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Comments

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INTRODUCTION

The specter of hostile corporate takeovers evidently weighed heavily upon the minds of legislators in the 1988 Kentucky General Assembly. In addition to the general antitakeover provisions contained in the new corporate change-of-control statute, the legislature passed an amendment to Kentucky Revised Statutes (KRS) section 278.020 to require state approval of the acquisition of control of any public utility providing utility services in Kentucky.


3 The Kentucky Public Service Commission [hereinafter "PSC"], the administrative agency that the General Assembly has charged with the responsibility of overseeing utilities in Kentucky, “shall approve any such proposed acquisition when it finds that the same is to be made in accordance with law, for a proper purpose and is consistent with public interest.” Id. at 907 (codified at KRS § 278.020(5)).

4 KRS § 278.010(3) provides the relevant definition of utility as follows: any person except a city, who owns, controls or operates or manages any facility used or to be used for or in connection with:

(a) The generation, production, transmission or distribution of electricity to or for the public, for compensation, for lights, heat, power or other uses;

(b) The production, manufacture, storage, distribution, sale or furnishing of natural or manufactured gas, or a mixture of same, to or for the public, for compensation, for light, heat, power or other uses;

(c) The transporting or conveying of gas, crude oil or other fluid substance by pipeline to or for the public, for compensation;

(d) The diverting, developing, pumping, impounding, distributing or furnishing of water to or for the public, for compensation;

(e) The transmission or conveyance over wire, in air or otherwise, of any message by telephone or telegraph for the public, for compensation; or

(f) The treatment of sewage for the public, for compensation, if the facility is a subdivision treatment facility plant, located in a county containing a city of the first class or a sewage treatment facility located in any other county and is not subject to regulation by a metropolitan sewer district.
While the Commonwealth of Kentucky is not new to the business of regulating the transfer of control of public utilities,\(^5\) this amendment reinforces the state's commitment to the regulation of utility change-of-control transactions.

Kentucky's utility change-of-control legislation has the potential to benefit the incumbent management of a utility subject to a hostile takeover bid. First, the Kentucky statute forces a potential bidder to seek Public Service Commission (PSC) approval to acquire more than ten percent of the target utility's voting securities and thereby to reveal its intentions with regard to the target utility.\(^6\)

\(^5\) In 1954, Kentucky's highest court held that PSC jurisdiction over the sale of utilities necessarily was implied "from the statutory powers of the commission to regulate the service of utilities." Pub. Serv. Comm. v. Cities of Southgate, Highland Heights, 268 S.W.2d 19, 21 (Ky. 1954). "In order to carry out its responsibility" to ensure that service is adequate, the PSC "must have the opportunity to determine whether the purchaser is ready, willing and able to continue providing adequate service." Id. See infra notes 119-30 and accompanying text for a discussion of past regulation in Kentucky of the acquisition of public utilities.

\(^6\) While KRS § 278.020(4), the subsection which previously governed utility change-of-control transactions, refers ambiguously to transferring "ownership of or control, or the right to control, any utility," subsection (5) states:

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 such ownership does not in fact confer control. KRS 278.020(5) (emphasis added). The PSC conceivably could assert that the new subsection presumes control at a lower level of ownership than does subsection (4) and thus requires an acquiror to seek approval from the PSC at a potentially earlier stage of the acquisition process than before. Such an interpretation thereby would force a hostile bidder to reveal its intentions at an earlier stage of ownership. The PSC, however, has not yet done so, and its orders in transfer cases since July 15, 1988, the effective date of subsection (5), have not addressed directly the possibility that the two subsections have different definitions of change in control. Compare PSC Order, In re Joint Application of Blue Grass Management Group, Inc. to Transfer 51 Percent Interest of TMC of Lexington to JTC Communications Corp. (now J.T. Carneal), And For Authorization to Provide Resale of Telecommunications Services, Case No. 89-038, at 3 (June 28, 1989) (holding proposed transaction would "constitut[e] a change in control within the meaning of KRS 278.020(4) and (5)," thereby implying one meaning) (emphasis added) with PSC Order, In re Joint Application of (1) Stone Nance, Inc. to Distribute All of its Wholly-owned Subsidiary, Goshen Util., and (2) James F. Stone, A Shareholder of Stone Nance, Inc. to Sell All of His Stock of Goshen Utils. to Lloyd Eades, Case No. 10363, at 2 (holding proposed transaction would "not effect a change of ownership or control of Goshen within the meaning of KRS 278.020(4) or (5)," thereby implying two meanings) (emphasis added). See also PSC Order, In re The Joint Filing of Litel Telecommunications Corp., LCI Communications, Inc., and LCI Communications Holding Co. Respecting the Acquisition of Control of Litel Telecommunications Corp. and Related Financing Transactions, Case No. 10364, at 3-4 (Oct. 26, 1988).
This caps the equity position that a bidder can attain while still pursuing its plans in secrecy. Second, the time delays inherent in the PSC approval process bestow upon incumbent management more time in which to respond to hostile gestures. Such prospects are likely to dissuade or at least modify many potential attempts to acquire control of a utility. While there is at least a possibility that utility change-of-control statutes such as Kentucky’s could be held unconstitutional, such a result is achievable only after years of protracted litigation. Hence, this possibility provides little solace to those acquirors whose current success depends on the specifics of the present statutory scheme. This Comment examines the regulatory framework in which the statute operates, addresses potential constitutional challenges to the statute, concluding that the challenges likely will fail, and then briefly examines the application heretofore of the statute by the PSC.

I. BACKGROUND

Public utilities attract the attention of both investors and regulators in part for the same reason: the continual public demand

(holding KRS 278.020(5) inapplicable because target utility derives greater percentage of gross revenue from interstate business than from business within Kentucky and proposed transaction is subject to a review by Federal Communications Commission affording protection to Kentucky ratepayers equal to that afforded by subsection (5), but holding KRS 278.020(4) inapplicable because no change of ownership within meaning of that subsection); PSC Order, In re The Joint Application of Com/Nav Marine, Inc. and Mobile Communications Corp. of America For Approval of the Distribution of All Its Shares of Com/Nav Marine, Inc. to the Shareholders of its Parent Mobile Communications Corp. of America, Case No. 10393, at 3-4 (Oct. 26, 1988) (same).

Of course, if the target utility is subject to the registration requirements of section 12(g) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78l(g) (1982), the bidder must file with the SEC a disclosure report within ten days of acquiring five percent "beneficial" ownership of any class of the target’s securities that are registered. Securities and Exchange Act of 1934, § 13(d), 15 U.S.C. § 78m(d) (1982).

Some delay from the approval process appears inevitable. The new legislation requires the PSC to act on every "application within sixty (60) days after the filing of the application," during which time the "commission may make such investigation and hold such hearings . . . as it deems necessary." Act of April 9, 1988, supra note 2 (codified at KRS § 278.020(5) (Baldwin 1988) ("In the absence of any . . . action [by the commission] within such period of time shall be deemed to be approved.").

For a discussion of the attraction to a purchaser of a plan of "creeping acquisition" as well as the options available to a target’s management upon learning of such acquisition, see 1 A. Fleischer, Jr., TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING 112-148.1 (1985).

The United States Supreme Court has not yet ruled on the constitutionality of state utility antitakeover legislation, and other courts that have considered the question are not in agreement. For a discussion of pertinent constitutional issues, see infra notes 62-118 and accompanying text.
for utilities' products coupled with the inherent technical difficulties of providing those products make most utilities natural monopolies. Indeed, technical peculiarities require that competition be restricted in order for some utilities to operate efficiently and profitably. Such restrictions in turn necessitate the regulation of utility rates and services for the protection of the consuming public. Thus, regulation replaces competition to a certain extent. The same considerations underlie the regulation of utility acquisitions and mergers. Since protection of the consuming public is the primary objective of such regulation, private investor interests should be respected to the extent they are not detrimental to the public interest.

II. REGULATION OF UTILITY TAKEOVERS

In 1986, it appeared that the spate of takeover activity in the rest of corporate America might spread to the utility industry. Spurred by the business press "as well as by investment bankers and lawyers eager to provide takeover defense advice," many

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11 In addition to continual demand and the inherent difficulties involved, utilities' often severely localized markets contribute to their status as "natural monopolies." J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 4, 11-12 (1961). Some kinds of utilities, however, are considered partially competitive (railroads, waterways, pipelines, cable television). C. WILCOX & W. SHEPHERD, PUBLIC POLICIES TOWARD BUSINESS 334 (5th ed. 1975).

12 Substantial technological advancements have led some economists to question whether the concept of a "natural monopoly" has not become outdated in some industries. Stelzer, A Policy Guide for Utility Executives: "Know When to Hold 'em; Know When to Fold 'em", PUB. UTIL. FORT., Oct. 9, 1980, at 62 (argument that copy-by-wire is a competitive alternative to the postal monopoly).

13 The purpose of utility regulation is to protect the public in its collective role as consumer. J. BONBRIGHT, supra note 11, at 4; see also Jones, Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920, 79 COLUM. L. REV. 426 (1979) (identifying the balance of investor and consumer interests involved in rate regulation as one of the primary purposes of utility regulation). But cf. Jarrell, The Demand for State Regulation of the Electric Utility Industry, 21 J.L. & Econ. 269 (1979) (arguing that state regulation is in the economic interests of utilities and rejecting the conventional rationale for regulation, viz., the protection of public interest).


15 See infra notes 118-30, 178-84 and accompanying text for a discussion of what constitutes the "public interest."

16 Laing, Power Play: Will Takeover Lightning Strike the Electric Utilities?, BARRON'S, June 2, 1986, at 8; see also Ozanian, Looking Past Chernobyl, FORBES, June 2, 1986, at 234 (examines appeal of electric utilities' cash flow); Stavro, Power Brokers, FORBES, June 16, 1986, at 54 (discusses the role of Catalyst Energy Development Corp. in the takeover of Alamito Co., a power wholesaler).

17 D. HAWES, UTILITY HOLDING COMPANIES, § 12.02, at 12-10 (1987).
utility industry executives prepared for battle. Some even sought and obtained state utility change-of-control statutes. Yet, because of significant legal obstacles, there have been relatively few utility takeovers or mergers in the past five years.

A. Federal Regulation

Potential utility acquirors are faced with a comprehensive federal system of securities laws governing various means of effecting a change of corporate control, including cash tender offers, proxy contests, and mergers. By far the most substantial federal impediment to most utility takeovers, however, is the Public Utility Holding Company Act of 1935 (PUHCA). Enacted in response to the financial collapse of a number of utility holding companies in the 1920's and early 1930's, PUHCA was designed "to curb abusive practices of public utility companies by bringing them under effective control and to provide effective regulation of the

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18 Utilities have adopted a variety of defensive measures, including staggered boards of directors, "fair price amendments," and "anti-greenmail" measures. Others have adopted "so-called poison pills or, more euphemistically, stockholder rights plans." D. Hawes, supra note 17, § 12.05, at 12-42.

19 New Jersey's utility change-of-control statute, for example, N.J. Stat. Ann. § 48:2-51.1 (West Supp. 1989), was signed into law on January 31, 1984, in the midst of the NUI/NJR takeover battle. Kentucky's utility change-of-control statute, KRS § 278.020(5), also appears to have been the product of the utility industry's lobbying efforts. As it first appeared in H.B. 460, the new change-of-control statute applied only to retail electric suppliers. Ch. 22, H.B. 460, 1988 Ky. Rev. Stat. & R. Serv. 72 (Baldwin), amended by Act of April 9, 1988, ch. 335, § 1, 1988 Ky. Rev. Stat. & R. Serv. 906, 907 (Baldwin). It is unlikely that public interest groups concerned with the effect of utility takeovers on consumers would pursue protection for so specific an industry.


21 Hawes, supra note 20, at 13.

22 15 U.S.C. §§ 78m(d)-(f), 78n(d)-(e) (1982).


24 When state law requires shareholder approval for mergers, federal law regulates the proxy-voting process. See id. When shares are exchanged in a merger, the registration requirements of the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982), might apply.


26 See D. Hawes, supra note 17, at § 2.04. For further discussion of the plethora of pre-PUHCA abuses, see Comment, Federal Regulation of Holding Companies: The Public Utility Act of 1935, 45 Yale L.J. 468 (1936).
expanding business[es] of [generating,] transmitting and selling electric power'\textsuperscript{27} and distributing natural gas.\textsuperscript{28}

In response to the speculative and often unsuccessful past diversification of public utility holding companies\textsuperscript{29} and the more than occasional use of deceptive financing practices possible under complex holding company structures,\textsuperscript{30} PUHCA "substantially limits both investments by public utilities in other companies and investments by other companies in public utilities."\textsuperscript{31}

PUHCA thereby imposes on public utility takeovers in a number of ways.\textsuperscript{32} If the target company consists of two or more jurisdictional utilities,\textsuperscript{33} prior approval by the Securities and Exchange Commission (SEC)\textsuperscript{34} is required pursuant to Section 9(a)(2) of PUHCA to acquire five percent or more of the target's stock.\textsuperscript{35} Also, if the acquiror is a utility or a jurisdictional utility holding company,\textsuperscript{36} or owns at least five percent of a utility or utility holding company, the SEC must approve in advance the purchase of five percent or more of any target that is a utility or utility


\textsuperscript{29} For example, Middle West Utilities Systems, a utility holding company with 111 subsidiaries, itself part of the Insull Utility System behemoth (one of three super holding companies that together controlled about 49% of the investor-owned electric utility industry in 1932), acquired cotton mills just when that industry went into a slump, and paper mills when that industry reached overcapacity. The leverage used to acquire these properties magnified the losses sustained by the holding company. D. Hawes, supra note 17, §§ 2.03, 2.04, at 2-5, 2-12 & 2-13.

\textsuperscript{30} Such practices include the manipulation of service charges made by holding companies to utilities, the recognition by holding companies of income from the sale of assets at inflated prices to controlled subsidiaries, and other nefarious accounting practices. See D. Hawes, supra note 17, § 2.04, at 12-13, 12-14.


\textsuperscript{32} For a more complete treatment, see D. Hawes, supra note 17, § 12.02; Elmer & Mazo, supra note 31. The act also affects non-stock-transfer acquisitions to the extent that such alternatives are chosen to avoid the act's strictures.

\textsuperscript{33} E.g., a holding company with two or more utility subsidiaries or a utility with a least one utility subsidiary will qualify.

\textsuperscript{34} The SEC approval criteria are set forth in § 10(b) of PUHCA. They reflect legislative concern with utility holding company diversification into non-utility operations, the concentration of utility company control, inequities in consideration paid for control interests, and undue complications of the utility holding company system.

\textsuperscript{35} 15 U.S.C. § 79i(a)(2) (1982). Because the act applies when there are two or more utilities involved, it is known as the "two bite" rule. See D. Hawes, supra note 17, § 3.06, at 3-40.

\textsuperscript{36} PUHCA defines "holding company" as a corporation that owns ten percent or more of any gas or electric utility. 15 U.S.C. § 79b(9)(7) (1982).
holding company, or that owns at least five percent of a utility holding company. Where the target is a utility (or owns at least five percent of one) and the acquiror is not a jurisdictional utility (nor owns five percent or more of one), the acquiror becomes a holding company subject to PUHCA regulation upon acquisition of at least ten percent ownership of the target. If the acquiror obtains ten percent or more but less than fifty-one percent of the target’s stock, it must either register as a holding company, file for an exemption from registration, or file for an order declaring that such ownership does not constitute a controlling influence, and that, therefore, the acquiror is not a holding company. Finally, upon acquisition of fifty-one percent or more of a target that includes a utility, the acquiror must register as a holding company or seek an exemption. This comprehensive regulatory scheme presents significant obstacles to potential utility acquisitions and, in a hostile contest, can provide management with critical time in which to take defensive action.

Depending on the form of transaction, other federal regulations may apply. The Federal Energy Regulatory Commission (FERC) has jurisdiction pursuant to the Federal Power Act (FPA) over sales and other dispositions of jurisdictional facilities and over issuances of securities by utilities that are subject to the FERC

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[38] In light of PUHCA’s stringent requirements for registered utility holding companies, this is considered by some to be a totally impractical alternative. See D. Hawes, supra note 17, § 12.02, at 12-3; PUHCA § 11, 15 U.S.C. § 79k (1982) (requiring simplification of holding companies so that they consist of single, localized utility systems with only narrowly-defined related assets). See generally D. Hawes, supra note 17, § 3.03.
[39] This is not always a practical alternative either, since PUHCA’s requirements generally limit registration exemptions to intrastate operations. See PUHCA § 3 (15 U.S.C. § 79c (1982)); see also Eastern Utils. Assocs., 43 S.E.C. 243 (1967) (declaring SEC’s policy that minority interests in utility subsidiaries of exempt holding companies are impermissible).
[40] See generally D. Hawes, supra note 17, §§ 3.04, 12.02, at 12-4.
[41] See supra note 38.
[43] It appears, however, that a utility that merely acquires five percent or more of another utility in order to subject any acquisition attempt to SEC scrutiny cannot avail itself of the defense. See Midlands Energy v. Eumar Oil (D. Colo. 1984) (holding such a ploy in contravention of PUHCA’s policies against undue complexities) (cited in Hawes, supra note 20, at 9).
A takeover could involve either situation, thereby invoking FERC’s jurisdiction. Also relevant are general federal securities law requirements governing corporate acquisitions, the Natural Gas Act (NGA), the Communications Act of 1934, and, when substantial stock purchases are involved, federal antitrust laws. Clearly, federal law thoroughly regulates potential utility takeovers. Yet one commentator suggests that, because of the obstacle of getting prior state PSC approval for financing hostile utility takeovers, “state PSC regulatory issues [are] the highest hurdle.”

B. State Regulation

Until several years ago, few states had statutes dealing specifically with the change of control of utilities. This has changed, however, as the general corporate anxiety over hostile takeovers has spread to the utility industry. States now regulate the change of control or ownership of public utilities through (1) statutes that specifically prohibit one from obtaining a certain percentage of ownership of a public utility without prior PSC approval, (2) FPA § 204 (codified at 16 U.S.C. § 824c(a)).

See Hawes, supra note 20, at 14.

See supra notes 22-24 and accompanying text. For a discussion of relevant federal securities law, see also Elmer & Mazo, supra note 31, at 18-20.

15 U.S.C. §§ 717-717z (1982). The NGA may be relevant to the change of control of facilities involved in the interstate transportation and sale of natural gas. Although the NGA does not confer expressly jurisdiction upon the Federal Energy Regulatory Commission (FERC) over change-of-control transactions, approval may be necessary if such transactions involve the abandonment of facilities, the extension of facilities, or the issuance of securities. See id. § 717F (1982); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 108 S. Ct. 1145, 1151 (1988) (holding FERC’s “comprehensive authority” over interstate transportation and sale of natural gas includes “a number of tools for examining the issuance of securities”).


D. Hawes, supra note 17, at xxii.

D. Hawes, supra note 17, § 12.03, at 12-35.

See supra notes 16-18 and accompanying text.

ARK. CODE ANN. § 23-3-306 (1987) (requiring PSC approval for merger or change of control); CAL. PUB. UTIL. CODE § 854 (West 1975) (bars acquisition of a utility without PSC approval); CONN. GEN. STAT. ANN. § 16-47(c) (West Supp. 1989) (requires PSC approval for acquisition of control of gas, electric, or water utility); DEL. CODE ANN. tit. 26, § 215 (Supp. 1988) (requires PSC approval for utility change of control) (For a discussion of effect of statute on South Jersey Industries’ attempted acquisition of Chesapeake Utilities
statutes that prohibit one utility from gaining possession of another utility without prior PSC approval,\textsuperscript{56} and (3) statutes relating to holding companies\textsuperscript{57} and takeover bids\textsuperscript{58} that indirectly may require PSC approval.\textsuperscript{59} While it is unclear to what extent these statutes are constitutionally permissible,\textsuperscript{60} compliance with them nonetheless is recommended strongly.\textsuperscript{61}

In addition to state statutes specifically directed at the utility industry, state general antitakeover statutes also deserve consider-
In the late 1960's and the 1970's, a number of states responded to growing concerns about hostile corporate takeovers by enacting statutes, most of which were subsequently invalidated or repealed, setting forth tender offer disclosure requirements. Typically, these "first-generation" regulations entailed significant pre-offer filing and notification requirements. Additionally, they often required state administrative hearings regarding the adequacy of disclosure and, in some cases, the fairness of the bid before the consummation of any offer. Thirty-seven states had enacted such statutes by the time the Supreme Court in *Edgar v. MITE Corp.* struck down the Illinois Business Takeover Act as an unconstitutional burden on interstate commerce. A plurality of three justices also found the Illinois statute pre-empted under the supremacy clause by the Williams Act.

A plurality of four justices found that the Illinois statute was a direct burden on interstate commerce because it had the potential to regulate transactions that took place wholly outside the state of Illinois and involved foreign corporations. The statute could be triggered even if none of the target's shareholders were Illinois residents.

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62 See D. Hawes, supra note 17, § 12.03, at 12-37.
64 "First-Generation" refers to the fact that these first state attempts to regulate takeovers subsequently were invalidated as unconstitutional by *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), and its progeny.
70 A plurality of four Justices found that the Illinois statute was a *direct* burden on interstate commerce and, consequently, a per se violation of the commerce clause. *MITE*, 457 U.S. at 641-43. The majority, however, found the statute unconstitutional because it imposed an impermissible *indirect* burden on interstate commerce. *Id.* at 643-46.
71 Justice White was joined by Chief Justice Burger and Justice Blackmun in his conclusion that the statute conflicted with the Williams Act and therefore was pre-empted. *Id.* at 634-40.
72 15 U.S.C. §§ 78(i), 78m(d), (e), 78n(d)-(f) (1982).
73 Justice White was joined by Chief Justice Burger and Justices Stevens and O'Connor in his conclusion that the statute constituted a direct burden on interstate commerce.
74 *MITE*, 457 U.S. at 641-43.
residents. Because of the Illinois statute's propensity to affect takeovers completely outside the state of Illinois, the plurality found that under prevailing Supreme Court jurisprudence the Illinois statute was an unconstitutional direct burden on interstate commerce.

Justice Powell joined this plurality in finding the statute unconstitutional as an impermissible indirect burden on interstate commerce. Applying the balancing test enunciated in Pike v. Bruce Church, Inc., the Court compared the burden on interstate commerce to the local interests served by the statute. "[E]ven when a statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute." This majority, in accordance with the then-prevailing scholarly sentiment, placed great value on the "reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition." While state governments might have an interest in "protecting local investors," such an interest is outweighed by a national interest in a smoothly functioning market for corporate securities. Therefore, the Illinois Act "imposes a substantial burden on interstate commerce which outweighs its putative local benefits . . . [and] is accordingly invalid under the commerce clause."
Justice White was joined by only two other justices in his conclusion that the Illinois statute was pre-empted under the supremacy clause by the Williams Act and, therefore, was unconstitutional. The Williams Act, enacted in 1968 as an amendment to the Securities and Exchange Act of 1934, was intended not to pre-empt the entire field of securities regulation with respect to cash tender offers, but rather to provide for certain filing and disclosure requirements in connection with tender offers. Justice White, however, felt that the Illinois statute frustrated three important principles of the Williams Act. First, the Illinois statute upset the Williams Act's uniform national regulatory scheme of strict neutrality between the incumbent management of the target company and the offeror. Second, the Illinois statute could prevent a tender offer from going forward "without unreasonable delay." Third, by empowering the Illinois Secretary of State to pass on the fairness of a tender offer, the Illinois statute ran contrary to the goal of the Williams Act that investors be the final arbiters of the fairness of any tender offer. Justice White therefore concluded that the Illinois Act conflicted with and was pre-empted by the Williams Act.

After MITE, courts continued to find state antitakeover statutes unconstitutional, and many states amended their statutes to conform with post-MITE expectations. Rather than regulating

86 Id. at 630-31. Justice White was joined in his supremacy clause analysis by Chief Justice Burger and Justice Blackmun. Justices Powell and Stevens disagreed, while the rest of the Court did not address the issue. See id. at 646-47 (Powell, J., concurring in part); id. at 655 (Stevens, J., concurring in part and concurring in the judgment).
87 15 U.S.C. §§ 78(i), 78m(d), (e), 78n(d)-(f) (1982).
89 The Williams Act did not amend § 28(a) of the 1934 Act. Section 28(a) provides in pertinent part: "Nothing in this title shall affect the jurisdiction . . . of any state over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder." 15 U.S.C. § 78bb(a) (1982).
91 MITE, 457 U.S. at 634-46. "[B]y providing the target company with additional time with which . . . to combat the offer, . . . the [Act's] provisions furnish incumbent management with a powerful tool to combat tender offers, perhaps to the detriment of stockholders." Id. at 635.
92 Id. at 639.
93 Id. at 639-40.
94 Id.
95 See, e.g., Nat'l City Lines v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982) (pre-commencement disclosure requirements invalidated); Esmark, Inc. v. Strode, 639 S.W.2d 768 (Ky. 1982) (pre-commencement disclosure requirements invalidated).
96 See STATE TAKEOVER STATUTES, supra note 63, at 3-6.
tender offers directly, these second-generation statutes attempt to effect the same goals of direct regulation through use of the states' traditional power of corporate governance.97 States have enacted antitakeover legislation in the form of control share acquisition statutes,98 business combination statutes,99 fair price statutes,100 and cash-out statutes.101 After these statutes received a generally unfavorable reception from the lower courts,102 the Supreme Court considered and upheld a second-generation state antitakeover statute, the Indiana Control Share Acquisition Statute,103 in CTS Corp. v. Dynamics Corp. of America.104 In so doing, the Supreme Court gave new life to state antitakeover legislation.

The Court upheld the Indiana statute against both commerce clause and supremacy clause attacks.105 The Court premised its commerce clause analysis on two factors.106 First, corporate law is by nature extraterritorial in impact.107 Second, corporate law historically has been the prerogative of the chartering state.108 One commentator suggests the court felt that "if it mandated a balancing approach simply because of extraterritorial effects of the statute, it would open up all corporate law principles to similar challenge."109 Indeed, Justice Scalia in his concurrence asserted that once a statute is found to neither discriminate against interstate commerce, nor create an impermissible risk of inconsistent state regulations, the commerce clause inquiry should end.110 In fact, the

97 Id. at 3-4.
98 Id. at 15-26.
99 Id. at 27-39.
100 Id. at 41-50.
101 Id. at 51-60.
106 Id. at 103.
107 Id.
108 Id.; see also CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89-92 (1987). An important question left open by CTS that is relevant to utility change-of-control statutes is whether, in order to find the appropriate nexus between a corporation and a regulating state, it is necessary for the state to be the place of incorporation, merely home to substantial corporate assets, the corporation's principal place of business, or any combination thereof. See STATE TAKEOVER STATUTES, supra note 63, at 147-52. See infra notes 135-56 and accompanying text for a discussion of the nexus issue in the utility context.
109 Langervoort, supra note 105, at 106.
110 CTS, 481 U.S. at 94-96.
balancing test itself is "an inquiry ... ill suited to the judicial function and should be undertaken rarely if at all." From this reasoning comes the corollary that federal courts should not question the validity of state corporation law absent some concrete indication of discrimination against interstate commerce.\(^\text{112}\)

In its supremacy clause analysis, the Court found that, even under the \textit{MITE} plurality's broad interpretation of the principles underlying the Williams Act,\(^\text{113}\) the Indiana statute should be upheld since it does not frustrate those principles.\(^\text{114}\) The Court found that the Indiana statute furthers the Williams Act's goal of protecting investor autonomy,\(^\text{115}\) and that compliance with both statutes is entirely possible.\(^\text{116}\) Thus, the Court concluded the Indiana statute was not pre-empted under the supremacy clause.\(^\text{117}\)

The breadth that lower courts give the holding in \textit{CTS} undoubtedly will affect both supremacy clause and commerce clause challenges to other second generation statutes as well as to state utility change-of-control statutes. As mentioned above, the Supreme Court has not considered the constitutionality of the latter.\(^\text{118}\)

\(^{111}\) \textit{Id.} at 95 (Scalia, J., concurring). For support of Justice Scalia's position, see, e.g., Langervoort, supra note 105, at 103-04; Regan, \textit{Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation}, 85 Mich. L. Rev. 1865, 1866-68 (1987).

\(^{112}\) "In many respects, the Court's hands-off approach in \textit{CTS} is a return to an older style of commerce clause analysis, in which a determination that an issue was particularly suited for state-by-state regulation effectively ended the inquiry." Langervoort, supra note 105, at 103 n.45; see, e.g., S. Carolina State Highways Dept. v. Barnwell Bros., 303 U.S. 177 (1938).

\(^{113}\) See supra notes 91-94 and accompanying text.

\(^{114}\) "As the plurality opinion in \textit{MITE} did not represent the views of a majority ... , we are not bound by its reasoning. We need not question that reasoning, however, because ... the Indiana Act passes muster even under the broad interpretation of the Williams Act." \textit{CTS}, 481 U.S. at 81. This interpretation leaves open the question of the extent of the Williams Act's pre-emptive reach.

\(^{115}\) \textit{Id.}

\(^{116}\) \textit{Id.} at 79.

\(^{117}\) "[A]bsent an explicit indication by Congress of an intent to pre-empt state law, a state law is pre-empted only 'where compliance with both federal and state regulation is a physical impossibility ...,' [or] if [the state law] frustrates the purposes of the federal law." \textit{Id.} at 78-79 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)). For a recent discussion of appropriate pre-emption analysis, see Schneiderwind v. ANR Pipeline Co., 485 U.S. 293 (1988).

\(^{118}\) See supra note 10 and accompanying text. Furthermore, only one federal court of appeals has addressed this issue. In \textit{Baltimore Gas & Elec. Co. v. Heinz}, 760 F.2d 1408 (4th Cir.), \textit{cert. denied}, 474 U.S. 847 (1985), the court, applying the balancing test announced in \textit{Pike v. Bruce Church, Inc.}, 397 U.S. 137 (1970), upheld a Maryland statute banning outright utility ownership (10% or more) by any holding company not already owning a
Unfortunately, the uncertainty surrounding the constitutionality of state utility change-of-control statutes likely will remain until it does.

C. Past Regulation in Kentucky

As mentioned above, Kentucky is not new to the business of regulating the sale and acquisition of control of public utilities. In Public Service Commission v. Cities of Southgate, Highland Heights, Kentucky's highest court held that, although “the governing statute, KRS Chapter 278, does not in express terms confer jurisdiction upon the Public Service Commission to pass upon sales of utility systems,” such “jurisdiction is implied necessarily from the statutory powers of the commission to regulate the service of utilities.” Because the PSC is “charged with responsibility, and vested with power, to see that the service of public utilities is adequate,” the PSC, “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.”

In Southgate, several cities that obtained water service from Union Light, Heat and Power Company sought to overturn the PSC’s approval of a sale of that company’s water system to Commonwealth Water Company and to purchase the water system themselves. The PSC, while asserting its authority to pass on the sale, declined to extend its inquiry into whether the cities or Commonwealth could provide the most economical service. Rather, the PSC limited its inquiry to whether the purchaser, Commonwealth, was “ready, willing, and able” to provide water service in
the area. The court endorsed this limitation, but noted that, "[i]n passing upon the ability of Commonwealth to provide adequate service, the Commission necessarily considered the financial structure of Commonwealth, and the probabilities of Commonwealth being able to operate successfully from a financial standpoint." Thus, a standard emerged under which the PSC did not hinge its approval on either the fairness of the proposed transaction or the transaction's potential effect on rates, but rather upon whether the acquiror was "ready, willing, and able to provide adequate service." This standard prevailed for over twenty years, was subsequently codified, and continues to animate the PSC's evaluation of utility change-of-control transactions.

III. KENTUCKY'S NEW UTILITY CHANGE-OF-CONTROL STATUTE

On March 4, 1988, the General Assembly of the Commonwealth of Kentucky approved an Act relating to business combi-
nations.\(^{131}\) Section five of that Act amended KRS section 278.020 by adding a new subsection regarding the acquisition of control of retail electric suppliers that furnish retail electric service in Kentucky.\(^{132}\) Subsequently amended to encompass such acquisitions of all utilities,\(^{133}\) the new Act provides that no acquiror,

whether or not organized under the laws of this state, shall acquire control,\(^{134}\) either directly or indirectly of any utility furnishing utility service in this state,\(^{135}\) without having first obtained approval of the commission.\(^{136}\) Any such acquisition of control without such prior authorization shall be void and of no effect.\(^{137}\)

Subsection 6 of the new Act exempts from operation of subsection 5

\(^{131}\) Act of March 4, 1988, \textit{supra} note 1.

\(^{132}\) Act of March 4, 1988, \textit{supra} note 1, at 73 (was to be codified at KRS § 278.020(5), but was amended by Act of April 9, 1988, \textit{supra} note 1).

\(^{133}\) Act of April 9, 1988, \textit{supra} note 2.

\(^{134}\) The Act defines control as 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 such ownership does not in fact confer control.

KRS § 278.020(5) (Baldwin 1988).

\(^{135}\) For the statutory definition of "utility," see KRS § 278.010 (Baldwin 1988), reprinted in pertinent part \textit{supra} note 4.

\(^{136}\) Requests for approval shall be ruled on within 60 days after filing the application. In the absence of action within this period, approval shall be deemed granted. Act of April 9, 1988, \textit{supra} note 1 (codified at KRS § 278.020(5) (Baldwin 1988)).

\(^{137}\) Act of April 9, 1988, \textit{supra} note 2 (codified at KRS § 278.020(5) (Baldwin 1988)) (emphasis added). While subsection (5) of KRS § 278.020 specifically states that "any . . . acquisition of control without . . . prior [PSC] authorization shall be void and of no effect," subsection (4) is silent as to the effectiveness of change-of-control transactions undertaken without prior PSC approval. Indeed, the PSC has given after-the-fact recognition to change-of-control transactions subject to subsection (4) approval but not to subsection (5) approval. See, e.g., PSC Order, \textit{In re} Investigation into the Operating Status of Brownsboro Utils., Case No. 10395 (Sep. 29, 1988) (confirming a completed transfer of control of sewer system where transaction effecting transfer occurred prior to July 15, 1988 and was therefore not subject to approval under subsection (5)); PSC Order, \textit{In re} Investigation into the Operating Status of Park Lake, Inc., Case No. 10322 (July 19, 1988) (same). This discrepancy assumes significance only where the transaction is subject to approval under subsection (4) but not under subsection (5). With transactions completed after July 15, 1988, this can happen only if one of the parties involved in the transfer of control is subject to the PSC's jurisdiction and either the transaction is exempted from the application of subsection (5) by subsection (6), see \textit{infra} text accompanying notes 138-39, or subsection (5) is invalidated by the courts and subsection (4) is left to stand alone pursuant to the section's severability clause, KRS § 278.020(7). See \textit{supra} note 130 and accompanying text.
any acquisition of control of any:
(a) Utility which derives a greater percentage of its gross revenue from business in another jurisdiction than from business in this state if the commission determines that the other jurisdiction has statutes or rules which are applicable and are being applied and which afford protection to ratepayers in this state substantially equal to that afforded such ratepayers by subsection (5) of this section;
(b) Utility by an [affiliated] acquirer . . . ; or
(c) Utility pursuant to the terms of any indebtedness . . . approved by the Commission.\(^\text{139}\)

This limitation on the reach of subsection 5 most likely will insulate it from certain constitutional challenges. Subsection 6, however, does not affect the operation of subsection 4's approval requirement. The approval requirements contained in the two subsections have the potential to benefit incumbent managers of target utilities by providing time in which to respond to hostile takeover bids. Because the constitutionality of such an Act has not yet been considered by the Supreme Court,\(^\text{140}\) potential constitutional issues merit consideration.

A. Commerce Clause

Commerce clause analysis usually begins with two threshold inquiries: (1) Does the statute discriminate against interstate commerce?;\(^\text{141}\) and (2) Does the statute impermissibly burden interstate commerce by subjecting activities to inconsistent regulations by different states?\(^\text{142}\) The Supreme Court has applied virtually a per se rule of invalidity to state legislation that falls into either of these two categories.\(^\text{143}\)

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\(^{138}\) An affiliated acquiror is one "who directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such utility, including any entity created at the discretion of such utility for purposes of corporate reorganization." KRS § 278.020(6)(b) (Bobbs-Merrill Supp. 1989).

\(^{139}\) KRS § 278.020(b) (Bobbs-Merrill Supp. 1989).

\(^{140}\) See supra note 118.


\(^{142}\) See id. at 88-89 (citing Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 583-84 (1986)).

\(^{143}\) We have applied a "virtually per se rule of invalidity" against state laws that amount to "simple economic protectionism," Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978), . . . and have found such protectionism when a state law "directly regulates or discriminates against interstate commerce, or
Kentucky's utility change-of-control legislation does not discriminate against interstate commerce. The Act regulates even-handedly and imposes no burden on out-of-state acquirors that it does not also impose on those in-state. However, because the Act purports to confer jurisdiction on the PSC to pass judgment on the acquisition of any utility furnishing utility service in Kentucky, apparently even the acquisition by a nonresident of a foreign utility that furnishes utility service in Kentucky,44 the Act creates a risk that such an acquisition might be subject to inconsistent regulation by different states.145

Four justices in *Edgar v. MITE*146 held that a similar extraterritorial assertion of jurisdiction rendered the Illinois Business Takeover Act unconstitutional as imposing an impermissible direct burden on interstate commerce.147 Moreover, in upholding the constitutionality of the Indiana Control Share Acquisition Statute in *CTS Corp. v. Dynamics Corp.*,148 the Supreme Court specifically interpreted the statute to apply only to entities incorporated in Indiana.149 Yet, because the limitations on states' power articulated in when its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).


The Act purports to confer jurisdiction on the PSC over any acquiror, "whether or not organized under the laws of [Kentucky]," who wishes to "acquire control . . . of any utility furnishing utility service in [Kentucky]." KRS § 278.020(5) (Baldwin 1988) (emphasis added).

Suppose, for example, that a hypothetical Ohio corporation, the Goldstar Gas Company, has its principal place of business in Cincinnati, Ohio, but provides service to customers across the Ohio River in northern Kentucky and derives the same percentage of its gross revenue from this service as it does from its business in Ohio. Also, even if Goldstar derived a great percentage of its gross revenue from Ohio rather than Kentucky, there still would be a risk of inconsistent regulation since the proposed acquisition would still be subject to prior PSC approval under KRS § 278.020(4). Further suppose that Ohio has a utility change-of-control statute similar to that of Kentucky. If another hypothetical corporation, the Brookings Gas Company, wishes to acquire control of Goldstar, it must obtain prior approval of the transaction from the public service commissions of both states. If Ohio's public service commission approves the proposed transaction but Kentucky's does not, Brookings' takeover attempt would be subject to inconsistent state regulations.

457 U.S. 624 (1982) (Justices Powell, Stevens, and O'Connor all concurred with Justice White that the statute's direct burden on interstate commerce was unconstitutional).

See supra notes 74-77 and accompanying text.

481 U.S. 69 (1987); see supra notes 104-17 and accompanying text.

Although the definitional language of the Act suggests Indiana's legislature might have intended the Act to cover foreign corporations with substantial ties with Indiana, (Note, *CTS Corp. v. Dynamics Corp. of America: Of State Regulation, Tender Offers, and
these cases in part depend upon the states' power over internal corporate governance, the Kentucky Act arguably is distinguishable.150

The restrictive interpretation of the Indiana Act follows from the nature of the interest asserted therein. Because the Court accepted Indiana's justification for the Act as being an undisputed interest in protecting those who invest in its domestic corporations, logic required the Court to restrict the Act's application to such domestic corporations. For while a state legitimately may legislate to protect shareholders in its domestic corporations, it has no interest flowing from its power over internal corporate governance in protecting resident shareholders of out-of-state corporations.151

State regulation of the change of control of public utilities, however, is not premised on the states' "firmly established ... authority to regulate domestic corporations."152 Rather, such regulation proceeds from the power traditionally asserted by states over utilities.153 States have a legitimate interest in protecting utility customers as well as investors.154 Thus, Kentucky's undisputed

Necromancy, 77 Ky. L.J. 149, 175 & nn.187-89 (1988-89)), the Supreme Court's interpretation of the Act specifically precludes such a possibility. See CTS, 481 U.S. at 93 (holding that the "Act applies only to corporations incorporated in Indiana"). Indeed, one commentator suggests "such an interpretation [was] a requirement for constitutionality." Note, supra, at 184 (suggesting that in-state incorporation of target and substantial ties between target and incorporating state might be constitutional prerequisites for state corporate change-of-control statutes).

However, one commentator suggests that the Court declined to acknowledge that the true purpose of the Indiana legislature was "the protection of local businesses," not the protection of shareholders of domestic corporations, because of "its inability to formulate a workable test to identify legislative motive in the corporate context." Langervoort, supra note 105, at 106-8. The commentator also notes that the Court "accepted at face value the dubious legislative purpose of promoting shareholder autonomy." Id. at 111. See also supra notes 106-11 and accompanying text.

Indeed, in upholding the Act, the Court stated: "We agree that Indiana has no interest in protecting nonresident shareholders of nonresident corporations." CTS, 481 U.S. at 93 (emphasis in original). See also MITE, 457 U.S. at 645-46 ("Illinois has no interest in regulating the internal affairs of foreign corporations.").

The Supreme Court has held that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." Arkansas Elec. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983). See also Great N. Ry. v. Washington, 300 U.S. 154, 159-60 (1937) (recognizing authority of states to regulate structure of public utilities as component of states' police power over utilities). While the manner in which the Kentucky Act progressed through the General Assembly might suggest a more pecuniary impetus, the Supreme Court's reluctance in CTS to assess the legislature's true motive likely precludes an attack on the Act as simply being economic protectionism. See supra notes 19 and 150.
interest in protecting in-state ratepayers may countenance the
limited extraterritorial assertion of jurisdiction contained in the utility
change-of-control statute. Without such jurisdiction, Kentucky
would be unable to ensure that an acquiror of a utility furnishing
utility service to its residents is "ready, willing, and able to continue
providing adequate service." Any effects on interstate commerce
flowing from application of the Act's "attempt at consumer pro-
tection are incidental to the purpose of the statute" and, therefore,
do not constitute per se violations of the commerce clause.

The Act also appears to pass constitutional muster under the
much-maligned balancing test enunciated in Pike v. Bruce Church,
Inc. In light of the holding of CTS, belittling the importance of
keeping the national market for corporate securities free from state
regulation, the burden on interstate commerce appears slight. On

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155 Pub. Serv. Comm'n v. Cities of Southgate & Highland Heights, 268 S.W.2d 19, 21
(Ky. 1954).

156 Baltimore Gas and Elec. Co. v. Heinz, 760 F.2d 1408, 1421 (4th Cir.), cert. denied,

157 See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (holding that where a
"statute regulates evenhandedly ... and its effects on interstate commerce are only inci-
dental," there is no per se violation of the commerce clause).

158 397 U.S. 137, 142 (1970). There is considerable debate on the continued applicability
of the Pike balancing test. See, e.g., Amanda Acquisition Corp. v. Universal Foods Corp.,
CTS majority "did not even cite [Pike] when dealing with a statute regulating only the
affairs of a firm incorporated in the state"); Hyde Park Partners v. Connolly, 839 F.2d
837, 844 (1st Cir. 1988) (Holding that "balancing test ... seem[s] to have been abandoned
by the CTS court where ... state law merely regulates intrastate 'corporate governance'."
(emphasis added)). See also supra notes 108-11 and accompanying text. The Supreme Court,
however, recently applied the Pike test to a state regulation in Northwest Central Pipeline
v. State Corp. Comm'n of Kansas, 109 S. Ct. 1262 (1989). The Court stated:

Even if not per se unconstitutional, a state law may violate the commerce
clause if it fails to pass muster under the balancing test outlined in Pike v.
Bruce Church, Inc. Provided the challenged law "regulates evenhandedly to
effectuate a legitimate local public interest," however, "and its effects on
interstate commerce are only incidental, it will be upheld unless the burden
imposed on such commerce is clearly excessive in relation to the putative local
benefits."

Id. at 1282 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

159 See CTS, 481 U.S. at 92 ("The Constitution does not require the states to subscribe
to any particular economic theory."); id. at 93-94 (Rejecting "'notion that the Commerce
Clause protects the particular structure or methods of operation in a ... market'.") (quoting
Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978)). The Court may have
been influenced by an abatement of academic support for takeovers. See, e.g., Bebchuk,
Toward Undistorted Choice and Equal Treatment in Corporate Takeovers, 98 Harv. L.
Rev. 1693, 1722-23 (1985); Coffee, Regulating the Market for Corporate Control: A Critical
Assessment of the Tender Offer's Role in Corporate Governance, 84 Colum. L. Rev. 249,
the other hand, the legitimacy of a state’s interest in regulating public utilities is beyond dispute\textsuperscript{160} and, indeed, is a fundamental aspect of contemporary views on utilities.\textsuperscript{161} Thus, it appears the Kentucky Act will survive all commerce clause challenges, including those under the \textit{Pike} balancing test.

B. \textit{Supremacy Clause}

Opponents of Kentucky’s approval requirement also may charge that federal legislation pre-empts the state’s utility change-of-control statute. Specifically, opponents may charge that the Kentucky statute conflicts with federal securities laws, the PUCHA, the FPA and/or the NGA.

It is clear that “Congress has the authority, in exercising its Article I powers, to pre-empt state law.”\textsuperscript{162} Supremacy clause analysis therefore must focus on Congressional intent.\textsuperscript{163} When federal legislation is alleged to pre-empt state law “in a field,” such as utility regulation, that is “traditionally occupied by the States, ‘we start with the assumption that the historic police powers of the States were not to be superseded unless that was the clear and manifest purpose of Congress.’ ”\textsuperscript{164} Thus, because there is no express statement of Congressional intent to pre-empt state authority over utility service as asserted in utility change-of-control statutes, supremacy clause challenges likely will fail.

1. \textit{Williams Act}

Kentucky’s utility change-of-control statute requires potential acquirers to obtain prior approval from the PSC for any proposed transaction that would effect a statutory change-in-control. In \textit{Edgar v. MITE Corp.},\textsuperscript{165} a plurality of three Justices held that such a pre-acquisition approval requirement frustrates important pur-

\textsuperscript{160} See supra note 154.

\textsuperscript{161} See supra notes 11-15 and accompanying text.

\textsuperscript{162} California v. ARC American Corp., 490 U.S. \textemdash, \textemdash, 104 L.Ed 2d 86, 94 (1989).


\textsuperscript{165} 457 U.S. 624 (1982).
poses of and therefore is pre-empted by the Williams Act. There was no express pre-emption, however. Rather, this was an example of pre-emption by frustration of broadly-interpreted Congressional purposes and objectives. As noted above, Congressional intent to pre-empt state law in a field traditionally occupied by the States, such as utility regulation, must be "clear and manifest." Courts should not and indeed have been hesitant to imply a Congressional intent to pre-empt traditional state power from broad and abstract federal goals.

Even under the broad interpretation of the Williams Act's principles espoused by Justice White in *MITE*, Kentucky's utility change-of-control statute does not appear susceptible to Supremacy Clause challenges. The new Kentucky Act imposes at most a sixty-day delay. Justice White's pre-emption analysis in *MITE* prohibits only "unreasonable delay[s]." Any such delay, however, might
operate to the benefit of incumbent management in a hostile take-over contest in contravention of the scheme of strict regulatory neutrality contemplated by the Williams Act. The Court in CTS disposed of such a concern by noting a potential acquiror could make his offer conditional on the required shareholder approval. Such logic has been extended to utility change-of-control transactions. Finally, the approval requirement contained in Kentucky's utility change-of-control statute does not remove decision-making authority from investors and place it with the PSC. The PSC's inquiry traditionally has been limited to the effect of the change-of-control transaction on Kentucky ratepayers and has not included an examination of the fairness of the terms of the transaction.

2. Federal Utility Legislation

Opponents of Kentucky's utility change-of-control statute also might claim the statute conflicts with federal utility legislation. As noted above, certain utility change-of-control transactions may require the approval of a federal regulatory body. If the Kentucky PSC denies an application for the approval of a transaction already or subsequently approved by a federal regulatory agency, operation of the Kentucky statute could conflict with federal law by prohibiting conduct specifically encouraged by federal action. However, the Kentucky statute evinces a willingness to defer to the public interest inquiries of other competent regulatory bodies. Thus, the reasonable application of the Kentucky statute is unlikely to conflict with the operation of federal law.

C. Application

Read together, KRS § 278.020(4) and (5) require prior PSC approval of almost all transactions effecting a change in the control of a utility providing service in Kentucky. If the utility derives a greater percentage of its gross revenue from business in Kentucky than it does from any other jurisdiction, both subsections apply.

173 See PSC Order, In re The Transfer of Control of Telemarketing Communications of So. Ky., Case No. 10408 (Feb. 3, 1989) (terms of transfer agreement subject to PSC approval).
174 See supra notes 118-30 and accompanying text.
175 See supra notes 25-51 and accompanying text.
176 For an example of pre-emption by this type of conflict, see Nash v. Florida Industrial Commission, 389 U.S. 235, 239 (1967).
177 See infra note 181 and accompanying text.
If the utility derives a greater percentage of its gross revenue from business in another jurisdiction than from business in Kentucky, KRS § 278.020(b)(a) exempts the change-of-control transaction from subsection 5’s approval requirement if the PSC “determines that the other jurisdiction . . . afford[s] protection to ratepayers in [Kentucky] substantially equal to that afforded such ratepayers by subsection (5).” 178 Subsection 6, however, does not obviate the need for prior PSC approval required by subsection 4, and “person[s] under the jurisdiction of the commission” 179 must still seek prior PSC approval to acquire or transfer control of a utility deriving less than one-half its gross revenue from business in Kentucky. 180 The active supervision of such a utility by a regulatory body in another jurisdiction, however, likely would lower the level of scrutiny exercised by the PSC over any change-of-control transaction involving the utility. 181

Kentucky’s new utility change-of-control statute provides that the PSC “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.” 182 In passing

178 KRS § 278.020(6)(a).
179 KRS § 278.020(4). KRS § 278.040(2) provides: “The jurisdiction of the commission shall extend to all utilities in this state.” KRS § 278.010(3) defines utility as “any person except a city, who owns, controls or operates or manages any facility used or to be used for or in connection with” furnishing utility service. This language does not appear to include a parent corporation of a utility operating a facility providing utility service in Kentucky. See PSC Order, In re The Application of Kentucky Utilities Co. To Enter Into An Agreement and Plan To Carry Out Certain Transactions In Connection Therewith, Case No. 10296, at 17 (Oct. 6, 1988) (finding proposed holding company would not, by reason of its ownership all outstanding common stock of utility, be a utility as defined in KRS § 278.010(3); holding company would not “own, control, operate, or manage any facilities used in connection with” furnishing utility service). But see PSC Order, The Application of ITT Communications, Inc. and Metromedia Long Distance, Inc. For Approval To Acquire Control, Case No. 89-106, at 2 (June 30, 1989) (applying subsection (4) based on PSC jurisdiction over the utility rather than over the parties to the change-of-control transaction, acquiror and the utility’s parent company).
180 See PSC Order, In re The Transfer of Control of Telemarketing Communications of So. Ky., Case No. 10408 (Feb. 3, 1989) (subjecting transfer of control of a utility to subsection (4) but not subsection (5) approval requirement where utility derives greater portion of its gross revenue from interstate business than from business in Kentucky).
181 Although limited by express language to subsection (5), the logic underlying subsection (6)(a) applies with equal force to subsection (4). If another jurisdiction with a stake in the proposed transaction greater than Kentucky’s approves the transaction, and the Kentucky PSC determines the other jurisdiction’s approval process afforded protection to Kentucky ratepayers comparable to that which it would have provided, the Kentucky PSC should not expend its resources to duplicate the other jurisdiction’s inquiry.
182 Act of April 9, 1988, ch. 355, supra note 2.
judgment on proposed acquisitions, the PSC has applied an approval standard similar to that of the past.\textsuperscript{183} Thus the PSC has construed the term "public interest" narrowly to mean absence of an adverse impact on consumer service.\textsuperscript{184}

**CONCLUSION**

Kentucky's utility change-of-control legislation reflects a more general trend on the part of states to protect local corporate interests from hostile takeovers.\textsuperscript{185} Because the utility industry by nature is subject to extensive supervision for the protection of consumers, the statute appears to serve a more compelling local interest and to cover a subject more appropriately left to local regulation than general corporate antitakeover statutes.\textsuperscript{186} Thus, the statute likely will be held constitutional. In any event, no matter whether an acquiror chooses to comply with or contest the statute, time delays are inevitable. This in turn makes utility takeovers

\textsuperscript{183} For a discussion of standards applied prior to the passage of subsection (5), see supra notes 119-28 and accompanying text. The PSC inquiry has continued to focus on whether the potential acquiror has the "financial, technical, and managerial abilities to provide reasonable service." See, e.g., In re The Application of Hancock County Public Improvement Corp. and Hancock County, Ky. For Approval of an Agreement of Sale Providing For the Purchase By the East Daviess County Water Ass'n From Hancock County Public Improvement Corp. of the Corp.'s Existing Waterworks Distribution System, Case No. 89-135, at 2 (June 30, 1989) (approving proposed transaction upon finding that acquiror "has the financial, technical, and managerial abilities to provide reasonable service . . . , and that the proposed transfer . . . is consistent with the requirements of KRS § 278.020(4) and (5)"); PSC Order, In re Joint Application of Blue Grass Management Group, Inc. to Transfer 51 Present Interest of TMC of Lexington to JTC Communications Corp. (now J.T. Carneal), and For Authorization to Provide Resale of Telecommunications Services, Case No. 89-038, at 3 (June 28, 1989) (approving proposed transaction where after its consummation transferred utility "will maintain the financial, technical, and managerial abilities to provide reasonable services").

\textsuperscript{184} If the PSC determines that the acquiror has the requisite abilities and that the proposed transaction will not harm consumers, it will approve the transaction. See, e.g., id.; In re TMC of Lexington, Case No. 89-038, at 3 (noting approved transaction "will not result in any detriment to the customers"); PSC Order, In re The Application of ITT Communications, Inc. and Metromedia Long Distance, Inc. For Approval to Acquire Control, Case No. 89-106, at 2 (noting approved transaction "will not harm consumer"). Cf. Application of Robert P. Trimble to Transfer the Land, and Physical Assets of the Thelma Activities Sewage Treatment Systems in Johnson County, Ky. to Billy Robert King, Case No. 10282 (Oct. 28, 1988) (denying premature application for transfer of control where acquiror failed to show he had requisite abilities to provide reasonable utility service). For a discussion of criteria used in passing judgment on utility merger transactions, see Nolan, Determination of the Public Interest—Utility Merger Cases, 109 PUB. UTILITY FORT., June 10, 1982, at 62-3.

\textsuperscript{185} See Langervoort, supra note 105, at 96.

\textsuperscript{186} See supra notes 105-30 and accompanying text.
more risky and thus less attractive to potential acquirors, making a rare breed rarer.

John Park