

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

**RESPONSE 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 COMPANY, INC. TO  
MOTION OF BLUEGRASS FLOW, INC. FOR REHEARING**

Bluegrass FLOW, Inc. ("FLOW") seeks a rehearing on two issues: Whether the Commission should require a waiver of the KRS 278.020(6) exemption in order to guard against a usurpation of its authority by a North American Free Trade Agreement ("NAFTA") tribunal and whether the Commission should adopt other conditions to protect against the "potential" impact of future provisions in international treaties and trade agreements. Both matters have already been fully addressed by the Commission and require no further review. FLOW has failed to establish any threat from either existing international trade agreements and treaties or proposed revisions to such treaties and trade agreements. In the absence of such a threat, the conditions proposed by FLOW are not only unnecessary, but meaningless. FLOW's Motion for Rehearing should accordingly be denied.

1. **THE COMMISSION DID NOT ERR IN FINDING THAT THERE IS NO NEED FOR A WAIVER OF THE KRS 278.020(6) EXEMPTION**

Refusing to accept its complete inability to establish a threat from NAFTA, FLOW frantically warns that there is a danger that the stock of either American Water Works Company, Inc. or Thames Water Aqua US Holdings, Inc. will be transferred to a Canadian or Mexican subsidiary of RWE Aktiengesellschaft. FLOW's theory is that such transfer would cause the Commission to lose its jurisdiction to a NAFTA tribunal. FLOW contends that the Commission must require a waiver of the KRS 278.020(6) exemption in order to avoid such a disaster. The fatal flaw in FLOW's argument is that even if NAFTA were applicable to either American Water Works Company, Inc. or Thames Water Aqua US Holdings, Inc. the international trade agreement would still not pose a threat to the Commission's jurisdiction. Any other concerns about limiting reorganization within Kentucky-American's corporate hierarchy have been addressed by the Commission through Commitment 50 as set forth in the December 20, 2002 Order.

FLOW concedes that the Commission has already rejected the need for a waiver of the KRS 278.020(6) exemption, but argues that the rejection was based on a misunderstanding of the "characterization of water". (Motion of Bluegrass FLOW, Inc. for Rehearing, p. 2). Since KRS 278.020(6) has absolutely nothing to do with "the characterization of water," FLOW's argument is inane and can be rejected outright. There is in fact no logical challenge to the Commission's prior decision as to what protections are needed with regard to corporate reorganizations. The Commission found no reason to require a waiver of the KRS 278.020(6) exemption: "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." (December

20, 2002 Order, pp. 24-25). In Condition 50 the Commission has mandated that "AWWC will hold all of KAWC's common stock and shall not transfer any of that stock without prior Commission approval even if the transfer is pursuant to a corporate reorganization as defined in KRS 278.020(6)(b)." FLOW's erratic references to water in its natural state fail to explain why any greater protection is needed.

Moreover, the Commission has already rejected the contention that if NAFTA were some day to become applicable to Kentucky-American's corporate hierarchy, it might pose a threat to the Commission's jurisdiction.

[A]ny claim that is brought by an 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.

(December 20, 2002 Order, p. 17).

In light of the undisputed evidence regarding NAFTA's limitations and FLOW's failure to identify a single provision of the Agreement which could even conceivably impact the Commission's jurisdiction, FLOW oversteps the bounds of acceptable advocacy by contending that the Commission has "knowingly diminish[ed] its own authority." (Motion of Bluegrass FLOW, Inc. for Rehearing, p. 2). The rejection of the proposed condition requiring a waiver of a statutory provision cannot be fairly characterized as diminishing the Commission's authority, be it knowingly or otherwise. FLOW has failed to provide the Commission with any reason why it should reconsider its rejection of the proposed waiver of the KRS 278.020(6) exception. The request for a rehearing on this ground should, therefore, be denied.

2. **THE COMMISSION DID NOT ERR IN FINDING THAT THERE IS NO IMPENDING THREAT FROM FUTURE PROVISIONS IN INTERNATIONAL TREATIES AND TRADE AGREEMENTS**

In the prepared testimony, FLOW's "expert" witnesses took the position that current international trade agreements and treaties pose an existing danger to the Commission's jurisdiction. They vehemently argued, "the sky is falling, the sky is falling." After that testimony was rebutted not only by an expert in international law, but also by concessions from FLOW's own "expert" witnesses that they had not even examined the legal documents upon which their opinion was based, the focus shifted from existing to future provisions in international treaties and trade agreements. Seeking a rehearing, FLOW continues in that vein, arguing that although existing international treaties and trade agreements pose no current danger to the jurisdiction of the Commission, onerous changes are on the horizon which must be guarded against. Such argument has already been conclusively refuted and need not be revisited.

The Commission had no problem rejecting the "expert testimony" offered by FLOW as unsubstantiated:

FLOW provided the only evidence in the record regarding the potentially adverse effects of international agreements upon the Commission's jurisdiction. Its witnesses testified that Commission jurisdiction over the Joint Applicants would be seriously weakened as a result of the North American Free Trade Agreement ("NAFTA") and the General Agreement on Trade and Services ("GATS").

The record shows that neither of FLOW's witnesses is qualified to render an opinion on this issue. Neither witness is a lawyer nor has engaged in any formal study of international law or law in general. Neither witness has any significant experience in international commerce. While both witnesses testified on NAFTA and GATS, neither witness had fully reviewed the treaties. Both acknowledged that they were unfamiliar with many of the treaties' provisions. When cross-examined on various aspects of these treaties, they repeatedly indicated their lack of

knowledge of the treaties' terms. Accordingly, we give little weight to their testimony or conclusions.

(December 20, 2002 Order, pp. 16-17).

FLOW has neither taken heed of this criticism nor learned from the experience, but rather smugly argues that "expertise may be found in disciplines and professions other than that of the law." (Motion for Bluegrass FLOW, Inc. for Rehearing, p. 3). It contends the topic at hand requires not an expert on international law, but rather "a [sic] expert in the area of the impact of international treaties on state regulatory authority." (Motion for Bluegrass FLOW, Inc. for Rehearing, p. 6). Such argument evidences the depths to which FLOW will sink to cook up an argument. (See December 20, 2002 Order, p. 17, footnote 34).

Notwithstanding FLOW's adversity to confining its arguments to facts, the international treaties and trade agreements either contain provisions which could infringe on the Commission's jurisdiction or they do not. The expert testimony provided by Joint Petitioners established that they do not. FLOW's evidence presented by "experts" on the impact of the international trade agreements and treaties was woefully inadequate to suggest otherwise. The Commission was right to expect those who testify about the content of international laws to have read such documents and was thoroughly justified in rejecting FLOW's "expert" testimony.

The materials offered by FLOW to support its Motion for Rehearing do not evidence an improvement in that regard. FLOW relies upon an undocumented quote from "a Canadian lawyer" as purportedly was reported in the Lexington-Herald Leader. (Motion of Bluegrass FLOW, Inc. for Rehearing, p. 3). Unabashed by the slender reed upon which it rests its argument, FLOW vehemently argues that this hearsay, as recounted by counsel, compels a rehearing. FLOW's argument that a delay in the Commission's ruling is appropriate since FLOW has proven that the question of whether or not water will be included within the scope of GATS

will be determined by March 31, 2003 betrays not only a basic misunderstanding of the rules of evidence, but also FLOW's complete ignorance of the January 1, 2005 deadline established by the World Trade Organization's Council for Trade in Services for completing its review of the proposed requests. Nonetheless, FLOW insists that the Commission must "suspend its Orders in this case and in Case No. 2002-0018." (Motion of Bluegrass FLOW, Inc. for Rehearing, p. 6).

Such suspension is unwarranted. Although FLOW solemnly asserts that the U.S. government is on the verge of agreeing to provisions which are contrary to the interests of its citizens, provisions that will usurp the authority of this Commission, FLOW has failed to identify any specific dangers arising from the proposals under review. Regardless of FLOW's passionate rhetoric and distrust of our government, the proposed changes identified by FLOW pose no threat to the Commission's jurisdiction.

The Commission has already explained why the addition of water to the list of goods and water supply to the list of services would have no impact on its jurisdiction:

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 rate and services. In the absence of such case, we find the imposition of such conditions is unreasonable.

(December 20, 2002 Order, p. 18).

Even if water is in the future considered to be a good and water supply is considered to be a service, there would still be no provision in GATS which threatens the Commission's jurisdiction.

FLOW moves from the ridiculous to the sublime by arguing that "If the federal government can remove state residency requirements for an attorney without consulting the state supreme court . . . 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." (Motion for Bluegrass FLOW, Inc. for Rehearing, p. 5). It is impossible not to become frustrated with such great leaps in logic and departures from reality. The federal government has not removed the state residency requirements for attorneys practicing law. It has not threatened to remove such requirements nor would any efforts to do so have any relevancy whatsoever to the Commission's approval of the transfer of control in Kentucky-American Water Company. The Commission has not taken any action "which might concede its authority." (Motion of Bluegrass FLOW, Inc. for Rehearing, p. 6). The sky is not now falling nor is it expected to fall in the future. FLOW is just simply grasping at straws. Its ramblings may be dismissed without a rehearing.

### **CONCLUSION**

Bluegrass FLOW, Inc. has failed to offer any "additional evidence that could not with reasonable diligence have been offered on the former hearing." KRS 278.400. Its request for a rehearing is merely a re-argument of issues previously addressed by the Commission without any

proffer of new or relevant evidence. That is simply insufficient to warrant a rehearing. See American Communications Services of Louisville d/b/a e.spire et al. v. Bell South Telecommunications, Inc., Case No. 98-212, Order of June 23, 2000; Approval of the Resale Agreement of Bell South Telecommunications, Inc. and Nustar Communications, Case No. 98-165, Order of June 5, 2002; The Alternative Rate Filing of Lake Columbia, Case No. 2000-458. There is accordingly no basis for granting the Motion of Bluegrass FLOW, Inc. for a Rehearing. The Commission did not err in choosing fact over hyperbole in reaching its December 20, 2002 decision.

Respectfully submitted on this the 17<sup>th</sup> day of January, 2003.

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**CERTIFICATION**

In conformity with paragraph 13 of the Commission's Order dated September 26, 2002, this is to certify that the electronic version of this Response 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 Company, Inc. to Motion of Bluegrass Flow, Inc. for Rehearing is a true and accurate copy of the Response 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 Company, Inc. to Motion of Bluegrass Flow, Inc. for Rehearing filed in paper medium; that the Joint Petitioners have notified the Commission and all parties by electronic mail on January 17, 2003 that the electronic version of this Response 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 Company, Inc. to Motion of Bluegrass Flow, Inc. for Rehearing has been transmitted to the Commission, and that a copy has been served by mail upon:

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and that the original and three copies have been filed with the Public Service Commission in paper medium on the 17<sup>th</sup> day of January, 2003.

  
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