

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

APPLICATION OF KENTUCKY-AMERICAN )  
WATER COMPANY FOR AN ADJUSTMENT ) Case No. 2004-00103  
OF ITS RATES )

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**BRIEF OF BLUEGRASS FLOW, INC.**

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Now comes Bluegrass FLOW, Inc., by counsel, and, in accord with the amended procedural schedule, submits this Brief in support of its positions in this matter.

For the sake of brevity, Bluegrass FLOW, Inc. adopts the Statement of the Case and, to the extent it does not conflict with the arguments presented herein, adopts the Brief of the Lexington-Fayette Urban County Government, including its adoption of the evidence and arguments of the Attorney General.

This Intervenor highlights the following point: this Commission can have no higher duty and obligation than to ensure the enforcement of its own orders and the proper conduct of its procedures.

While it may be the case that the Attorney General and municipalities and other governments have sufficient power and ability to discover such procedural errors as *ex parte* contacts, members of the public are completely cut out of the process and afforded no opportunity to seek intervention and present arguments when such events are permitted to happen. (See LFUCG Brief, pp. 9–19.) This Commission has the opportunity to make clear to the public as well as the regulated utilities that it will observe the fundamentals of procedural due process, and not reward such conduct by imposing additional costs on the ratepaying public.

This Application is the first test of the commitments and sincerity of RWE and its corporate subsidiaries, down to Applicant, in observance of the orders of this Commission and in particular the Conditions attached to the Order of December 20, 2002 (Case No. 2002-00317, made final by the Order of January 29, 2004, denying motions for rehearing) approving the sale/transfer of control over Kentucky-American Water Company, conditions accepted by RWE et al on January 8, 2003. The Lexington-Fayette Urban County Government has illustrated a number of instances where there has been noncompliance with that Order and other orders of this Commission. To this list is added the failure to comply with Condition 49 of the December 20, 2002 Order, to wit:

Condition No. 49 requires that forty (40%) percent of the members of the board of directors of Kentucky-American Water Company be independent outside directors who are also ratepayers.<sup>1</sup>

Mr. Chris Jarrett testified that the KAWC board has eight (8) members. (Case No. 2004-00103, Transcript of Evidence, Vol. III, p. 201.) Forty percent of that number is 3.2, which requires a rounding up to four (4) members who must be independent outside directors to comply with the Condition. Mr. Jarrett further testified that there are, however, only two (2) such outside directors. (Id., p. 202.)<sup>2</sup> Clearly, there is material noncompliance with this Condition of the approval of the transfer of control.

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<sup>1</sup> "49. At least 40 percent of the members of KAWC's Board of Directors will be persons who are not employees or officers of RWE, Thames, TWUS, AWWC, or any other RWE affiliated entity, and who reside within the area that KAWC serves." Order, December 20, 2002, Appendix A, p. 8.

<sup>2</sup> Patricia Freibert and William Sisson are identified by Mr. Jarrett as the outside directors, and that they live in the service area. Lindsey Ingram, Jr., is also identified as living in the service area. As Mr. Ingram is employed by KAWC and/or other RWE affiliated entities as legal counsel, he does not meet the commonly accepted definition of an independent outside director nor does Mr. Jarrett attempt to characterize him as such.

Only the Commission can enforce its Order in this case because another Condition to said Order (No. 58) required only a "limited process agent" be appointed to receive service of process from the Commission, thus preventing any action by the Attorney General, the Lexington-Fayette Urban County Government, or any member of the public, seeking to enforce compliance.<sup>3</sup> If a Condition this mathematically simply to meet can be ignored or overlooked, what other instances of noncompliance would be revealed by a diligent investigation?

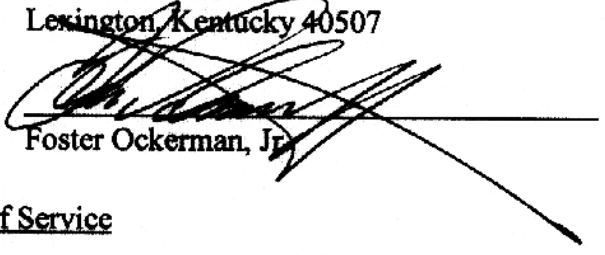
Opponents of the efforts of the Lexington-Fayette Urban County Government to acquire the assets of Kentucky-American rely heavily on the protection and oversight of the Commission, including those Conditions to the transfer of control Order seeking to preserve some level of local involvement in the management of KAWC, as reasons why municipal ownership and control should not be pursued. If the Commission does not enforce its own Orders, its protection of the ratepayers is meaningless and the confidences of those ratepayers is misplaced.

In addition to the positions of the Attorney General and the Urban County Government as to the propriety, timing and amount of any of the requested increases, Bluegrass FLOW, Inc. requests that no increase of any character be approved until the Commission has satisfied itself after diligent investigation of the full compliance by KAWC and RWE et al with all relevant Orders, that any approved rate increase only be initiated on or after the entry of the Commission's future Order finding full compliance, and that refunds be ordered through that date.

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<sup>3</sup> On information and belief, it is understood by counsel that the members of the board of directors of KAWC are elected by its shareholder, in this case, Thames Water Agua Holdings US, Inc., a non-Kentucky foreign corporation which has not qualified to do business in the Commonwealth of Kentucky and has not appointed an statutory process agent in Kentucky. Counsel has been unable to find any statutory authority for the appointment of a "limited process agent" subject to service by only one entity.

Respectfully submitted,  
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Certificate of Service

The undersigned certifies that the original and one copy of the foregoing document have been filed via United States mail, first class postage prepaid, to Elizabeth O'Donnell, Executive Director, Public Service Commission, 211 Sower Blvd., P. O. Box 615, Frankfort, KY 40602-0615, and by uploading an electronic version of said document to the file transfer protocol site designated by the Commission; that the electronic version is a true and accurate copy of the said document(s) filed in paper medium, the electronic version has been transferred to the Commission, and the Commission and other parties have been notified by electronic mail of the filing; and that a copy of the foregoing was served by first class mail, postage prepaid on the following this the 4<sup>th</sup> day of January, 2005.

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