

**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 )**  
**AKTIENGELLSCHAFT, THAMES WATER )**  
**AQUA US HOLDINGS, INC., AND AMERICAN ) CASE NO. 2006-00197**  
**WATER WORKS COMPANY, INC. FOR )**  
**APPROVAL OF A CHANGE IN CONTROL OF )**  
**KENTUCKY-AMERICAN WATER COMPANY )**

**JOINT PETITIONERS' MEMORANDUM IN  
RESPONSE TO THE COMMISSION'S ORDER OF JUNE 19**

Come RWE Aktiengesellschaft (“RWE”); Thames Water Aqua Holdings GmbH (“Thames GmbH”); Thames Water Aqua US Holdings, Inc. (“TWAUSHI”); American Water Works Company, Inc. (“American Water”); and Kentucky American Water Company (“KAWC”) (collectively, “Joint Petitioners”), and file their Memorandum in Response to the Commission’s Order of June 19, 2006.

**INTRODUCTION**

On June 5, 2006, Joint Petitioners filed their Petition (“Petition”) pursuant to KRS 278.020, and all other applicable statutory and regulatory authority, requesting Commission approval of the transfer of control of KAWC. Although the two transactions at issue appear complex, the result will be that American Water, rather than RWE, will be the ultimate parent of KAWC after RWE has sold its shares of American Water in an initial public offering (“IPO”) or subsequent public offerings as may be necessary.

The Commission's Order of June 19, 2006 directed the parties to file, by June 26, 2006, written memoranda addressing the issue of whether KRS 278.020(5) and/or KRS 278.020(6) apply to this case. The Commission did not, in its June 19 Order, specify its reasons for doubting that both statutory subsections apply. Because these statutory subsections should not be read independently from each other, particularly given the facts in this case, Joint Petitioners urge the Commission to conclude that both subsections apply and to conduct these proceedings accordingly.

### ARGUMENT

**I. KRS 278.020(5) AND (6) MUST BE CONSTRUED TOGETHER BECAUSE THEY SHARE A COMMON PURPOSE, COMPLEMENT EACH OTHER AND BECAUSE SUCH CONSTRUCTION IS CONSISTENT WITH COMMISSION PRECEDENT.**

KRS 446.080 (1) states, in pertinent part, that “[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature.” The overriding objective of the two statutory subsections at issue here could not be clearer: the General Assembly intended the Public Service Commission to investigate any proposed transfer of control of a utility, hold any necessary hearings, and approve or disapprove the transfer based on findings meant to ensure the continued viability of utility service to Kentucky citizens.

Statutes having a common purpose or subject matter must be construed together. In *Nichols v. Rogers*, 166 S.W.2d 867 (Ky. 1942), for example, the Court held that two statutes, one requiring the fiscal court to publish the county's financial statement annually, and the other requiring county officers charged with collection of county funds to publish the county's financial statement in the newspaper having the largest circulation

in the county at the end of the fiscal year, must be read together to require the fiscal court and county treasurer, together, to publish the statement in the newspaper having the largest circulation in the county.

Here, as in *Nichols*, the statutory provisions in question clearly share a common purpose and a common subject matter. KRS 278.020(5) governs transfers of control of utilities as follows:

No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical and managerial abilities to provide reasonable service.

KRS 278.020(6) then resumes the description of the change of control process where subsection (5) leaves off by repeating some provisions and adding others, including additional statutory standards for approval and the establishment of procedures under which the proposed transaction is to be considered.

While subsection (5) requires a “person”<sup>1</sup> to obtain Commission approval of a change of control, subsection (6) goes on to specify that a “group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity” must also obtain commission approval prior to acquiring control. Subsection (6) states (and subsection (5) does not) that “indirect” change of control is also subject to Commission approval. Subsection (6) provides that change of “control” without prior authorization is “void and of no effect,” whereas subsection (5) is silent on that issue. Subsection (6) presumes “control” as ownership of 10% or more of the voting securities

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<sup>1</sup> “Person” is defined at KRS 278.010(2).

of the utility, whereas subsection (5) is silent on that issue as well.<sup>2</sup> Subsection (6) provides for findings by the Commission with regard to whether a transfer of control is “in accordance with law, for a proper purpose and consistent with the public interest.” It provides for investigation and hearings. It provides for a sixty day review period and for a sixty day continuance if necessary. In short, it supplements the very terse, and incomplete, subsection (5).

Subsection (5), read in isolation, provides neither a procedural guidance nor a remedy for failure to obtain prior approval. Nor does it permit the Commission to conduct a “public interest” analysis beyond the basic determinations that the acquirer possesses the “financial, technical, and managerial abilities to provide reasonable service.”

The Commission’s Order points out the absence of a statutory deadline if subsection (6) does not apply. Additionally, if subsection (6) does not apply, the Commission may be precluded from examining broad public interest questions, conducting an “investigation” or holding a hearing. Similarly, if subsection (6) *does* apply and while subsection (5) does *not*, the Commission may be precluded from considering whether American Water continues to have the “financial, technical, and managerial abilities to provide reasonable service.” After all, these key terms -- integral terms in the context of a utility change of control statute -- do not appear in subsection (6).

Pursuant to KRS 446.080 and applicable case law concerning statutory construction, the better interpretation of these statutory subsections is to construe them together – to conclude that, where one applies, both apply. It is hornbook law that

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<sup>2</sup> “Control” is defined at KRS 278.010(19).

“statutes having a common purpose or subject matter must be construed together.” *Commonwealth v. O’Bryan*, 97 S.W.3d 454, 456 (Ky. App. 2003). In *O’Bryan*, the appellate court rejected a parsed reading of statutory subsections dealing with victim restitution when, although one subsection required a court order of restitution, another subsection of the same statute specified that, if the person to pay restitution were incarcerated, restitution would be a condition of parole. In rejecting the trial court’s determination that the subsection dealing with parole deprived it of authority to order restitution, the *O’Bryan* court held that the legislature had clearly intended an order of restitution and that the subsections of the statute must be read together to prevent an absurd result.

Here, as in *O’Bryan*, the statutory subsections deal with the same subject matter and have a common purpose: ensuring Commission review and approval prior to any transfer of control of a utility. Surely no one would contend that, because the Commission’s authority to “investigate” a transfer of control appears only in subsection (6), a transfer of control subject only to subsection (5) should include no investigation. Surely no one would contend that, because the Commission’s authority to make findings as to “financial, technical and managerial abilities to provide reasonable service” appears only in subsection (5), a transfer of control subject only to subsection (6) should include no findings on these vital questions. Separating the provisions of these two subsections thwarts the legislative intent of ensuring thorough governmental oversight when control of utility service is proposed to be transferred.

The vast majority of Commission “change of control” cases do, in fact, involve full analysis and procedures based on both subsections. For example, in the recent

*Application for Approval of the Transfer of Control of Alltel Kentucky, Inc. and Kentucky Alltel, Inc.*, Docket No. 2005-00534 (Ky. PSC May 23, 2006), the Commission applied both KRS 278.020(5) and (6) to a transaction involving, among other things, transfer of two of Kentucky's incumbent telecommunications utilities to a new subsidiary, ownership of which was transferred to the parent corporation's shareholders. Ultimately, the new subsidiary was merged into Valor Communications Group. The Commission approved the transactions based on findings specified by both change of control subsections. That precedent and similar precedents should be followed here.

**II. BOTH SUBSECTIONS MUST BE APPLIED TO EFFECTUATE THE GENERAL ASSEMBLY'S INTENT THAT TRANSFERS OF CONTROL SHOULD BE SUBJECT TO FULL COMMISSION REVIEW.**

As explained above, KRS 446.080 requires liberal construction of Kentucky's statutes to promote their objects and to effectuate legislative intent. Kentucky law disfavors narrow, word-by-word parsing of statutes if such parsing will thwart legislative goals. *See County of Harlan v. Appalachian Regional Health Care*, 85 S.W.3d 607, 611 (Ky. 2002) ("No single word or sentence is determinative, but the statute as a whole must be considered . . . . In order to effectuate the legislative intent, words may be supplied, omitted, substituted or modified. The purpose is to give effect to the intent of the legislature.").

Joint Petitioners filed this proceeding despite the fact that neither subsection (5) nor (6) literally addresses the specific proposal before the Commission: a divestiture of stock by the ultimate corporate parent (RWE) that will leave the current parent (American Water) in essentially the same relation to the utility that existed prior to the divestiture. For the same reason that the statutory sections should not be narrowly read

so as to defeat Commission jurisdiction, they should not be narrowly read so as to find one subsection, but not the other, applicable in this case. The better reading of the subsections is that both apply so that the intent of the General Assembly to ensure thorough review through investigation and hearings is effectuated.

It is true that, in some previous change of control cases, the Commission has determined that, while subsection (5) applies, subsection (6) does not, due to the exemption provided in subsection (7)(b). Subsection (7)(b) exempts a change of control case from Commission jurisdiction when the utility will be acquired by “an acquirer who directly, or indirectly through one (1) or more intermediaries, controls, or is controlled by, or is under common control with, the utility . . . .” But here, any argument that subsection (7)(b) renders subsection (6) inapplicable because the “acquirer” of the utility currently “controls...or is under common control with, the utility” presupposes that the “acquirer” in this case is American Water. However, American Water is *already* the corporate parent of KAWC, and is thus not technically the “acquirer” of anything. American Water itself will *be* acquired in the sense that it will have new shareholders. Of course, the new shareholders will be warned of the consequences of acquiring sufficient shares to “control” American Water as regulated by subsection (6).

Kentucky law dictates that, particularly when there is as much ambiguity as exists here, the Commission must interpret statutes liberally to effectuate the General Assembly’s intent to ensure that Kentucky’s ratepayers are protected when a change in utility control is proposed. In this case, the Commission has already liberally construed the statute by declaring in its June 19 Order herein -- without reference to any specific wording in either subsection (5) or subsection (6) -- that the transaction proposed here

will “*effectively* result in change of control of KAWC.” (Emphasis added.) That same liberal construction should be used again to achieve legislative intent and to avoid an unintended result.

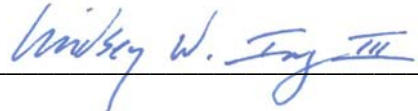
### **CONCLUSION**

In construing statutes, it is more important to effectuate the legislative intent than to parse every word -- particularly when, as here, two statutory subsections deal with the same subject matter yet are procedurally and substantively incomplete when read independently. The General Assembly clearly intended that the Commission conduct a full inquiry into a transaction with such broad public interest implications as this one, despite the absence of specific statutory wording applicable to initial public offerings or to divestiture above the utility parent company level. Accordingly, truncation of the process through narrow reading of the subsections is inappropriate. Instead, petitions such as the one that is before the Commission in this case clearly are meant to be fully reviewed pursuant to both subsection (5), with its specific prescription for examination of financial, technical, and managerial abilities, and subsection (6), with its procedures and discretionary public interest inquiry. For the foregoing reasons, Joint Petitioners respectfully request that the Commission enter an Order in this case finding that both KRS 278.020(5) and KRS 278.020(6) apply in this proceeding.



Respectfully submitted,

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**CERTIFICATION**

This is to certify that a true and accurate copy of the foregoing has been electronically transmitted to the Public Service Commission on June 26, 2006; that the Public Service Commission and other parties participating by electronic means have been notified of such electronic transmission; that, on June 27, 2006, the original and one (1) copy in paper medium will be hand-delivered to the Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; and that on June 26, 2006, one (1) copy in paper medium will be served upon the following via U.S. Mail:

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