue.<sup>1</sup>

Both Professor Trawick, a professor of anthropology with a speciality in international water policy and former consultant to the World Bank on privatization issues in Latin and South America, and Mr. Eades, a geologist with a specialty in hydrogeology and many years of professional consultation work on water and water policy issues, both testified that there was international pressure to subject water as a good and water supply as a service to the General Agreement on Trade in Services (GATS).<sup>2</sup> In fact, Mr. Eades made direct reference to the formal request by the European Community to the United States to subject water services to GATS, and to a March, 2003, deadline for a response.

Mr. Layton, a lawyer with experience in international law, did not dispute or rebut this, but stated on the point that water services are not subject to any treaty at present. He agreed under cross-examination that this could change.

After the hearing, the *Lexington Herald-Leader* published a story on December 9, 2002, quoting a Canadian lawyer with experience in internal law as saying the deadline for the United States response is March 31, 2003.

---

<sup>1</sup> Contrary to the Commission's observation in footnote 34, the qualifications of its witnesses were part of the prefiled written testimony.

<sup>2</sup> Eades Prefiled Testimony, p. 2; Trawick Prefiled Testimony, p. 2.

Attached hereto as Exhibit A is a copy of the GATS 2000 *Request of the EC (European Community) and its Member States to the United States of America*, dated June 3, 2002.<sup>3</sup> The pages are not numbered consecutively, rather by topic; but on the fifteenth (15<sup>th</sup>) page, titled “Environmental Services,” the E C “requests the United States to commit the following subsectors” to the provisions of GATS, and the first subsector listed is:

A. Water for human use & wastewater management

Water collection, purification and distribution services through mains, except steam and hot water.

Extent sectoral coverage to include the above services, and take full commitment in that sub-sector for mode 2 and 3.

Waste water services (CPC9401)

“Mode 3,” under GATS, is when service is provided by commercial presence in the territory of any other Member state, which will be the condition of RWE post-transaction.

The Commission majority believes that it may protect its regulatory authority by imposing conditions on its approval, but even more disturbing are the requests found on the sixth (6<sup>th</sup>) page of the E C Request. Entitled “Professional Services,” the E C requests, in an area to which the United States has already partially committed, that certain state-level restrictions on the practice of the

---

<sup>3</sup> Counsel notes the Request was filed after the hearing and Order in Case No. 2002-00018. Counsel was unable to obtain a copy of the Request until a matter of a few days ago.

professions of law, accounting, architecture and engineering be *removed by the United States*. If the federal government can remove state residency requirements for an attorney without consulting the state supreme court, or incorporation requirements for accountants without consulting the board of accountants, or local licensing requirements without consulting the board of architects, etc., then there is little hope that the Commission could defeat a future demand and concession for removal of some portion or all of its regulatory authority.

It is unreasonable of the Commission not to inquire, knowing now that this is a very real possibility, as to the mechanisms by which these treaties work, and what is the response of the United States. At the very least, the Commission should set a hearing for some time after March 31, 2003, to receive testimony as to the United States response and the mechanisms of the treaties in order to craft additional conditions to protect the public and its own authority,<sup>4</sup> or whether, in fact, such conditions cannot be crafted due to federal preemption considerations.

### Conclusion

It is unreasonable, given the proximity of the answer in just a few weeks, for the Commission to approve the change of control of a local utility to a foreign owner when a rehearing could easily be had to learn the position of the United States in response to the very present and real demand of the European Community that water services be submitted to GATS. It is unlawful, and

---

<sup>4</sup> BGFlow does not waive its objections to the transaction and change of control by this suggestion.

probably unconstitutionally arbitrary, for the Commission to take any act which might concede its authority to another.

The Commission should suspend its Orders in this case and in Case No. 2002-0018 and hold a rehearing on the issue, *inter alia*, of the impact of international treaties on its regulatory authority over a local utility, which hearing should be scheduled at a reasonable time after the March 31, 2002, deadline for the response of the United States. Further, in lieu of partisan testimony, the Commission should request the Joint Applicants provide, as a witness for the Commission, not an expert in international law, but a expert in the area of the impact of international treaties on state regulatory authority. Only then can the Commission make a reasonable decision founded on law.

For the forgoing reasons, Bluegrass FLOW, Inc. requests rehearing.

Respectfully submitted,

MARTIN, OCKERMAN & BRABANT LLP  
200 N. Upper St.  
Lexington, KY 40507  
(859) 254-4401

---

Foster Ockerman, Jr.  
ockerman@kycounsel.com  
Attorneys for Bluegrass FLOW, Inc.

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 9<sup>th</sup> day of January, 2003. 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.

William H. Bowker  
Deputy Executive Director  
Public Service Commission  
211 Sower Dr.  
PO Box 615  
Frankfort, KY 40601

Gerald E. Wuetcher  
Public Service Commission  
211 Sower Dr.  
PO Box 615  
Frankfort, KY 40601

Roy W. Mundy  
Kentucky-American Water Company  
2300 Richmond Rd.  
Lexington, KY 40502

Lindsey W. Ingram, Jr.  
Robert Watt  
Stoll, Keenon & Park LLP  
300 W. Vine St., Suite 2100  
Lexington, KY 40507

David Barberie  
Lexington-Fayette Urban Co. Gvt.  
200 E. Main St.  
Lexington, KY 40507

Anthony G. Martin  
Lexington-Fayette Urban Co. Gvt.  
P. O. Box 1812  
Lexington, KY 40588-1812

A. B. Chandler III, Attorney General  
Dennis G. Howard II  
David Edward Spenard  
Assistant Attorneys General  
1024 Capital Center Dr., Suite 200  
Frankfort, KY 40601-8204

John N. Hughes  
124 W. Todd St.  
Frankfort, KY 40601

---

Attorneys for Bluegrass FLOW, Inc.