

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)

PUBLIC COMMENT SUBMITTED BY
BLUEGRASS FLOW, INC.
IN RESPONSE TO THE ORDER OF THE COMMISSION
DATED JUNE 19, 2006

Bluegrass FLOW, Inc., is a Kentucky nonprofit corporation and hereby submits this public comment in response to the Order of the Commission dated June 19, 2006, regarding the question of whether KRS 278.020(5) or KRS 278.020(6) is controlling in the current Application.

The Application presents the request by RWE Aktiengesellschaft GmbH and its subsidiaries (collectively, "RWE"), which currently control Kentucky-American Water Company, for Commission approval to *transfer* its control to unknown persons via the sale of corporate stock in American Water Works Company, Inc. No proposed *acquirer* of such control is a joint applicant.

KRS 278.020(6) applies only to a person acquiring control of a utility. It does not mention the word "transfer" or "transferror." KRS 278.020(5), on the other hand applies both to a person who

acquires and one who transfers control. The Commission is required to both approve the transfer,¹ and separately to approve the acquisition.²

As only the current controlling entities have requested permission to transfer control, only subsection (5) currently applies to the Application. The remainder of subsection (5) and subsection (6) become applicable when the acquiring person(s) become identified and a party to the joint Application, after which time the Commission can determine whether the six standards in the two subsections can be met by the acquiror.

Subsection (5) does not impose time constraints on the Commission, giving the Commission the ability to time its consideration of the transfer to its particular terms and conditions, in this instance the sale of corporate stock. The review, of course, cannot be conducted until all required filings have been made by RWE with the U. S. Securities and Exchange Commission (SEC). Joint Applicants represent, at paragraph 19, that the initial registration statement could be filed as early as fall, 2006, and that the review and comment process at the SEC typically takes two to three months, which is reasonable period of time for this Commission to defer final review of the transfer portion of the Application.

As presented by the Application, and particularly as described therein at paragraph 22, the Commission is presented with a four-stage transaction. First is approval of the transfer by RWE; second is the acquisition of control by proposed but unidentified underwriters, and third is the resale of securities and transfer of control by the underwriters, and fourth is the acquisition of control by investors. Both transfers and both acquisitions must have Commission approval under KRS 278.020.

¹ “No person shall . . . transfer ownership. . . without the approval by the commission.” KRS 278.020(5), first sentence.

² “The commission shall grants its approval if the person acquiring the utility” KRS 278.020(5), second sentence.

In response to questions and concerns raised by Bluegrass FLOW, Inc., and other parties in the prior transfer of control case (to RWE) that the Commission would not have binding jurisdiction over acquiring parties until they registered to do business in the Commonwealth under applicable statutes, the Commission took the position that compliance with such laws was not necessary as it had jurisdiction “over the transaction.”³ In view of this position, it is even more important that the Commission have as full and complete an understanding of the entire proposed transaction, which may only be obtained after completion of the review and comment process at the SEC.

The Commission must still determine a way to comply with its statutory assessment of the proposed acquisitions under the six tests of KRS 278.020(5) and (6). While the Joint Applicants attempt to gloss over this difficulty by asserting the same management team will stay in place as supervised by a board of directors (see, e.g., paragraphs 38 and 39 of the Joint Application), the Joint Applicants admit in paragraph 31 thereof that, following the transaction, a majority of the board members must be independent and all of certain important committees must be independent. The Application does not state that this condition is met currently, which means a significant change in board membership and effective management will certainly occur; which present difficulties in the Commission’s review of the acquisition side of the proposed transaction.

Therefore, Bluegrass FLOW, Inc., requests the Commission determine that KRS 278.020(5) is controlling at the current stage of the proceeding, and adjust its procedural calendar herein to accommodate the reasonable additional time to complete the SEC process before any final hearings and determination

³ Bluegrass FLOW, Inc., has not changed its position that compliance with the corporate laws of Kentucky with regard to qualification to do business in the Commonwealth is a requirement before a party may apply to the Commission for approval of a transfer and acquisition of control of a utility is the correct application of the law.

on the Application; or, alternatively, to dismiss the Application as prematurely filed with leave to refile when a full and complete review of all components of the proposed transfer and acquisition of control may be reviewed by the Commission.

Respectfully submitted,

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/s/ Foster Ockerman, Jr.

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This certifies that the above public comment was filed electronically with pscfilings@ky.gov this the 26th day of June, 2006.

/s/ Foster Ockerman, Jr.

Foster Ockerman, Jr.