

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

**LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT'S MEMORANDUM IN RESPONSE
TO THE COMMISSION'S JUNE 19, 2006 ORDER**

COMES the Lexington-Fayette Urban County Government (the "LFUCG"), by counsel, and submits the following memorandum in response to the Commission's June 19, 2006 order regarding the application of KRS 278.020(5) and/or (6) to this case.

I. BACKGROUND

The Joint Petitioners seek Commission approval of a plan to initiate an Initial Public Offering ("IPO") for the stock of American Water Works ("AWW"). All stock of AWW is currently owned by Thames GmbH, a wholly owned subsidiary of RWE AG. Although the Joint Petitioners have recognized that "[t]he first step in a public offering is the preparation and filing with the SEC [Securities and Exchange Commission] of a registration statement [i.e., prospectus]"¹, the Joint Petitioners apparently do not plan to file a draft registration statement with

¹ Joint Petition at page 6.

the SEC "before late 2006"². Once filed, the statement is still subject to change as a result of the SEC approval process before the IPO can actually be initiated.³

Despite the fact that the Joint Petitioners have not even taken this first step in the IPO process, they still seek approval from the Commission at this time for the transfer of control of AWW and, effectively, Kentucky–American Water Company ("KAW"), to persons or entities unknown. The Joint Petitioners have indicated that should any person or entity acquire a controlling interest (i.e. 10% or more) in the utility as result of the IPO, the acquisition would be "void and of no effect" pursuant to KRS 278.020(6).⁴

II. ARGUMENT

In a typical change of control proceeding, the Commission and the parties would have before them at this stage of the proceeding a consummated sale agreement or similar documents that would specify with certainty the actual acquirer(s) and the various rights and responsibilities of the parties to the change of control transaction -- subject to various regulatory approvals.⁵ To date, however, the Joint Petitioners have presented merely an outline, and have represented that they have no intention of permitting any individual person or

² Joint Petition at page 7.

³ Joint Petition at page 7.

⁴ Joint Petition at pp 14-15. The Joint Petition does not discuss further what the practical effect of such an event would be.

⁵ The LFUCG is unaware of any previous change of control proceeding in Kentucky where the acquiring person or persons are unidentified and unknown.

entity to acquire a controlling interest in AWW.⁶ This representation has a direct bearing on whether KRS 278.020(5) and/or (6) apply to this Petition. However, it is clear from the Joint Petition that this filing is both premature and facially insufficient under Kentucky law, and that ultimately no approval under either section is possible at this time.

KRS 278.020(5) applies to any acquisition or transfer of ownership of a regulated utility in Kentucky, even if no “controlling interest” is transferred to any particular person or entity and requires that the Commission determine whether “the person acquiring the utility has the financial, technical and managerial abilities to provide reasonable service.”⁷ KRS 278.020(6) only applies to the acquisition of a controlling interest in a utility, which is presumed to occur upon the acquisition of 10% or more of the utility’s voting securities.

The Joint Petitioners have yet to take the first meaningful step in the IPO process. Even when the initial registration statement is filed with the SEC, the new owner or owners will not be known until after the IPO process is completed. Therefore, it is not possible to make a rational and reasonable finding regarding the ability of these yet to be determined acquirer(s) to meet their statutory obligations. Kentucky law does not appear to provide for Commission pre-approval of an IPO under either KRS 278.020(5) or (6). Because the Joint Petitioners have opted to file a proposed change of control that cannot meet the

⁶ Joint Petition at pp. 14-15.

⁷ KRS 278.020(5)(emphasis added).

statutory standards for review and approval, the application should not be considered by the Commission at this time.

If the Commission nevertheless decides to proceed with this matter, at most only KRS 278.020(5) could apply to this proceeding at this time, as the Joint Petitioners clearly represent that no one will acquire a controlling interest (as defined in KRS 278.020(6)) as a result of the IPO. (“RWE has no intention of permitting any person to acquire a controlling interest in American Water through the proposed transaction” Joint Petition at par. 50, page 14). The LFUCG is concerned with how this is to be accomplished (especially given the lack of a prospectus to review), but have insufficient information at this stage of the proceeding to fully evaluate how the Joint Petitioners plan to enforce this intention. Having made this representation, the Joint Petitioners must assume full responsibility for assuring that in fact no person or entity acquires a controlling interest in AWW, and should be fully prepared to explain in detail how they will enforce this intention and what corrective action will occur if their intention fails.⁸

No matter what the decision of the Commission on the controlling law, a meaningful decision cannot be made on the Joint Petition until the IPO process is complete and the new owner(s) of AWW have been determined, thus allowing sufficient evidence and assurances that they possess the requisite statutory

⁸ The LFUCG reserves the right to change its position on the application of KRS 278.020(6) if additional information suggests that a controlling interest in AWW might be obtained as a result of the proposed transaction.

abilities. Further, because KRS 278.020(5) does not have a time limit for decision, there is no reason for the Commission to make a determination as sought by the Joint Petitioners until the necessary information for such a decision is available.

The IPO process has not yet begun, and the draft prospectus will not be filed for many months. There is no way of knowing what the actual provisions in the draft prospectus will be if this case is concluded on the current procedural schedule ordered by the Commission. Further, the SEC process involves SEC recommendations, amendments and other changes to the filed prospectus that might have a bearing on this issue. Without this information available, there is simply no way for the Commission to make the necessary determinations required by law.

III. CONCLUSION

Regardless of which statutory provision might control this proceeding, the Commission cannot make a meaningful final decision under Kentucky law until the IPO takes a more concrete form than the one presented in the Joint Petition. Therefore, the LFUCG recommends that the Commission make a finding, based upon the Joint Petition as filed, that no approval for a transfer of control can be given until the acquiring person or persons are identified with specificity, and that the procedural schedule be modified accordingly should this case remain pending.

Respectfully submitted,

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

BY: /s/ David J. Barberie (for)
Anthony G. Martin
P. O. Box 1812
Lexington, KY 40588
(859) 268-1451

BY: /s/ David J. Barberie
David J. Barberie
Corporate Counsel
Leslye M. Bowman
Director of Litigation
Department of Law
200 East Main Street
Lexington, Kentucky 40507
(859) 258-3500

ATTORNEYS FOR LEXINGTON-
FAYETTE URBAN COUNTY

CERTIFICATION, NOTICE OF FILING, CERTIFICATE OF SERVICE

Pursuant to Commission Order, counsel certifies that the electronic version of this document 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 as further certified below, the electronic version has been transmitted to the Commission, and the Commission and other parties have been notified by electronic mail that the electronic version has been transmitted to the Commission, and an electronic version has been uploaded to the file transfer protocol site designated by the Executive Director. I further certify that an original and one (1) copy of this document were served by first class U.S. Mail delivery, postage prepaid, to Beth O'Donnell, Executive Director, Public Service Commission, P.O. Box 615, 211 Sower Boulevard, Frankfort, Kentucky 40602-0615; furthermore, it was served by mailing a copy by first class U.S. Mail delivery, postage prepaid, on the following, all on this the 26th day of June 2006:

Hon. Gerald Weutcher
Public Service Commission
P.O. Box 615
211 Sower Boulevard
Frankfort, Kentucky 40602-0615
JWuetcher@ky.gov

Hon. David Edward Spenard
Hon. Dennis Howard
Hon. Laura Rice
Assistant Attorney General
Office of the Attorney General
Utility & Rate Intervention Division
1024 Capital Center Drive
Suite 200
Frankfort, Kentucky 40601-8204
david.spenard@ag.ky.gov
dennis.howard@ag.ky.gov
laura.rice@ag.ky.gov

Lindsey W. Ingram, Jr., Esq.
Lindsey W. Ingram, III
Stoll Keenon Ogden PLLC
300 West Vine Street
Suite 2100
Lexington, Kentucky 40507-1801
ingramjr@skp.com
ingram3@skp.com

/s/ David J. Barberie
ATTORNEY FOR LEXINGTON-FAYETTE
URBAN COUNTY GOVERNMENT

G:\DJB\PSC\2006-00197(KAWC-IPO)\LFC_MEM_062606