

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AIRVIEW UTILITIES, LLC'S NOTICE )  
OF SURRENDER AND ABANDONMENT ) CASE NO. 2016-00207  
OF UTILITY PROPERTY )

ORDER

On June 16, 2016, Airview Utilities, LLC ("Airview") tendered a notice of surrender and abandonment of utility property ("Notice"), stating its intent to abandon all the property interests and rights in and to the property owned by Airview, necessary to provide service to its customers.<sup>1</sup> On July 11, 2016, Airview submitted a filing which demonstrated that it had provided the written notices required pursuant to KRS 278.020(11), and on July 15, 2016, the Commission entered an Order accepting Airview's Notice for filing as of July 11, 2016.

On July 29, 2016, the Commission entered an Order that, among other things, initiated this investigation into the request by Airview to abandon its utility services and facilities and required Airview to continue to operate its utility facilities during the pendency of this investigation, and until the Commission issues an Order adjudicating Airview's request to abandon its facilities.<sup>2</sup>

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<sup>1</sup> Notice (filed June 16, 2016).

<sup>2</sup> Order (July 29, 2016) at 2.

On July 8, 2016, the Attorney General of the Commonwealth of Kentucky (“AG”) filed a motion for full intervention into the matter, and on July 12, 2016, the Commission entered an Order granting the AG intervention into the proceeding. The AG is the only person who has sought intervention into the instant case.

The proceedings to date include multiple rounds of discovery, a hearing on October 12, 2016, and the filing of post-hearing briefs by Airview and the AG. For the reasons stated below, the Commission finds it necessary and appropriate to issue an interim Order that directs Airview to have prepared detailed engineering plans for an interconnection between the Airview system and the city of Elizabethtown’s (“Elizabethtown”) wastewater system. The preparation of the plans is to be performed by an engineering firm acceptable to Elizabethtown, to contain sufficient financial information to allow the development of a project profile by the Kentucky Infrastructure Authority (“KIA”), and to be prepared, signed, sealed, and dated by an engineer registered in Kentucky, in a format meeting all Kentucky Division of Water (“DOW”) filing requirements necessary for that agency’s review of the project for a decision on whether the interconnection plan should be approved.

Further, the Commission finds it necessary and appropriate, through this interim Order, to direct Airview to ascertain the status of its property rights in the lease of the real property upon which Airview’s wastewater treatment plant (“WWTP”) is located and to seek the written consent of the lessor for the transfer of Airview’s benefits under the lease. Finally, the Commission finds that Elizabethtown has an interest in the instant case and finds it necessary and appropriate to make Elizabethtown a party to the proceedings.

## Discussion

Per KRS 278.010(3)(f):

- (3) "Utility" means any person except a regional wastewater commission established pursuant to KRS 65.8905 and, for purposes of paragraphs (a), (b), (c), (d), and (f) of this subsection, a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with:
  - (f) The collection, transmission, or treatment of sewage for the public, for compensation, if the facility is a subdivision collection, transmission, or treatment facility plant that is affixed to real property and is located in a county containing a city of the first class or is a sewage collection, transmission, or treatment facility that is affixed to real property, that is located in any other county, and that is not subject to regulation by a metropolitan sewer district or any sanitation district created pursuant to KRS Chapter 220;

Airview is not a regional wastewater commission established pursuant to KRS 65.8905 and is not subject to regulation by a metropolitan sewer district or any sanitation district created pursuant to KRS Chapter 220. Airview owns, controls, operates, or manages facilities used in the collection, transmission, or treatment of sewage for the public for compensation. Airview's facility is a subdivision collection, transmission, or treatment facility plant affixed to real property. Therefore, Airview is a utility that provides services as set forth in KRS 278.010(3)(f), and, consequently, is subject to the jurisdiction of the Public Service Commission pursuant to KRS 278.040.

The statutory framework for an abandonment request by a utility is set forth by KRS 278.020 and KRS 278.021, and this framework was significantly revised during the 2016 Regular Session of the General Assembly by amendments that became effective

on April 8, 2016.<sup>3</sup> Airview's request for abandonment is the first abandonment case to be decided under the revised framework.

The portions of KRS 278.020 relevant to this discussion provide:

- (3) Prior to granting a certificate of public convenience and necessity to construct facilities to provide the services set forth in KRS 278.010(3)(f), the commission shall require the applicant to provide a surety bond, or a reasonable guaranty that the applicant shall operate the facilities in a reasonable and reliable manner for a period of at least five (5) years. The surety bond or guaranty shall be in an amount sufficient to ensure the full and faithful performance by the applicant or its successors of the obligations and requirements of this chapter and of all applicable federal and state environmental requirements. However, no surety bond or guaranty shall be required for an applicant that is a water district or water association or for an applicant that the commission finds has sufficient assets to ensure the continuity of sewage service.

...

- (6) No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.

- (7) No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission.

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Application for any approval or authorization shall be made to the commission in writing, verified by oath or affirmation, and be in a form and contain the information

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<sup>3</sup> Ky. Acts 2016, c 50.

as the commission requires. The commission shall approve any proposed acquisition when it finds that the same is to be made in accordance with law, for a proper purpose and is consistent with the public interest. The commission may make investigation and hold hearings in the matter as it deems necessary, and thereafter may grant any application under this subsection in whole or in part and with modification and upon terms and conditions as it deems necessary or appropriate. The commission shall grant, modify, refuse, or prescribe appropriate terms and conditions with respect to every such application within sixty (60) days after the filing of the application therefor, unless it is necessary, for good cause shown, to continue the application for up to sixty (60) additional days. The order continuing the application shall state fully the facts that make continuance necessary. In the absence of that action within that period of time, any proposed acquisition shall be deemed to be approved.

...

- (10) The commission shall not approve any application under subsection (6) or (7) of this section for the transfer of control of a utility described in KRS 278.010(3)(f) unless the commission finds, in addition to findings required by those subsections, that the person acquiring the utility has provided evidence of financial integrity to ensure the continuity of sewage service in the event that the acquirer cannot continue to provide service.
- (11) The commission shall not accept for filing an application requesting authority to abandon facilities that provide services as set forth in KRS 278.010(3)(f) or to cease providing services unless the applicant has provided written notice of the filing to the following:
  - (a) Kentucky Division of Water;
  - (b) Office of the Attorney General; and
  - (c) The county judge/executive, mayor, health department, planning and zoning commission, and public sewage service provider of each county and each city in which the utility provides utility service.
- (12) The commission may grant any application requesting authority to abandon facilities that provide services as set forth in KRS 278.010(3)(f) or to cease providing services

upon terms and conditions as the commission deems necessary or appropriate, but not before holding a hearing on the application and no earlier than ninety (90) days from the date of the commission's acceptance of the application for filing, unless the commission finds it necessary for good cause to act upon the application earlier.

KRS 278.021, the abandonment statutes, provides:

- (1) If the commission, after notice and hearing, enters an order in which it finds that a utility is abandoned, the commission may bring an action in the Franklin Circuit Court for an order attaching the assets of the utility and placing those assets under the sole control and responsibility of a receiver.
- (2) For purposes of this section, a utility shall be considered abandoned if it:
  - (a) Disclaims, renounces, relinquishes, or surrenders all property interests or all rights to utility property, real or personal, necessary to provide service;
  - (b) Notifies the commission of its intent to abandon the operation of the facilities used to provide service;
  - (c) Fails to comply with an order of the commission in which the commission determined that the utility is not rendering adequate service, specified the actions necessary for the utility to render adequate service, and fixed a reasonable time for the utility to perform such actions, and the failure of the utility to comply with the order presents a serious and imminent threat to the health or safety of a significant portion of its customers; or
  - (d) Fails to meet its financial obligations to its suppliers and is unable or unwilling to take necessary actions to correct the failure after receiving reasonable notice from the commission, and the failure poses an imminent threat to the continued availability of gas, water, electric, or sewer utility service to its customers.
- (3) Within twenty (20) days after commencing an action in Franklin Circuit Court, the commission shall file a certified

copy of the record of the administrative proceeding in which the commission entered its finding of abandonment.

- (4) Any action brought pursuant to KRS 278.410 for review of an order of the commission containing a finding that a utility is abandoned shall be consolidated with any action brought pursuant to subsection (1) of this section and based upon the same order.
- (5) Any receiver appointed by the court shall file a bond in an amount fixed by the court. The receiver shall operate the utility to preserve its assets, to restore or maintain a reasonable level of service, and to serve the best interests of its customers.
- (6) During the pendency of any receivership, the receiver may bring or defend any cause of action on behalf of the utility and generally perform acts on behalf of the utility as the court may authorize.
- (7) The receiver shall control and manage the assets and operations of the utility until the Franklin Circuit Court, after reasonable notice and hearing, orders the receiver to return control of those assets to the utility or to liquidate those assets as provided by law.
- (8) (a) Notwithstanding subsection (1) of this section, the commission may petition the Franklin Circuit Court to appoint temporarily a receiver to operate and manage the assets of an abandoned utility. After notice to the utility and a hearing, the court may grant a petition, upon terms and conditions as it deems appropriate, upon a showing by a preponderance of the evidence:
  1. That a utility has been abandoned;
  2. That the abandonment is an immediate threat to the public health, safety, or the continued availability of service to the utility's customers; and
  3. That the delay required for the commission to conduct a hearing would place the public health, safety, or continued utility service at unnecessary risk.

(b) Sixty (60) days after its entry, the order of temporary receivership shall terminate and control and responsibility for the assets and operations of the utility shall revert to the utility without further action of the court unless the commission brings an action under subsection (1) of this section.

(9) Nothing contained in this section shall be construed as requiring the commission to approve an application made pursuant to KRS 278.020(6) for authority to abandon a utility or other assets of a utility or to cease the provision of utility service.

In Case No. 2005-00022, the Commission approved the transfer of the utility assets of Airview Estates, Inc. to Airview, the latter entity then-known as Elizabethtown Utilities, LLC.<sup>4</sup> Airview was aware of the fact that the facility was aged at the time of the transfer.<sup>5</sup> Airview's WWTP was installed in 1969, and per the testimony of Lawrence Smither in this proceeding, it was meant to be a temporary solution for a development.<sup>6</sup> Airview's WWTP is a package treatment plant that has a design life of 20 to 25 years and has far outlived its planned useful life.<sup>7</sup> Per Airview, the WWTP is old and needs to be taken off line and Airview's collection system connected to a regional system or the WWTP needs to be replaced.<sup>8</sup>

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<sup>4</sup> Case No. 2005-00022, *Joint Application of Airview Estates, Inc. and Elizabethtown Utilities, LLC for the Transfer of Wastewater Treatment Plant to Elizabethtown Utilities, LLC*, (Ky. PSC Apr. 28, 2005) at 7.

<sup>5</sup> October 12, 2016 VR at 11:55:26.

<sup>6</sup> *Id.* at 9:27:28 to 9:28:39.

<sup>7</sup> *Id.* at 9:27:28 to 9:29:35; 9:38:25 to 9:40:05; and 11:27:10 to 11:28:40; also see 10:06:20 to 10:07:16.

<sup>8</sup> *Id.* at 9:54:10 to 9:54:38 and 10:00:38 to 10:01:45.



Airview identifies an interconnection with the Elizabethtown municipal system as the best solution.<sup>9</sup> Per Airview, Elizabethtown, which is within a mile of Airview, has the closest trunk line, and a connection with the Elizabethtown system is the solution to the problem of Airview's aging system.<sup>10</sup> The testimony presented by Airview is that it is economically prudent to dismantle Airview and connect it to a regional system.<sup>11</sup> Marty Cogan testified that it did not make economic sense to continue to operate the Airview system and that it is prudent to have Elizabethtown make a connection to the system.<sup>12</sup> It would not, per Mr. Cogan, make economic sense to replace the outdated system with a new WWTP on that spot.<sup>13</sup> Airview's testimony is that it does not make economic sense to spend money to maintain the current system.<sup>14</sup>

Although an interconnection with the Elizabethtown system has been identified as the best solution, Airview has no idea as to the cost of such an interconnection with Elizabethtown.<sup>15</sup> In explaining why Airview did not ask its consultant, Eric M. Carrico, to include an analysis of an interconnection with a regional system, such as the Elizabethtown system, as part of his March 2016 report, Airview stated: "Airview did not believe it is within the scope of the operation of the wastewater treatment plant to analyze and determine the steps necessary and the cost to connect to a trunk line of

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<sup>9</sup> *Id.* at 10:01:25 to 10:01:50.

<sup>10</sup> *Id.* at 9:24:37 to 9:25:35; and 9:51:35 to 9:54:29.

<sup>11</sup> *Id.* at 11:01:30 to 11:02:25; and 11:07:10 to 11:08:05.

<sup>12</sup> *Id.* at 12:00:10 to 12:02:30 and 12:02:00 to 12:02:25.

<sup>13</sup> *Id.* at 12:00:10 to 12:01:38; 12:02:00 to 12:02:25; and 12:12:07 to 12:12:49.

<sup>14</sup> *Id.* at 9:30:00 to 9:32:15;

<sup>15</sup> *Id.* at 11:26:23 to 11:26:35.

one of the local sanitary sewer systems.”<sup>16</sup> Airview cites no authority in support of its position.

The Commission finds that KRS 278.020(12) authorizes the Commission to determine the terms and conditions necessary or appropriate in authorizing an abandonment of facilities that provide services as set forth in KRS 278.010(3)(f). We find that Airview has known since its acquisition of this system in 2005 that the WWTP was past its planned useful life; further, we find that Airview states that the economically prudent option is to interconnect its system with the Elizabethtown system.

The Commission finds it necessary and appropriate to issue an interim Order that directs Airview to have prepared detailed engineering plans for an interconnection between the Airview system and Elizabethtown’s wastewater system. The preparation of the plans is to be performed by an engineering firm acceptable to Elizabethtown, to contain sufficient financial information to allow the development of a project profile by the KIA, and to be prepared, signed, sealed, and dated by an engineer registered in Kentucky in a format meeting all DOW filing requirements necessary for that agency’s review of the project for a decision on whether the interconnection plan should be approved.

The Commission finds that Airview should submit the names of three engineering firms with engineers registered in Kentucky acceptable to Elizabethtown within 30 days of the date of this Order. The submission should include documentation that verifies Elizabethtown’s approval of each firm and, if applicable, Elizabethtown’s

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<sup>16</sup> Responses to Staff’s Second Request for Information (“Staff’s Second Request”) (filed Nov. 30, 2016) at Item 4.

recommendation as to which firm should perform the work. The Commission finds that the plans should be completed within 180 days of the date of this Order.

The Commission finds that Airview leases the real property upon which its current WWTP is located and that Airview has not made the owners of the property, the lessor, aware of its request to abandon.<sup>17</sup> The Commission finds it necessary and appropriate, through this interim Order, to direct Airview to ascertain the status of its property rights in the lease of the real property upon which Airview's WWTP is located and to obtain the written consent of the lessor for the transfer of Airview's benefits under the lease. The Commission finds that Airview should obtain the written consent of the lessor within 180 days of the date of this Order and file the written consent into the record of this case.

The Commission finds that Elizabethtown has an interest in the instant case and finds it necessary and appropriate to make Elizabethtown a party to the proceedings.

IT IS THEREFORE ORDERED that:

1. Airview shall continue to operate its utility facilities during the pendency of this investigation and shall continue operating until the Commission issues an Order adjudicating Airview's request to abandon its facilities.

2. Within 30 days of the date of this Order, Airview shall submit the names of three engineering firms with engineers registered in Kentucky acceptable to Elizabethtown. The submission shall include documentation that verifies Elizabethtown's approval of each firm and, if applicable, Elizabethtown's recommendation as to which firm should perform the work.

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<sup>17</sup> October 12, 2016, VR at 9:59:25 to 9:59:58.

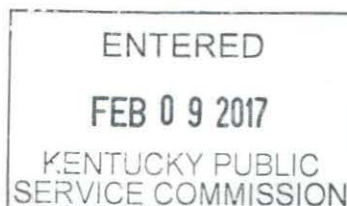
3. Within 180 days of this Order, Airview shall have prepared and file into the record in the instant case detailed engineering plans for an interconnection between the Airview system and the Elizabethtown wastewater system. The preparation of the plans shall be performed by an engineering firm acceptable to Elizabethtown, contain sufficient financial information to allow the development of a project profile by the KIA, and to be prepared, signed, sealed, and dated by an engineer registered in Kentucky in a format meeting all DOW filing requirements necessary for DOW to review the project.

4. Within 180 days of this Order, Airview shall ascertain the status of its property rights in the lease of the real property upon which Airview's WWTP is located and shall obtain and file into the record written consent of the lessor for a transfer of Airview's benefits under the lease.


5. The city of Elizabethtown is made a party in this matter and shall be served with a copy of this Order.

6. A copy of this Order shall be served to the Kentucky Division of Water.

By the Commission



ATTEST:

  
Executive Director

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