

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

* * * * *
**RESPONSE OF JOINT PETITIONERS
TO NOTICE AND MOTION PURSUANT TO
KRS 278.020(4) & (5) FILED BY
BLUEGRASS FLOW, INC.**

Joint Petitioners, Kentucky-American Water Company (“Kentucky-American”), Thames Water Aqua Holdings GmbH (“Thames Holdings”), RWE Aktiengesellschaft (“RWE”), Thames Water Aqua US Holdings, Inc. (“TWUS”) and American Water Works Company, Inc. (“American”), submit this memorandum in response to the Notice and Motion pursuant to KRS 278.020(4) & (5) of Bluegrass FLOW, Inc. (“FLOW”). In its Notice and Motion, FLOW offers its opinion that the Order of December 20, 2002, herein is “void and of no effect” and moves the Commission to withdraw and vacate the Commission’s Order of December 20, 2002, herein and its orders in Case No. 2002-00018 because “they have been rendered moot as a matter of law.” FLOW’s analysis of the situation is incorrect and the Motion should be denied.

FLOW claims that a “final order” is necessary to authorize properly the change of control of Kentucky-American and that the Commission’s Order of December 20, 2002, is a “provisional order,” which is allegedly insufficient to authorize the action. FLOW’s claims, however, are not based on concepts or terms that appear in Chapter 278 of the Kentucky Revised Statutes, but rather on terms that FLOW has formulated with no statutory support. The concept of “provisional order” exists nowhere in Chapter 278 and, most especially, not in KRS 278.390, 278.400 or 278.410. Similarly, the concept of “final order,” as that term is used in the Kentucky Rules of Civil Procedure or in FLOW’s Motion does not appear in Chapter 278. FLOW’s reference to KRS 278.410(1) is to the phrase “final order on rehearing.” That is a far different concept than the meaning that FLOW attempts to place on it. The “final order” in KRS 278.410(1) refers to the last order in the rehearing process, not to a final order for purposes of appeal, as FLOW would have the Commission believe.

If parties to Commission proceedings could make up their own concepts and the definitions therefor in support of their arguments, they should be successful on every occasion. Unfortunately for FLOW, the concepts governing proceedings before the Commission have been provided by the General Assembly and they do not support FLOW’s argument.

The Joint Petitioners were authorized by the Commission’s Order of December 20, 2002, to consummate a change of control of Kentucky-American in accordance with the terms of the Order. On January 10, 2003, the Joint Petitioners closed the transaction by which the change of control occurred. On that date, the Commission’s Order of December 20, 2002, was in full force and effect and the Joint Petitioners were fully

authorized to close the transaction. That authority is found in KRS 278.390 and in cases of this Commission and the Kentucky Supreme Court.

KRS 278.390 provides, in pertinent part, as follows:

Every order entered by the commission shall continue in force until 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.

The true force of this statute was highlighted by the Supreme Court of Kentucky in Commonwealth ex rel Stephens v. South Central Bell Telephone Company, 545 S.W.2d 927, 931 (Ky. 1976) as follows:

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).

FLOW, however, argues that the filing of motions for rehearing by the Intervenors herein somehow vitiated the mandate of the foregoing statute and Supreme Court decision. In support of that argument, it cites to a section of a legal encyclopedia. FLOW Notice and Motion at 3. Upon investigation of the legal encyclopedia, however, one sees that its statement was based on a 1975 California decision. A current examination of the statutes in California governing rehearing before the California Public Utilities Commission reveals that, except in limited circumstances not present here, they do not support the statement in the legal encyclopedia. In fact, California Public Utilities Code § 1735 provides, “An application for rehearing shall not . . . operate in any

manner to stay or postpone the enforcement of [any order or decision of the commission].”

This Commission addressed the precise issue presented in FLOW’s Motion in the order of August 10, 1981 in In the Matter of: The Application of Goshen Utilities, Inc. for (1) An Adjustment of Water Service Rates and Charges and Sewage Rates and (2) Approval of the Purchase Agreement of Cardinal Harbour Sanitation, Case No. 7797, and The Complaint of Douglas H. Morris, et al, Against Goshen Utilities, Inc., Case No. 9151. There, the Commission held,

K.R.S. 278.410 gives any party to a proceeding before this Commission 20 days to file either an application for rehearing of a PSC order, or a complaint in the Franklin Circuit Court for review of said PSC order. However, the mere filing of an application for rehearing (or even a complaint in court) does not serve to stay the effectiveness of the PSC’s order. This is clear from the provisions of K.R.S. 278.410(3), which states that “[i]njunctive relief may be granted by the circuit court in the manner and upon the terms provided by law.” Thus, a party seeking to stay the effectiveness of any order of this Commission pending further review, must seek an injunction in the circuit court. The Attorney General did not do this at the time it filed its application for rehearing of the rate established by the Commission’s Order of September 26, 1980, and Goshen was thus lawfully entitled to charge those rates . . .

Id. at 3. Since none of the Intervenors herein have applied to the Franklin Circuit Court for injunctive relief, the motions for rehearing do not stay the effectiveness of the Commission’s Order of December 20, 2002, and it “continues in force” to this day. Thus, the Joint Petitioners were lawfully entitled to take the actions authorized by the Order of the Commission.

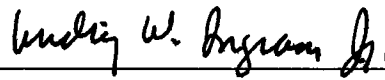
As to the portion of FLOW’s Motion pertaining to the Commission’s orders in Case No. 2002-00018, this proceeding is not the place to seek to have them withdrawn or

vacated. The Franklin Circuit Court, where the appeals of the Commission's orders in Case No. 2002-00018 are pending, is the forum in which the validity of those orders will be examined.

For the foregoing reasons, the Notice and Motion of FLOW must be denied.

Respectfully submitted,

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APOLLO ACQUISITION COMPANY

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., and American Water Works Company, Inc. to The Notice and Motion Pursuant to KRS 278.020 (4) & (5) filed by Bluegrass Flow, Inc. 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., and American Water Works Company, Inc. to The Notice and Motion Pursuant to KRS 278.020 (4) & (5) filed by Bluegrass Flow, Inc. in paper medium; that the Joint Petitioners have notified the Commission and all parties by electronic mail on January ~~22~~, 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., and American Water Works Company, Inc. to The Notice and Motion Pursuant to KRS 278 (4) & (5) filed by Bluegrass Flow, Inc. has been transmitted to the Commission, and that a copy has been served by mail upon:

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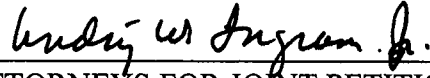
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and that the original and three copies have been filed with the Public Service Commission in paper medium on the 23rd day of January, 2003.



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