

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 RESPONSE
TO WRITTEN MEMORANDA ADDRESSING
THE APPLICATION OF KRS 278.020

The Attorney General submits his Response to the written memoranda of the Joint Petitioners and the LFUCG. KRS 278.020 (5) statutorily confirms the PSC's subject-matter jurisdiction to review any plan for a change in ownership or control through any means including abandonment. Therefore, RWE's express intent and plan to rid itself of its North American water holdings, including Kentucky American Water, is an adequate basis for review of the proposal under Subsection 5. The determination of whether divestiture through an IPO is authorized under Kentucky law is a separate consideration relevant to the Commission's power to approve the proposal; however, it does not bear upon the Commission's power to review this proposal.

While the Commission's authority over the transaction via Subsection 5 is not in doubt, the circumstances warranting a review under KRS 278.020 (6) are not present. Thus, Subsection 6 is not currently applicable.

1. The Commission Has Authority Through KRS 278.020 (5) to Review This Proposal.

RWE is ridding itself of its North American water holdings. The parties appear to be in agreement regarding the fact that consummation of RWE's plan to cast aside these holdings will result in a transfer of ownership of, control of, or the right to control Kentucky American Water. LFUCG, however, indicates that any review of the plan is "premature."¹ The Attorney General states that the while the plan may not be appropriate or otherwise sufficient for the Commission's approval, it is properly before the Commission for review.

Continuity of adequate service is of paramount concern, and the Commission's power to investigate the condition of a utility is well-settled. See KRS 278.250; also see KRS 278.260. With regard to any potential transfer of ownership, transfer of control, or abandonment of a utility, KRS 278.020 (5) reflects a broad legislative assignment for the Commission to review situations in which a transfer is, through any means, under way. Also see *Public Service Commission v. Cities of Southgate, Highland Heights, et al.*, 268 S.W.2d 19 (Ky. 1954). While the Attorney General agrees that the details of RWE's unilateral plan of divestment are far from being final, the Commission may, under Subsection 5, begin consideration of the application at this time.

¹ LFUCG Memorandum, page 3.

2. While the Commission's Authority to Review the Proposal via Subsection 5 is Present, the Circumstances Warranting a Review Under KRS 278.020 (6) Are Not Present.

RWE's unilateral plan to unload its North American water holdings is moving forward. The Attorney General agrees with the Joint Petitioners that the General Assembly intends for the Commission to investigate RWE's decision to cast aside these holdings which include Kentucky American Water. The difference in viewpoints stems from the application of the legislature's instructions for such an investigation to the facts of this case.

In sum, the Joint Petitioners suggest that both Subsections 5 and 6 must apply to this transaction. The problem in the theory is that there is a difference in the scope of these provisions. Subsection 5 applies when there is either a transferor and/or an acquirer. It is applicable when an acquirer seeks to obtain a utility from a transferor such as in RWE's acquisition of Kentucky American Water through the purchase of the then-existing AWWC. Likewise, it applies to a unilateral attempt for an acquisition such as, per the vernacular, a takeover bid. It also applies when an acquirer is not present such as in abandonment.

Subsection 6 applies to the investigation of a "proposed acquisition" (whether "friendly" or "hostile") by an "acquirer." Here, there is no proposal for an acquisition within the meaning of the provision. Instead, there is RWE's unilateral proposal for divestment. Accordingly, there is no "acquirer" within the meaning of Subsection 6. Moreover, the Joint Petitioners make clear that they do not propose or want a transaction that results in the creation of an "acquirer."

Currently, for this transaction, the only identifiable party is a hopeful RWE who, as transferor, sends forth a plan of divestment that will allow someone - anyone - to take ownership. The plan, which is uncomfortably close to a plan of abandonment, does not by its express terms create an acquirer nor has one otherwise come into being. If there is no acquirer, there can be no proposed acquisition, and the circumstances warranting a review under Subsection 6 are simply not present. Subsection 6 does not currently apply.

The Joint Petitioners' insistence that both Subsections apply raises an inconsistency in their representations. First, they expend great effort in assuring the Commission that there will be no "acquirer" for the Initial Public Offering. Now, they seek to invoke the provision for the review of a proposal for an acquisition - which expressly calls for the existence of an "acquirer."

With regard to the Joint Petitioners' warnings about the hazards of proceeding with this application without applying Subsection 6, the questions are simple. First, does anyone seriously contend that the Commission is without power to conduct an investigation or hold a hearing under Subsection 5? The General Assembly certainly does not. KRS 278.250 that states the following:

Whenever it is necessary in the performance of its duties, the commission may investigate and examine the condition of any utility subject to its jurisdiction. In conducting such investigations, the commission may proceed with or without a hearing as it deems best, but shall make no order without giving a hearing to the parties affected thereby.

Likewise, the judiciary does not. In *Public Service Commission v. Cities of Southgate, Highland Heights, et al.*, 268 S.W.2d 19 (Ky. 1954), Kentucky's highest court recognized the power of the commission to review a change in control application including hearings held in the course of the review as necessarily implied from the Commission's powers to regulate utilities.

Second, does anyone seriously contend that the Commission in reviewing a transferor's application for divestment under Subsection 5 is somehow authorized to produce a result that is in conflict with law, for an improper purpose, or inconsistent with the public interest? The General Assembly does not. KRS 278.410 (1). Further, the judiciary has not made such a suggestion.

The difference between the two subsections is quite simple. Subsection 5 is a confirmation of the Commission's implied powers noted by the judiciary in *Southgate*. Subsection 6 is an express legislative declaration to expand the Commission's power of review in a situation in which there is a proposal for an acquisition. Subsection 5 always applies: Subsection 6 does not.

Hence, Subsection 6 may but does not necessarily pick up where Subsection 5 "leaves off."² If there is an absurd or unintended result that we should avoid, then it is applying a time limit for an acquisition proposal where there is both a transferor and an acquirer to a divestiture plan where the potential purchaser is unidentifiable and unknown (and also not represented).

² Joint Petitioners' Memorandum, page 3.

There is no legitimate debate regarding the Commission's duty and authority to review RWE's plan of divestment. The debate between the Attorney General and the Joint Petitioners concerns the applications of the instructions to the facts of this case. The Commission can and must, under Subsection 5, review the plan of divestment just as it would any other unilateral plan of transfer or abandonment. In the absence of a plan of acquisition, which is wholly unremarkable given the fact that the Joint Petitioners deny the existence of an acquirer, Subsection 6 is not applicable. There is simply no proposed acquisition by an acquirer to review. There is only RWE's unilateral plan to leave. Consequently, while that plan is subject to review, it is not subject to the time constraints of Subsection 6 for conducting the review.

WHEREFORE, the Attorney General submits his Response.

Respectfully submitted,

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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 3 July 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 30th 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 30 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 30th day of June 2006.

/s/ David Edward Spenard