

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Adjustment of Rates of Kentucky-  
American Water Company

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Case No. 2004-00103

ATTORNEY GENERAL'S REPOSE TO  
BLUEGRASS FLOW, INC.'S MOTION TO INTERVENE

The Attorney General provides his response to Bluegrass FLOW, Inc.'s Motion to Intervene in this proceeding. Bluegrass FLOW, Inc., seeks full intervention in this proceeding. Kentucky-American Water Company opposes FLOW's motion arguing, in part, that FLOW's "motion must be denied because Kentucky American Water's customers' interests are already fully represented by the Attorney General ... and the Lexington-Fayette Urban County Government."<sup>1</sup> The Attorney General submits a reply to the FLOW motion and the corresponding KAWC response.

807 KAR 5:001 Section 3 (8) contains the following language that identifies the determination that the Commission must make when considering a request for full intervention.

*If the commission determines that a person has a special interest in the proceeding which is not otherwise adequately represented or that full intervention by a party is likely to present issues or to develop facts that assist the commission in fully considering the*

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<sup>1</sup> KAWC's Response to Bluegrass FLOW, Inc.'s Motion to Intervene, 22 June 2004.

matter without unduly complicating or disrupting the proceedings, such person shall be granted full intervention. (emphasis added)

Thus, there are alternative grounds or reasons that a party may assert (either individually or in tandem) as justification for full intervention. The Attorney General limits his comments for the determination that will be made by this Commission on the issue of whether FLOW has a special interest that is not otherwise adequately represented.<sup>2</sup>

The decision to allow intervention, in the absence of a party having an express statutory mandate (or prohibition), is a matter within the sound discretion of the Commission. In the proper exercise of its discretion, the Commission may exclude a party because it does not truly have a “special interest” or that its interest is too remote. There have been cases in which the Commission has chosen to point to the Attorney General’s participation in support of its denial of allowing intervention via the “special interest” claim.

For example, the Commission did not allow a third-party to assert the interests of a customer receiving service under an interruptible transportation tariff.<sup>3</sup> (The customer did not seek to advance a claim on its own.) The Commission pointed to the Attorney General’s participation in the proceeding as an adequate ground for preventing a third-party from intervention to assert such a claim due to the fact that the customer was otherwise adequately represented.

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<sup>2</sup> The Attorney General does not address the issue of whether FLOW satisfies the alternative ground.

<sup>3</sup> See *In the Matter of: Adjustment of Gas Rates of the Union Light, Heat and Power Company*, Case No. 2001-00092, Order, 13 September 2001, page 2.

Thus, in situations in which the “special interest” claim is either illusory or too remote, the Attorney General’s participation in a proceeding can serve as the basis for properly denying intervention. The Attorney General, however, does not believe that his participation is a proper basis for denying all requests for intervention made under a “special interest” claim.

The General Assembly gives the Attorney General a statutory mandate for intervention.<sup>4</sup> The grant is not to the exclusion of any other party. Thus, there is no statutory prohibition that prevents the Commission from allowing other parties, such as FLOW, to participate in Commission proceedings.

In fact, the statute that provides the Attorney General with a right to intervene is a consumer protection measure. It does not provide Kentucky-American with a sword for use against a party whose views or advocacy may differ from those of Kentucky-American. To be blunt, KRS 367.150 is a statute to protect the public rather than Kentucky-American.

Kentucky-American asserts, in part, that “the presence of the Attorney General ... necessarily means that *all* of Kentucky American Water’s customers are represented (emphasis added).”<sup>5</sup> While the Attorney General agrees that he represents the consumers’ interest, he does not assert that other parties need not seek a seat at the table.

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<sup>4</sup> KRS 367.150 (8)

<sup>5</sup> KAWC Response to FLOW Motion to Intervene, page 2.

The Attorney General has a significant amount of discretion in representing the consumers' interest. On numerous prior occasions, this Office has advised various consumers that the Attorney General does not have to present every argument, pursue every theory, or adopt every policy that is called to the attention of this Office. In fact, because some arguments, theories, and policies are antagonistic or mutually exclusive, it simply cannot be done.

It is normal, and appropriate, for this Office to advise parties who seek special attention for their particular concerns and theories for a pending action that they may request full intervention as a means to advance those theories and concerns. This advice is in accord with 807 KAR 5:001 Section 3 (8), and it is also wholly consistent with KRS 278.260, a statute that allows "any person" with a direct interest in the actions or policies of a utility to pursue Commission consideration of their grievance.

Taken to its logical conclusion, Kentucky-American suggests that no party could satisfy the "special interest" ground for intervention in any case in which the Attorney General is a party. That produces an absurd result. It simply does not make sense that a party who may advance a claim by way of a complaint (under KRS 278.260) cannot seek to advance the claim in a rate case simply because the Attorney General is a party to the proceeding. Yet, this is the result under Kentucky-American's position.

As noted in the Dissenting Opinion of Commissioner Spurlin in a relatively recent case, "intervention rules should be liberally construed to ensure

that the Commission considers a variety of perspectives before rendering a decision that will directly affect thousands of central Kentuckians.”<sup>6</sup> The Attorney General agrees that the intervention rules should be liberally construed in favor of allowing the intervention of individual customers or customer groups that have a direct interest in the decision that the Commission will render. Nothing in KRS Chapter 278 or in the grant of authority to the Attorney General via KRS 367.150 precludes such a policy.

The Attorney General does not suggest that FLOW has an automatic right to full intervention. However, on this issue of whether the Attorney General’s participation is an adequate reason to deny FLOW’s request for intervention, the Attorney General asserts that it is not.

The Attorney General has made clear in other proceedings that he does not support or advance all of the claims and theories of FLOW. (Thus, the fact that some of FLOW’s claims and theories have no representation via this Office is a matter of record.) Rate-making is legislative in character, and the Commission should continue to keep open the door to customers and customer groups who have a direct interest in the proceedings and who seek to participate and contribute to the regulatory process.

WHEREFORE, the Attorney General has no opposition to Bluegrass FLOW, Inc.’s Motion to Intervene.

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<sup>6</sup> *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 Company, Inc. For Approval of a Change of Control of Kentucky-American Water Company*, PSC Case No. 2003-00317, Order, 3 October 2002.

Respectfully submitted,

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*Submission of Filing in Paper Medium*

Per Instructions 3 and 13 of the Commission's 27 May 2004 Order, Counsel submits for filing, by hand delivery to Beth O'Donnell, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601, the original and one copy in paper medium of the document. 25 June 2004 is the date for the filing in paper medium.

/s/ David Edward Spenard  
Assistant Attorney General

*Certificate of Service*

Per Instructions 4, 8 (d), and 12 of the May 27<sup>th</sup> Order, Counsel certifies service of a true and correct photocopy of the document by mailing the photocopies, first class postage prepaid, to the other parties of record on 24 June 2004. The following are the other parties of record: David Jeffrey Barberie, Lexington-Fayette Urban County Government, Department of Law, 200 East Main Street, Lexington, Kentucky 40507; Leslye M. Bowman, Lexington-Fayette Urban County Government, Department of Law, 200 East Main Street,

Lexington, Kentucky 40507; Coleman D. Bush, Kentucky-American Water Company, 2300 Richmond Road, Lexington, Kentucky 40502; Joe F. Childers, 201 West Short Street, Suite 310, Lexington, Kentucky 40507; Roy L. Ferrell, West Virginia American Water Company, 1600 Pennsylvania Avenue, Charleston, West Virginia 25302; Lindsey W. Ingram III, Stoll, Keenon & Park, LLP, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507-1801; Lindsey W. Ingram, Jr., Stoll, Keenon & Park, LLP, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507-1801; Michael A. Miller, West Virginia American Water Company, 1600 Pennsylvania Avenue, Charleston, West Virginia, 25302; Jon Parker, 201 W. Short Street, Suite 310, Lexington, Kentucky 40507; and Roy W. Mundy II, Kentucky-American Water Company 2300 Richmond Road, Lexington, Kentucky 40502.

/s/ David Edward Spenard  
Assistant Attorney General

*Certification Regarding Electronic Filing*

Counsel certifies that he has (per Instructions 3 and 8 (b) of the May 27<sup>th</sup> Order) submitted one copy of the document in electronic medium. Pursuant to Instructions 8 (a) and 8 (c) of the May 27<sup>th</sup> Order, he certifies that the electronic version of the filing is a true and accurate copy of the document filed in paper medium and that he has, by electronic mail, notified the Commission and the other parties that the electronic version of the filing has been transmitted to the Commission. 24 June 2004 is the date of filing in electronic medium.

/s/ David Edward Spenard  
Assistant Attorney General