

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE JOINT PETITION OF KENTUCKY-AMERICAN)
WATER COMPANY, THAMES WATER AQUA) Case No. 2006-00197
HOLDINGS GMBH, RWE AKTIENGESELLSCHAFT)
THAMES WATER AQUA US HOLDINGS, INC.,)
AND AMERICAN WATER WORKS COMPANY,)
INC. FOR APPROVAL OF A CHANGE IN CONTROL)
OF KENTUCKY-AMERICAN WATER COMPANY)

ATTORNEY GENERAL'S WRITTEN MEMORANDUM
ADDRESSING THE APPLICATION OF KRS 278.020

The Attorney General submits his Written Memorandum in response to the Commission's 19 June 2006 Order. The Commission has the power to review any change in control proposal for a jurisdictional utility. The underlying Application/Petition, falls within the scope of KRS 278.020(5). While the Initial Public Offering ("IPO") carries with it the potential of triggering KRS 278.020(6), there is presently no identifiable "acquirer" within the meaning of Subsection 6. Thus, Subsection 6 is not presently applicable.

MEMORANDUM OF LAW

The Commission's duty and power to review a proposal for a change in control of a jurisdictional utility is well-established. In *Public Service Commission v. Cities of Southgate, Highland Heights, et al.*, 268 S.W.2d 19 (Ky. 1954), Kentucky's highest court, while making an assessment of the non-statutory boundaries of the Commission's jurisdiction to review a change in control, held the following.

The Public Service Commission is charged with the responsibility, and vested with the power, to see that the service of public utilities is adequate, and where an existing utility proposes to sell its system the commission, in order to carry out its responsibility, must have the opportunity to determine whether the purchaser is ready, willing and able to continue providing adequate service.¹

The General Assembly currently marks the boundaries of the Commission's jurisdiction for changes in control through KRS 278.020 (5) and (6).

KRS 278.020 (5) states the following:

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.

Per the plain language of Subsection 5 that imposes a prior approval requirement on any person seeking to acquire or transfer ownership or control (including an abandonment), the underlying Application/Petition requires prior

¹ *Southgate*, 268 S.W.2d at 21.

approval by the Commission. The applicability of this Subsection to the Initial Public Offer proposal is clear.

KRS 278.020 (6) states the following:

No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission. Any acquisition of control without prior authorization shall be void and of no effect. As used in this subsection, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a utility, whether through the ownership of voting securities, by effecting a change in the composition of the board of directors, by contract or otherwise. Control shall be presumed to exist if any individual or entity, directly or indirectly, owns ten percent (10%) or more of the voting securities of the utility. This presumption may be rebutted by a showing that ownership does not in fact confer control. Application for any approval or authorization shall be made to the commission in writing, verified by oath or affirmation, and be in a form and contain the information as the commission requires. The commission shall approve any proposed acquisition when it finds that the same is to be made in accordance with law, for a proper purpose and is consistent with the public interest. The commission may make investigation and hold hearings in the matter as it deems necessary, and thereafter may grant any application under this subsection in whole or in part and with modification and upon terms and conditions as it deems necessary or appropriate. The commission shall grant, modify, refuse, or prescribe appropriate terms and conditions with respect to every such application within sixty (60) days after the filing of the application therefor, unless it is

necessary, for good cause shown, to continue the application for up to sixty (60) additional days. The order continuing the application shall state fully the facts that make continuance necessary. In the absence of that action within that period of time, any proposed acquisition shall be deemed to be approved.

Subsection 6 is applicable in many but not all situations in which Subsection 5 is applicable. The difference in their activation depends upon the existence or identification of an “acquirer.” For example, in the initial RWE transaction (Case Numbers 2002-00018 and 2002-00317), the identity of the “acquirer” was known. Therefore, both Subsections were applicable. In a situation in which there is no identifiable “acquirer” (such as, for example, an application for an abandonment), Subsection 6 is simply not triggered.

Presently, there is “no individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity” identified as seeking to acquire control. RWE, a scant few months after a gleeful courtship and race to the Altar, is walking away in order to seek new and different companionship without placing Kentucky American Water with a specifically identifiable purchaser. Indeed, per the Application/Petition, “RWE has no intention of permitting any person to acquire a controlling interest in American Water through the proposed transaction.”² Thus, at the moment, there is no “acquirer” or a plan for there to be an “acquirer.” Thus, as with abandonment, Subsection 6 has not been triggered and is not applicable.

² Application/Petition, Numbered Paragraph 50.

Nonetheless, while RWE does not want an “acquirer,” it is not clear that RWE or any of the remaining Joint Petitioners may prevent the formation or coming into existence of acquirer. Per Ellen C. Wolf in her pre-filed testimony, “the prospectus pursuant to which the share will be sold in the IPO will include disclosure about the relevant statutory restrictions and the consequences of a violation.”³ Thus, there remains a possibility that KRS 278.020 (6) will be triggered prior to the consummation of the IPO.

WHEREFORE, the Attorney General submits this Written Memorandum.

Respectfully submitted,

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³ Application/Petition, Wolf Testimony, pages 9 and 10.

Notice of Filing

Counsel gives notice that (pursuant to Instruction 1 of the Commission's 5 June 2006, Order of procedure) the original and one photocopy in paper medium of the filing by hand delivery to Beth O'Donnell, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601 on 27 June 2006. Further, one copy in electronic medium has been filed by uploading the filing to the file transfer protocol site designated by the Executive Director on this 26th day of June 2006.

/s/ David Edward Spenard
Assistant Attorney General

Instruction 6 Certification

Per Instructions 6 of the 5 June 2006, Order of procedure, counsel certifies that the electronic version is a true and accurate copy of the document filed in paper medium, a copy in paper medium has been served on all the parties of record, the electronic version has been transmitted to the Commission, and the Commission and other parties have been notified by electronic mail (on 26 June 2006) that the electronic version has been transmitted to the Commission.

/s/ David Edward Spenard
Assistant Attorney General

Certificate of Service

Counsel certifies that this response has been served by mailing a true and correct photocopy of the same, first class postage prepaid, to Lindsey W. Ingram, Jr., Lindsey W. Ingram III, Stoll Keenon Ogden, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507-1801; Foster Ockerman, Jr., Martin, Ockerman & Brabant, 200 N. Upper Street, Lexington, Kentucky 40507; Anthony G. Martin, P. O. Box 1812, Lexington, Kentucky 40588; and Leslye M. Bowman, David Barberie, Lexington-Fayette Urban County Government, Department of Law, 200 East Main Street, Lexington, Kentucky 40507 all on this 26th day of June 2006.

/s/ David Edward Spenard