

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE ACQUISITION OF)
AMERICAN WATER WORKS COMPANY, INC.)
("AMERICAN") BY THAMES WATER AQUA)
HOLDINGS GmbH ("THAMES HOLDINGS")
)
)

Utility Case No. 3712

NEW MEXICO-AMERICAN WATER COMPANY,)
INC. ("NEW MEXICO-AMERICAN") AND)
THAMES HOLDINGS,)
)
Applicants.)
)

RECOMMENDED DECISION OF THE HEARING EXAMINER

William J. Herrmann, Hearing Examiner in this case, hereby submits this Recommended Decision to the New Mexico Public Regulation Commission ("Commission") pursuant to 17 NMAC 1.2.32.44 and 1.2.39.2. The Hearing Examiner recommends that the Commission adopt the following Statement of the Case and Discussion.

STATEMENT OF THE CASE

On December 20, 2001, New Mexico-American Water Company, Inc. ("NM-A") and Thames Water Aqua Holdings GmbH ("Thames Holdings"), on behalf of itself and its parent holding company RWE Aktiengesellschaft ("RWE"), (collectively referred to as Applicants ("Applicants")) filed their Application with the Commission. The Application requests the following approvals and authorizations by the Commission:

- (i) Authorization and approval, pursuant to NMSA 1978, Section 62-6-12(A)(2) and (3) and 62-6-13, of the transaction contemplated by the Agreement and

Plan of Merger ("**Agreement**"), including, specifically, authorization and approval allowing Thames Holdings to acquire the outstanding common stock of American Water Works Company, Inc., parent of NM-A, ("American"), and allowing American to merge with Apollo Acquisition Company, with American being the surviving corporation; and

(ii) Authorization required by NMSA 1978, Section 62-3-3(K), and Commission Rule 450.7 approving a General Diversification Plan for New Mexico-American, which Plan New Mexico-American filed with the Commission on March 12, 2002 ("**GDP**"); and

(iii) Such other authorizations, approvals and consents as may be required under the New Mexico Public Utility Act, and the Commission Rules and Regulations for the transaction contemplated by the Agreement.

On the 23rd day of January, 2002, the Commission issued its Order Designating Hearing Examiner in which it appointed William J. Herrmann as presiding officer in this case.

On February 11, 2002, the Hearing Examiner issued his Order setting a pre-hearing conference to be scheduled to discuss procedural dates and details for this case.

Pursuant to the Order Setting Pre-hearing Conference, a pre-hearing conference was held February 26, 2002 at 10 a.m. at the offices of the Commission attended by NMA, Thames Holdings, American and Commission Staff.

On February 27, 2002, the Hearing Examiner issued a Procedural Order which set procedural dates and schedules for this case, including Publication of Notice in a newspaper of general circulation where New Mexico-American provides utility service.

On March 8, 2002, an Affidavit of Publication was filed reflecting that the Notice issued with the Procedural Order was published in the Albuquerque Journal on March 6, 2002.

On March 8, 2002, an Affidavit of Publication was filed reflecting that the Notice issued with the Procedural Order was also published in the Clovis News Journal on March 7, 2002.

There were no interventions in this case.

Applicants filed the direct testimonies of Michael Carmedy ("Carmedy") and David P. Stephenson ("Stephenson") with their Application.

On March 12, 2002, Applicants filed its General Diversification Plan pursuant to Commission Rule 450.

Staff filed the prepared direct testimony of Jose R. Martinez II on April 15, 2002. No rebuttal testimony was filed.

A public hearing was commenced on May 29, 2002 at 10 o'clock a.m. at the Commission's offices and concluded on that same day.

APPEARANCES:

For the Applicants

Richard B. Cole, Esq., Keleher & McLeod, P.A., attorneys for Thames Water Aqua Holdings GmbH.

Thomas W. Olson, Esq., Montgomery & Andrews, P.A., attorneys for New Mexico-American Water Company, Inc.

For Staff

Joan T. Ellis, Esq.

At the hearing, the Direct Testimonies of Carmedy and Stephenson were admitted into evidence and the witnesses were subject to cross-examination. The direct testimony of Staff witness Martinez was admitted into evidence, being adopted by Staff witness Anthony Sisneros, Economist. At the end of the hearing, the Hearing Examiner requested that a Proposed Recommended Decision of the Hearing Examiner be submitted on behalf of the Applicants and Staff. On July 17, 2002, the Hearing Examiner submitted his proposed Recommended Decision to the parties.

DISCUSSION

A. The Transaction

Applicants, NMA and Thames Holdings on its behalf and on behalf of its parent holding company, RWE, have requested that the Commission approve the acquisition and merger described in its Agreement and Plan of Merger ("**Agreement**") dated September 16, 2001.

That Agreement is by and among RWE, Thames Holdings, Apollo Acquisition Company ("Acquisition Corp"), a Delaware corporation and wholly-owned subsidiary of Thames Holdings, which was created for the purpose of implementing the agreement, and American, a corporation of the State of Delaware. The Agreement provides that Acquisition Corp. shall be merged with and into American, the parent of NM-A. American shall be the surviving corporation and shall continue its corporate existence under Delaware law. NM-A is the utility providing service within New Mexico subject to the jurisdiction of the Commission, and it will remain a subsidiary of American. The Applicants have indicated that the transaction contemplated by the Agreement will not cause any changes in NM-A.

NM-A is a corporation organized under the laws of the State of New Mexico and has its principal office in Clovis, New Mexico. It is a regulated public utility organized and operating under the laws of the State of New Mexico (NMSA 1978 §62-1-2 *et seq.*) and is engaged in the business of distributing water to the public in Clovis, New Mexico, and nearby areas. Recently, on June 25, 2002, in NMPRC Case No. 3669 the Commission approved NM-A's acquisition of Edgewood Water, Inc.

Thames Water Plc ("**Thames**") is a public limited corporation organized under the laws of England and Wales with its principal office located at 14 Cavendish Place, London, United Kingdom. It operates the water business of Thames Holdings and brings to Thames Holdings its extensive experience and expertise as the largest water and wastewater company in the United Kingdom and is one of the largest water and wastewater companies in the world, providing water-related services to over 43 million people world-wide.

Thames Holdings, with its offices located at 1101 Laurel Oak Road, Voorhees, New Jersey, is a company organized under the laws of the Federal Republic of Germany and is a wholly-owned subsidiary of RWE.

RWE is a German holding company and is its fifth largest industrial group. It is organized into four major core businesses: electricity, water services, gas, and waste management services.

Under the terms of the Agreement, American will become a wholly-owned subsidiary of Thames Holdings which, in turn, is a wholly-owned subsidiary of RWE. NM-A is not a party to the Agreement or to any transaction contemplated by the Agreement. The Applicants stated that the transaction contemplated by the Agreement

will cause no change in NM-A. NM-A will not issue, assume or guarantee any securities in connection with the Agreement, nor will it sell, transfer or otherwise dispose of its stock or its plant, property or other assets, or purchase or otherwise acquire any securities, plant, property or other assets in connection with the Agreement. NM-A, says the Applicants, will continue to be a subsidiary of American and will continue to exist as a New Mexico public utility corporation subject to the jurisdiction and regulation of the Commission. None of the outstanding debt that is owed and recorded as liabilities on the books of NM-A will be affected by the Agreement. All of its outstanding debt will continue to be liabilities and obligations of NM-A.

The Agreement provides that each issued and outstanding share of Common Stock, par value \$1.25 per share, of American ("**American Common Stock**") not owned by Thames Holdings, Acquisition Corporation or American, other than shares owned by any holder who invokes appraisal rights under Delaware law, shall be converted into the right to receive cash consideration of \$46.00 per share.

As of September 30, 2001, the authorized capital stock of American consisted of (i) 300,000,000 shares of American Common Stock, (ii) 1,770,000 shares of Cumulative Preferred Stock, par value \$25.00 per share (the "**Preferred Stock**"), (iii) 750,000 shares of Cumulative Preference Stock, par value \$25.00 per share (the "Preference Stock"), and (iv) 3,000,000 shares of Cumulative Preferential Stock, par value \$35.00 per share (the "**Preferential Stock**").

As of September 30, 2001, 99,971,542 shares of American Common Stock (excluding shares held by American as treasury shares), 101,777 shares of the Preferred Stock, 365,158 shares of the Preference Stock and no shares of the

Preferential Stock were issued and outstanding. The Agreement requires American to redeem, prior to the closing of the transaction, each outstanding share of the Preferred Stock at a redemption price of \$25.25 per share, plus full cumulative dividends thereon, and each outstanding share of the Preference Stock at a redemption price of \$25.00 per share, plus full cumulative dividends thereon. The Agreement also provides that, at the time of the closing of the transaction, each share of American Common Stock owned by Thames Holdings, Acquisition Corp. or American shall automatically be cancelled and cease to exist and no consideration shall be delivered in exchange therefore. The cost of acquiring American to RWE is approximately \$4.6 billion dollars.

B. Jurisdiction and Regulatory Approvals

(i) **Approval Pursuant to NMSA § 62-6-13**

The Application requests authorization and approval, pursuant to NMSA 1978, §62-6-12(a)(2) and (3) and §62-6-13, allowing Thames Holdings to acquire the outstanding common stock of American, and allowing American to merge with Apollo Acquisition Company, with American being the surviving corporation.

Pursuant to NMSA 1978, § 62-6-13, the Commission shall give its consent and approval in writing to the transaction unless the Commission finds "that the proposed transaction[s] [are] unlawful or inconsistent with the public interest." In applying the statutory test in the context of a proposed merger, the Commission has previously determined:

Under the facts of this proceeding, a "no net detriment" test as previously utilized by the Commission does not mandate either approval or rejection of SPS' Application. The outcome depends on how the Commission weights the quantifiable and unquantifiable benefits against mostly unquantifiable detriments. By their very nature, unquantifiable benefits and costs are not

subject to a dollar valuation but, nevertheless, are every bit as important, or more so, as quantifiable benefits and costs. Because a "no net detriment" test can be misinterpreted to mean that all costs and benefits are somehow quantifiable, or that unquantifiable benefits outweigh unquantifiable detriments, the Commission should no longer use this phrase in describing its statutory mandate in approving mergers. Rather, the Commission should state that the test is whether the public interest is served by approving the merger as determined by the specific facts and circumstances of each case. Generally, the complexities of mergers should require a positive benefit to ratepayers if they are to be approved.

Corrected Recommended Decision of the Hearing Examiner 22, *In the Matter of the Application of Southwestern Public Service Co.*, Utility Case No. 2678 (Nov. 15, 1996); *adopted by* Final Order Approving Recommended Decision (Jan. 28, 1997).

The Applicants have satisfied the statutory standard, as construed by the Commission, in providing the following testimony:

NM-A will continue to operate under its existing tariffs and rates until changed by the Commission, and the transaction will cause no adverse changes in the balance sheet or financial position of NM-A.

The transaction will cause no changes in local staffing, based on current estimates, of NM-A or its day-to-day operations. The transaction will result in no adverse impact on NM-A's customer service.

The association of Thames Holdings and American will benefit customers and employees of NM-A and will promote the public interest by combining resources and expertise to create opportunities for sharing best operating practices.

The transaction will permit NM-A to utilize Thames' experience and expertise in safeguarding its water systems. Thames, with water operations around the globe, has

considerable experience in operating water facilities and systems in regions where security concerns have been a fact of life for some time. NM-A, and ultimately its customers and employees, will significantly benefit from the sharing of Thames' extensive experience in developing and implementing comprehensive security measures to protect its customers throughout the world.

The need to obtain additional ground water rights, to replace depleting water wells and meet future growth to environmental standards has created substantial demands for capital investment by NM-A. Although American has been successful in raising needed funds (and will still have that ability after the merger), the financial resources and backing of RWE/Thames will enhance and provide security to NM-A's access to capital markets. Enhanced access to capital markets at reasonable costs will be a benefit to NM-A and its customers. Enhanced access to capital will increase NM-A's ability to acquire additional water systems and water rights, replace depleted wells, and implement new technology.

The association with Thames will further enhance American and its subsidiaries' strong environmental track records. The transaction enhances NM-A's ability to respond to environmental challenges. Backed by RWE's annual research and development budget, Thames is conducting several programs in the area of renewable energy. Such programs include the use of solar power, fuel cell technology, wind power and local heat and power generating systems which offer the potential for ameliorating the continuing increase in the cost of electricity used in the distribution and treatment of water. The goal of Thames and American is to facilitate new and expanded environmentally friendly programs that will benefit NM-A and its customers.

The transaction will allow a sharing of research and development between American and Thames. American is recognized as an industry leader in the identification and detection of pathogenic organisms, cryptosporidium being a prime example. Thames enjoys a comparable reputation in the area of water quality monitoring and treatment. The combination of these research and development capabilities offers potential benefits to the customers of New Mexico-American.

The transaction contemplated by the Agreement will have no adverse impact on the employees of NM-A. The transaction is predicated on growth in earnings through achieving accelerated business development. Further, no overlap exists between Thames' current U.S. operations and NM-A's operations. The transaction will not cause changes in local staffing or compensation, and the value of employee benefits will not be reduced. Based on best current estimates, the day-to-day operations and management of NM-A are not expected to change as a result of this transaction.

The transaction will benefit NM-A's employees by providing increased opportunities for training and career development. Like American, Thames firmly believes in equipping its employees with the skills and tools needed to perform at the highest possible level.

The transaction will result in no adverse changes in NM-A's policies with respect to service to customers, employees, operations, financing, accounting, capitalization, rates, depreciation, maintenance, or other matters affecting the public interest or utility operations.

The transaction will not impair NM-A's ability to raise necessary capital on reasonable terms or to maintain a reasonable capital structure.

NM-A will remain subject to all applicable laws, regulations, rules, decisions and policies governing the regulation of New Mexico public utilities.

The transaction will have no adverse impact on existing NM-A rates. NM-A will continue to operate under its existing tariffs and rate structures (until such time as such tariffs and rate structures are revised in accordance with New Mexico law). This transaction will cause no changes in the balance sheet or financial position of NM-A.

American has a long history of service in the communities where it operates. The philosophy of corporate responsibility to the communities served resides at the core of the RWE, Thames, and American cultures, and this philosophy will continue.

The Applicants have thus identified a number of benefits likely to accrue to NM-A and its customers from the proposed transaction, and Staff did not dispute any of them. On the other hand, the record reflects no detriments, quantifiable or unquantifiable, attributable to the proposed transaction. The proposed transactions are, therefore, in all respects, lawful, and consistent with the public interest.

(ii) **Authorization required by NMSA §62-3-3(K), and Commission Rule 450.7 (Class II transactions).**

The Applicants have also requested authorizations by the Commission required by NMSA 1978, Section 62-3-3(K) and Commission Rule 450.7 for approval of a GDP for NM-A. Section 62-3-3K(I) defines a Class II transaction to include formation of public utility holding company by a public utility or its affiliated interest. NMPRC Rule 450 requires a public utility to obtain prior Commission approval before engaging a Class II transaction. The proposed Merger will result in the formation of a public utility holding company which is a Class II transaction requiring prior Commission approval. Rule 450, enacted pursuant to Section 62-6-19 of the PUA, contains provisions

regarding the Commission's review and approval of NM-A's GDP, i.e. in Section 450.7(b) & (c).

As a preface to this discussion, it is helpful to note the complexity of the transaction and the large number of affiliates and subsidiaries that are involved in this merger. For example, the GDP filed in this docket on March 12, 2002, shows that the holding companies involved in this transaction control over 850 national and international subsidiaries, not including joint ventures. NM-A, the local utility subject to the Commission's jurisdiction, is a substantially-owned subsidiary of American. American is a holding company with over 41 subsidiary utility operations throughout the United States. American is being purchased by Applicant Thames Aqua Water Holdings GmbH, which is also a holding company. Thames Holdings, through its subsidiary, Thames Water Plc, has over 41 subsidiaries throughout the world, including joint ventures. It is the third largest water business in the world and is a subsidiary of RWE AG. RWE is a German holding company and is its fifth largest industrial group. RWE's major core businesses include electricity, water services, gas and waste management services. Those core businesses, in turn, have over seventy-one first-tier subsidiaries. As of June 30, 2001, RWE had 850 fully consolidated subsidiaries for accounting purposes, and 246 other subsidiaries using the equity method of accounting.

As can be seen by the above, RWE, Thames Holdings, and American all have complex corporate structures. Notwithstanding this complex structure, the NM-A produced, as supplemented at the hearing, a GDP to accommodate NM-A's proposed attachment with such large and complex affiliates.

The Commission hereby adopts the following definitions concerning this transaction as regards the applicability of §62-3-3(K)(1).

NM-A is a "utility" as that term is defined in NMSA § 62-3-3(G)(3). American is a "public utility holding company" as that term is defined in NMSA § 62-3-3(M). It is also an "affiliated interest" as that term is defined in NMSA § 62-3-3(A). RWE and Thames Holdings are each a "public utility holding company" as that term is defined in NMSA § 62-3-3(M), and an "affiliated interest" as that term is defined in NMSA § 52-3-3(A). Thames Water Plc is an "affiliated interest" as that term is defined in NMSA § 62-3-3(A) and a "public utility holding company" as that term is defined in NMSA § 62-3-3(M). Thames Water Plc's subsidiaries are "affiliated interests" as that term is defined in NMSA § 62-3-3(A). American's subsidiaries are "affiliated interests" as that term is defined in NMSA § 62-3-3(A).

In adopting these definitions, the Commission does not determine, nor does it waive, however, its right to determine in the future, whether or not the holding companies are public utilities pursuant to the New Mexico Public Utility Act. The Commission has previously held that a holding company could be a public utility under New Mexico law. Specifically, the Commission stated:

We find, however, that nothing in the Public Utility Act precludes our finding that a specific holding company is a public utility. Because the approval of PNM's holding company is subject to the terms and conditions we find are in the public interest, and because the interests of ratepayers and PNM's ability to provide them adequate service at reasonable rates are consequently protected, we need not determine whether the holding company is a public utility. Absent the continued applicability of the required terms and conditions, whether due to PNM's non-compliance with them or for some other reason, we would find it necessary to decide whether PNMR is a public utility. Order

Approving Formation of a Holding Company, NMPRC Case
No. 3137, p.13.

This transaction properly requires the filing and approval of a GDP. The Applicants have also requested approval in the GDP of two additional transactions, namely, the Edgewood Transaction and the Cash Sweep Transaction.

The Edgewood Transaction is NM-A's proposed acquisition of the stock of Edgewood Water Inc., a water utility serving the community of Edgewood, New Mexico, followed by the merger of Edgewood into NM-A. NM-A and Edgewood applied to the Commission for all authorizations, approvals and consents necessary to complete the Edgewood Transaction, and the request has recently been approved by the Commission in NMPRC Case No. 3669. Upon approval of that transaction by the Commission, NM-A will merge Edgewood into NM-A within a short time after it has acquired the stock of Edgewood. As a result, for the period that NM-A owns the stock of Edgewood, NM-A will be a public utility holding company and the acquisition may thus be a Class II transaction. The Edgewood Transaction has been thoroughly reviewed in Case 3669 and the GDP filed in this proceeding should be approved for both this transaction as well as that transaction.

The Cash Sweep Transaction involves a Financial Services Agreement filed by NM-A with the Commission as part of its Class I Transaction notification on June 30, 2000. The GDP requests its approval as a Class II transaction.

This Financial Services Agreement between NM-A and American provides for a pooling of the financial services requirements of all of American's utility subsidiaries. American is able to access short and long-term debt capital more efficiently and at more favorable rates and terms and conditions, and obtain more favorable rates on short-term

cash deposits than could the individual utility subsidiaries, like NM-A. The Cash Sweep transaction is fully set forth in Applicant's GDP and the GDP states that because the term "Securities" is broadly defined by the Public Utility Act, NMSA 1978, § 62-3-3(F), and may include any evidence of indebtedness, the short-term cash deposits by NM-A with American, even though they do not represent owner interests in American or any other person, may arguably represent Class II transactions. For this reason NM-A has requested approval of the Cash Sweep Agreement to allow it to participate pursuant to the terms of that Agreement upon its approval as a Class II transaction. The Cash Sweep transaction should be approved as a Class II transaction as described in the GDP. Reporting of any transactions thereunder shall be done in the Class I report.

In order to approve a proposed Class II transaction pursuant to Rule 450.7, the Commission must determine that: (1) the transaction is in the public interest which occurs if the level of the public utility's investment appears reasonable, and it appears that the public utility's ability to provide reasonable and proper service at fair, just, and reasonable rates will not be adversely and materially affected by the proposed transaction and its resulting effect; and (2) the public utility has provided satisfactory representations that: (a) the books and records of the public utility and its affiliated interests will be separately maintained; (b) the Commission will have access to the books and records of the public utility's affiliated interest(s); (c) the diversified transaction will not obstruct, hinder, impair, or unduly complicate the Commission's supervision and regulation of the public utility; (d) for the formation of a holding company, the public utility will not pay excessive dividends to the holding company, and the holding company will take no action that will have an adverse and material effect on

the public utility's service and rates; (e) the public utility will obtain prior approval for each investment in an affiliated interest, and (f) the public utility will agree to conduct a management audit and/or allocation study, at the utility's expense, and the audit/allocation study will be conducted by a consultant selected and directed by the Commission.

C. Discussion

At the hearing, Applicant, Thames Holdings and RWE witness, Michael Carmedy, discussed the numerous aspects of this complex transaction that made it impossible in many instances to provide information on the numerous holding companies and affiliates. Mr. Carmedy explained that some of the information requested under Rule 450.7 for all the affiliates of the utility that may be readily available for less complex transactions was not readily available in this transaction. As a result, a variance for certain information under 450.7 (b)(1), (5) and (7) should be granted. This variance is conditioned on the fact that if the Commission requests more information on NM-A's affiliates, RWE would comply. Mr. Carmedy did agree that the Applicant, Thames Holdings, would provide some additional information that would assist the Commission to monitor the activities envisioned under Rule 450. That additional information is as follows:

(i) NM-A agrees to furnish to the Commission and Commission Staff a notice of NM-A's declaration to pay a dividend to American with respect to NM-A's common stock. Such notice will be provided at least fifteen (15) days prior to the payment date for such dividend, and shall include (1) the amount of the dividend in dollars; (2) the cumulative amount of the dividend for the calendar year; and (3)

information showing the net income and pay-out ratio for the prior two calendar years for NM-A.

In the event the payout exceeds 75% of the net income available for dividends in a fiscal year, NM-A shall also explain the basis for that decision in the notice provided for above.

(ii) In its annual report to the Commission, NM-A will not only provide the end of year capital structure of NM-A, but will advise the Commission if NM-A's capital structure has deviated more than 5%, in that year, from the capitalization ratios shown in Exhibit 7 of the filed GDP, along with an explanation as to the reason for the change in the actual capitalization ratios in that year from the pro forma projection.

(iii) In its annual report, NM-A will provide to the Commission the name, home office address, and chief executive officer of RWE, Thames Holdings, and American. Further, NM-A will provide a current balance sheet for American, and the most current annual report for RWE.

The Commission finds, based on the conditions of this Recommended Decision, that granting the approvals requested by the Applicants is in the public interest.

The Hearing Examiner recommends that the Commission finds and concludes:

(1) The Statement of the Case and Discussion, and all findings and conclusions contained therein, are hereby incorporated by reference as a finding and conclusion.

(2) NM-A is a public utility defined in the Public Utility Act, NMSA 1978, §62-3-1, *et seq.*

(3) The Commission has jurisdiction over NM-A and the subject matter of the case.

(4) Due and adequate notice of this case has been provided.

(5) On December 20, 2001, the Applicants applied to the Commission for an Order approving the purchase of stock and the merger as set forth in the Application; and authorizing Thames Holdings, RWE, and any other entity owned or controlled, directly or indirectly, by Thames Holdings and managed by Thames to acquire control of American.

(6) The Application and Merger Agreement is in the public interest and should be approved.

(7) The Merger, as described in the Agreement, is not unlawful and is not inconsistent with the public interest.

(8) Subject to the conditions of this Order, Applicants' GDP, including its testimony and Staff's testimony regarding the GDP, indicates that Applicants have complied with NMSA 1978, §62-6-19, and Commission Rule 450, and has demonstrated that the proposed Class II transactions will not materially and adversely affect NM-A's ability to provide reasonable and proper utility service to its New Mexico customers at fair, just and reasonable rates.

(9) Pursuant to Commission Rule 450, the Applicants have made the required representations concerning the Commission's oversight of transactions with affiliated interest.

(10) Pursuant to Commission Rule 450.7(C), NM-A will not without the prior approval of the Commission:

(a) loan its funds or securities or transfer similar assets to any affiliated interest; or

(b) purchase debt instruments of any affiliated interest or guarantee or assume liabilities of such affiliated interest.

(11) Pursuant to Commission Rule 450.7(c), if and when required by the Commission, NM-A will have an allocation study (which will not be charged to rate payers) performed by a consulting firm chosen by and under the direction of the Commission.

(12) Pursuant to Commission Rule 450.7(C), if and when required by the Commission, NM-A will have a management audit (which will not be charged to rate payers), performed by a consulting firm chosen by and under the direction of the Commission, to determine whether there are any adverse effects from the approval of Class II transactions upon NM-A.

(13) Pursuant to Rule 450.7(c), the books and records of NM-A shall be kept separate from American or any of its affiliates.

(14) Pursuant to Rule 450.7(c), the Commission and its Staff shall have access to the books, records, accounts or documents of the affiliate, corporate subsidiary or holding company participating in a Class I or Class II transaction with NM-A.

(15) As described herein, NM-A should be granted a variance for certain information regarding its affiliates required by NMPRC Rule 450.7(b)(1), (5) and (7).

(16) The application for a GDP by NM-A satisfies the criteria for a finding by the Commission that its approval is in the public interest.

(17) Approval of NM-A, RWE and Thames Holdings' Application is conditioned on the following:

(i) NM-A shall furnish to the Commission, and the Commission Staff, a notice of NM-A's declaration to pay a dividend to American with respect to NM-A's common stock. Such notice will be provided at least fifteen (15) days prior to the payment date for such dividend, and shall include (1) the amount of the dividend in dollars; (2) the cumulative amount of the dividend for the [fiscal] year, and (3) information showing the net income and pay-out ratio for the prior two [fiscal] years for NM-A. In the event the payout exceeds 75% of the net income in a fiscal year, NM-A shall also explain the basis for that decision in the notice provided for above. The record in this case reflects that American's current dividend policy is to receive 75% of the net income in the fiscal year from its subsidiaries. RWE, Thames Holdings and American all agreed that this was a reasonable dividend policy.

(ii) If notified by the Commission within fifteen (15) days of NM-A's dividend notification described in paragraph (i) above that the Commission intends to further review or investigate a proposed dividend payment, NM-A will suspend payment of any dividend over 75% of the net income in the fiscal year pending Commission authorization provided that the Commission's notification may require suspension of a different amount.

(iii) In its annual report to the Commission, NM-A will not only provide the end of year capital structure of NM-A, but will advise the Commission if NM-A's capital structure has deviated more than 5% in that year, from the capitalization

ratios shown in Exhibit 7 of the filed GDP, along with an explanation as to the reason for the change in the actual capitalization ratios in that year from the pro forma projection.

(iv) In its annual report, NM-A will provide to the Commission the name, home office address, and chief executive officer of RWE, Thames Holdings, and American. Further, NM-A will provide a current balance sheet for American, and the most current annual report for RWE.

(v) If required by the Commission, RWE and NM-A will fully comply with NMPRC 450.7(b)(1), (5) & (7).

(vi) RWE, Thames Holdings, American, and NM-A will not assert in any Commission proceeding that Commission review of the reasonableness of any cost has been or is preempted by the government (including any regulatory body) of the United Kingdom, Federal Republic of Germany, European Community, or other foreign government.

(vii) RWE, Thames Holdings, American and NM-A will not assert in any judicial or administrative proceeding that the Commission lacks jurisdiction over NM-A's New Mexico utility operations.

(viii) NM-A shall not incur, directly or indirectly, any costs, liabilities, or obligations in conjunction with RWE's acquisition of American.

(ix) Any premium or acquisition adjustment that RWE pays for acquiring American shall not be assessed, directly or indirectly, to NM-A and will not be recovered from NM-A's ratepayers.

(x) RWE, Thames Holdings, American and NM-A will notify the Commission in writing within 30 days of any downgrading of the bonds of RWE,

Thames Holdings, or any American subsidiary and will include with such notice the complete report of the issuing bonding agency.

18. In approving this Application, the Commission relied upon the following representations made by RWE, Thames Holdings and NM-A. But for these representations, the Commission would find that the Application is inconsistent with the public interest and would not approve it:

(a) NM-A will continue to operate under its existing tariffs and rates until changed by the Commission, and the transaction will cause no adverse changes in the balance sheet or financial position of NM-A;

(b) The transaction will cause no changes in local staffing, based on current estimates, of NM-A or its day-to-day operations. The transaction will result in no adverse impact on NM-A's customer service;

(c) The transaction will have no adverse impact on the employees of NM-A and the transaction will not cause changes in local staffing or compensation and the value of employee benefits will not be reduced and the day-to-day operations and management of NM-A will not change;

(d) The transaction will result in no changes in NM-A's policies with respect to service to customers, employees, operations, financing, accounting, capitalization, rates, depreciation, maintenance, or other matters affecting the public interest or utility operations;

(e) The transaction will not impair NM-A's ability to raise necessary capital on reasonable terms or to maintain a reasonable capital structure;

(f) NM-A will remain subject to all applicable laws, regulations, rules, decisions and policies governing the regulation of New Mexico's public utilities;

(g) The transaction will have no adverse impact on existing NM-A rates. NM-A will continue to operate under its existing tariffs and rate structures (until such time as such tariffs and rate structures are revised in accordance with New Mexico law). This transaction will cause no changes in the balance sheet or financial position of NM-A.

The Hearing Examiner recommends that the Commission Order:

A. The Application requesting approval for the purchase of stock and the Merger is approved subject to the terms and conditions of this Final Order.

B. The Application to authorize Thames Holdings, RWE, and any other entity owned or controlled, directly or indirectly, by Thames Holdings and managed by Thames to acquire control of American, is granted and approved.

C. NM-A is a public utility, as defined by the PUA and subject to the jurisdiction of the Commission.

D. NM-A's GDP is approved subject to the terms and conditions of this Final Order.

E. As described herein, NM-A is granted a variance for certain information regarding its affiliates required by NMPRC Rule 450.7(b)(1), (5) and (7).

F. Any outstanding matter not specifically ruled on is disposed of consistent with this final order.

G. This Order shall constitute appropriate evidence and the only evidence required for these approvals and for approval of the GDP.

H. Approval of this Application is conditioned upon the filing within 15 days of this Final Order of an affidavit by appropriate company officials of RWE and Thames Holdings, American and NM-A indicating their respective acceptance of the conditions herein.

I. This Order is effective immediately.

J. Copies of this Order shall be mailed to all persons on the attached Certificate of Service.

K. This docket is closed.

ISSUED at Santa Fe, New Mexico this **22nd** day of July, 2002.

NEW MEXICO PUBLIC REGULATION COMMISSION



WILLIAM J. HERRMANN
Hearing Examiner

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE ACQUISITION OF)
AMERICAN WATER WORKS COMPANY, INC.)
("AMERICAN") BY THAMES WATER AQUA)
HOLDINGS GmbH ("THAMES HOLDINGS"),)

Utility Case No. 3712

NEW MEXICO-AMERICAN WATER COMPANY,)
INC. ("NEW MEXICO-AMERICAN") AND THAMES)
HOLDINGS,)

Applicants.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Recommended Decision of the Hearing Examiner, issued July 22, 2002, was mailed First Class, postage prepaid, to each of the following:

Richard B. Cole, Esq.
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and-hand-delivered to:

Roy Stephenson, Staff Counsel
NM Public Regulation Commission
224 East Palace Avenue
Santa Fe, NM 87501

DATED this 22nd day of July, 2002.

NEW MEXICO PUBLIC REGULATION COMMISSION



ELIZABETH SAIZ, Law Clerk