

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)	

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**RESPONSE OF JOINT PETITIONERS TO
MOTION TO DISMISS OF 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”), Apollo Acquisition Company (“Apollo”) and American Water Works Company, Inc. (“American”), submit this response to the Motion to Dismiss of Bluegrass FLOW, Inc. (“FLOW”). The Motion to Dismiss is without merit and should be dismissed.

The essence of FLOW’s Motion is that the Commission should dismiss this proceeding because it is without jurisdiction to modify its Orders in Case No. 2002-00018, In the Matter of: Application for Approval of the Transfer of Control of Kentucky-American Water Company to RWE Aktiengesellschaft and Thames Water Aqua Holdings GmbH. FLOW, however, has mischaracterized this proceeding. It was initiated because an intermediary holding company, TWUS, has been formed and is

owned by Thames Holdings for the purpose of holding the stock of American upon consummation of the merger that was approved in Case No. 2002-00018. In the Order of July 10, 2002, in Case No. 2002-00018, the Commission recognized the possibility that TWUS might be formed and, if so, the Commission could consider whether to approve its role in the transaction by request to modify the May 30, 2002, Order in Case No. 2002-00018. Case No. 2002-00018, Order of July 10, 2002, at 6. Subsequent to the issuance of that order, the Intervenor appealed the Orders in Case No. 2002-00018. Therefore, when this case was initiated, the Joint Petitioners advised the Commission as follows:

The Joint Petitioners understand the Commission's declaration in the order of July 10, 2002, that approval of this modification to the transaction could be requested by motion in Case No. 2002-00018. Given the current circumstances of three appeals of the prior orders in Case No. 2002-00018 pending in the Franklin Circuit Court, however, the Joint Petitioners are submitting this Motion and Petition to establish a new docket for the purpose of avoiding a prolonged delay in the proceedings over the jurisdictional status of the appellate cases and this proposed modification to the transaction.

Motion and Petition at 2. Since this case is a separate docket from Case No. 2002-00018, the Joint Petitioners have not sought modification of the Orders in Case No. 2002-00018.

Instead, they seek the following relief:

WHEREFORE, the Petitioners request that the Commission issue an Order, pursuant to KRS 278.020, approving the change of control as contemplated by the modification by and among RWE, AWW, Apollo, Thames Holdings and TWUS under the terms of which TWUS will acquire indirect control of Kentucky-American following the merger of Apollo and AWW and any other authorization required by law.

Motion and Petition at 9.

It is clear, therefore, that the entire premise of FLOW's Motion to Dismiss is a mischaracterization of the nature of this proceeding. Joint Petitioners are not seeking to modify the Orders in Case No. 2002-00018; they are seeking approval of the change in control by which TWUS will hold the stock of American. It is true that the Commission's Orders and the record in Case No. 2002-00018 provide background information and support for the relief requested in this proceeding, but that fact does not make this a proceeding by which those Orders will be modified.

After its argument based on its mischaracterization of the relief sought in this proceeding, FLOW embarks upon a discussion about the parties to this proceeding that does not seem to have anything to do with its argument that the proceeding should be dismissed. Motion to Dismiss at 3. Then, FLOW rambles on about subject matter and in personam or personal jurisdiction, again, without any apparent relationship to its Motion to Dismiss. Motion to Dismiss at 3-4.

At the end of its discussion about subject matter jurisdiction, FLOW inserts a footnote in which it questions whether KRS 278.390 applies to the Orders in Case No. 2002-00018 in light of the fact that KRS 278.020(4) and (5) were enacted after KRS 278.390. Motion to Dismiss at 3, n. 3. There is no rule of statutory construction by which an earlier enacted general statute, like KRS 278.390, is rendered ineffective by the later enactment of a statute pertaining to a more specific subject matter, like KRS 278.020(4) and (5). In fact, the only time a later enacted statute is found to be controlling over an earlier enacted statute is when it is in conflict with the earlier enacted statute. Williams v. Commonwealth, 829 S.W.2d 942, 944 (Ky. App. 1992), citing Commonwealth v. Hunt, 619 S.W.2d 733 (1981). The Williams court went on to note

that where there is a conflict between statutes or sections thereof, it is the duty of the court to attempt to harmonize the interpretation so as to give effect to both sections or statutes. Williams, supra at 944, citing Ledford v. Faulkner, 661 S.W.2d 475 (Ky. 1983). Finally, the Williams court noted that a court may not interpret a statute so as to bring about an absurd result. Williams, supra at 944, citing George v. Alcoholic Beverage Control Board, 421 S.W.2d 569 (Ky. 1967). There is no conflict between KRS 278.390 and KRS 278.020(4) and (5). Like the courts, this Commission must give effect to both statutes, which it can easily do. Without question, FLOW's approach would bring about an absurd result. In any event, since the Orders about which FLOW has questions concerning their continued effectiveness are on appeal in the Franklin Circuit Court, the Commission cannot modify, suspend or limit their effectiveness.

FLOW supports its Motion to Dismiss by setting up straw men and then attempting to knock them down. It does not base its Motion to Dismiss on the Motion and Petition that was filed, but rather on its mischaracterization of it. Further, its discussion about the parties to this proceeding, jurisdiction and statutory construction have nothing to do with its Motion to Dismiss and should be ignored. In sum, the Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATION

In conformity with paragraph 13 of the Commission's Order dated September 16, 2002, herein, this is to certify that the electronic version of this pleading is a true and accurate copy of the pleading filed in paper medium; that the Petitioners have notified the Commission and the parties in this case by electronic mail on September 23, 2002, that the electronic version of this pleading 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 23d day of September 2002.

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