

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AIRVIEW UTILITIES, LLC, AND)
MARTIN COGAN AND LARRY)
SMITHER IN THEIR INDIVIDUAL)
AND OFFICIAL CAPACITIES)
_____) CASE NO. 2006-00558
)
ALLEGED FAILURE TO COMPLY)
WITH COMMISSION'S ORDER)

O R D E R

In Case No. 2003-00494,¹ the Commission authorized Airview Estates, Inc. to collect a monthly surcharge of \$17.31 per customer for a period of 36 months or until \$118,990 had been collected.

On January 7, 2005, Airview Estates, Inc. and Elizabethtown Utilities, LLC (now Airview Utilities, LLC²) ("Airview") jointly applied for Commission approval of the proposed transfer of Airview Estates, Inc.'s assets to Airview, a Kentucky limited liability company whose only members are Martin Cogan and Larry Smither.³ Airview was

¹ Case No. 2003-00494, Application of Airview Estates, Inc. for an Adjustment of Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities (Ky. PSC June 14, 2004).

² See [http://apps.sos.ky.gov/business/obdb/\(jg4dujbwk5ofu545yxztc255\)/show-entity.aspx?id=0603025&ct=06&cs=99998](http://apps.sos.ky.gov/business/obdb/(jg4dujbwk5ofu545yxztc255)/show-entity.aspx?id=0603025&ct=06&cs=99998), showing that Elizabethtown Utilities, LLC is now known as Airview Utilities, LLC.

³ Case No. 2005-00022, Joint Application of Airview Estates, Inc. and Elizabethtown Utilities, LLC for Approval of the Transfer of Wastewater Treatment Plant to Elizabethtown Utilities, LLC (Ky. PSC April 28, 2005).

directed to use its surcharge proceeds to fund certain system repairs pursuant to a specific construction schedule. The Commission further ordered, *inter alia*, that "If an entity or person that is affiliated with [Airview] is used to perform any of the surcharge construction projects, [Airview] shall obtain bids or estimates from 3 nonaffiliated sources. Copies of the three competitive bids, an explanation of the criteria used in awarding the construction, and the affiliated entity bid should be filed with the next quarterly report." In its Order, the Commission found that if Airview failed to follow those conditions or the construction schedule, Airview could be required to refund all of its surcharge collections plus interest.

In Case No. 2006-00094, Airview made application to extend its surcharge for a period of 4 months. In that proceeding, Airview acknowledged that it had used surcharge proceeds for purposes other than those ordered by the Commission and had also failed to obtain the requisite competitive bids.

The Commission, on its own motion, HEREBY ORDERS that:

1. In addition to Airview, Martin Cogan and Larry Smither are hereby made parties to this action in their individual and official capacities.
2. Airview, Mr. Cogan, and Mr. Smither shall submit to the Commission, within 20 days of the date of this Order, written responses: (a) regarding their failures to comply with the Commission's Order in Case No. 2005-00022; (b) showing cause why they should not be jointly and severally subject to the penalties prescribed in KRS 278.990(1); and (c) explaining why Airview's surcharge should not be revoked and why Airview should not be required to refund the monies already collected plus interest, pursuant to the Commission's Order of April 28, 2005 in Case No. 2005-00022.

3. The parties shall appear before the Commission at 211 Sower Boulevard, Frankfort, Kentucky, on a date to be determined, for the purpose of presenting evidence pertaining to the issues described in ordering paragraph 2 above.

4. The Commission does not favor motions for continuance and will grant them only when such a motion is made in writing and states compelling reasons for granting the motion.

5. Corporate entities are advised that, under Kentucky law, a corporation, its employees, and any representatives, who are not licensed to practice law in Kentucky, are not permitted to make objections, examine, or cross-examine witnesses in administrative hearings.⁴

6. A certified copy of the final Order in Case No. 2005-00022, dated April 28, 2005, is appended hereto as Appendix A.

7. The records of Case Nos. 2003-00494, 2005-00022, and 2006-00094 are made part of the record of this proceeding.

8. Any motion requesting an informal conference with Commission Staff to consider matters that would aid in the handling or disposition of this proceeding shall be filed with the Commission no later than 20 days from the date of this Order.

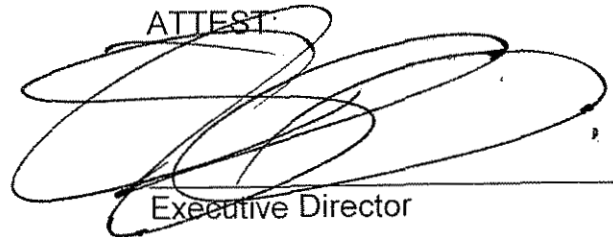
9. Pursuant to KRS 278.360, the record of the formal hearing shall be kept by videotape. A stenographic transcript shall not be made unless requested by a party to this action.

⁴ Turner v. Kentucky Bar Ass'n., 980 S.W.2d 560 (Ky. 1998), and Practice Before The Commission By Attorneys Non-Licensed In The Commonwealth Of Kentucky, Admin. Case No. 249, Order dated June 15, 1981.

Done at Frankfort, Kentucky, this 22nd day of December, 2006.

By the Commission

ATTEST

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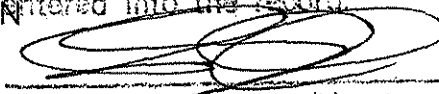
Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2006-00558 DATED December 22, 2006.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

CERTIFICATE
This is a true and complete
copy of the Kentucky Public
Service Commission Order
entered into the record.


Executive Director
12/20/06
Date

In the Matter of:

JOINT APPLICATION OF AIRVIEW)
ESTATES, INC. AND ELIZABETHTOWN)
UTILITIES, LLC FOR APPROVAL OF THE) CASE NO.
TRANSFER OF WASTEWATER) 2005-00022
TREATMENT PLANT TO)
ELIZABETHTOWN UTILITIES, LLC)

ORDER

On January 7, 2005, Airview Estates, Inc. ("Airview") and Elizabethtown Utilities, LLC ("Elizabethtown Utilities") jointly applied for Commission approval of the proposed transfer of Airview's assets to Elizabethtown Utilities.¹

On January 18, 2005, the Attorney General ("AG"), through his Office of Rate Intervention, moved for full intervention in this proceeding. The Commission granted his motion on January 26, 2005. The record does not reflect any further participation by him in this proceeding after that date.

Having considered the application and evidence of record, the Commission finds that:

¹ On February 15, 2005, Airview and Elizabethtown Utilities submitted an amended application with the Commission. Commission Staff propounded interrogatories and requests for production of documents to Elizabethtown Utilities on February 7, 2005. Elizabethtown Utilities submitted its responses to these requests on March 3, 2005. Because of the limited time in which to review the responses to these requests, the Commission, pursuant to KRS 278.020(5), extended the period for its review of the application to 120 days.

1. Airview, a Kentucky corporation, owns and operates a subdivision sewage treatment facility in the Airview Estates Subdivision in Hardin County, Kentucky that serves approximately 191 single family residential units.²

2. Airview is not subject to the regulation of any metropolitan sewer district.

3. Airview's sewage treatment facilities include a wastewater treatment plant with a maximum daily treatment capacity of 55,000 gallons, an aeration tank, a settling tank, chlorinating facilities, a lagoon and force mains.³ These facilities have been in operation since 1972. Airview's sewage treatment plant is considered a Class Type I sewage treatment plant.

4. As of December 31, 2004, Airview reported net utility plant of \$9,570.⁴

5. As of December 31, 2004, Airview reported total assets and other debits of \$37,405.⁵

6. As of December 31, 2004, Airview reported outstanding liabilities of \$138,500, which is comprised of notes payable to associated companies of \$50,780; notes payable to Airview's owner, Fred Schlatter, of \$59,434; and accounts payable of \$28,286.⁶

7. As of December 31, 2004, Airview reported a balance of \$16,801 in Account No. 271, "Contributions in Aid of Construction;" however, in its 2004 Annual

² Amended Application at ¶5.

³ Id., Asset Purchase Agreement at 1.

⁴ Annual Report of Airview Estates, Inc. to the Kentucky Public Service Commission for the Year Ended December 31, 2004 ("Annual Report") at 4.

⁵ Id. at 2.

⁶ Id. at 11.

Report, Airview states that 100 percent of the "Sewer Utility Plant" was recovered by the developer of the subdivision, through the sale of lots.⁷

8. Airview proposes to transfer to Elizabethtown Utilities, and Elizabethtown Utilities proposes to acquire, all utility assets of Airview pursuant to an agreement between these entities. This agreement provides, inter alia, that:

a. Airview convey to Elizabethtown Utilities its wastewater treatment plant and associated sanitary sewers, pumping stations, force mains, equipment, and sewer easements upon which the wastewater treatment plant is located for \$1.

b. Airview will provide to Elizabethtown Utilities copies of all records relating to the ownership and design of the wastewater system including, but not limited to, sewer maps, construction plans, and drainage plans that may exist.

c. Airview will transfer to Elizabethtown Utilities all governmental approvals including the KPDES discharge permit issued by the Kentucky Department for Environmental Protection, Division of Water, Certificates of Public Convenience and Necessity, permits, licenses, orders, tariffs, and similar rights obtained from governments and governmental agencies.

d. Airview and Elizabethtown Utilities will enter into a Lease Agreement and Memorandum of Lease Agreement, wherein Elizabethtown Utilities agrees to a 50-year lease of the wastewater treatment plant site with an annual rental payment of \$1.⁸

e. Elizabethtown Utilities will not assume any liabilities or obligations.

⁷ Id. at 3.

⁸ Elizabethtown Utilities' Response to Commission Staff's Interrogatories and Requests for Production of Documents, Item 8.

9. Elizabethtown Utilities, a Kentucky limited liability company, was formed on January 7, 2005.⁹

10. Martin Cogan and Larry Smither are Elizabethtown Utilities' sole members.¹⁰

11. Mr. Cogan has a Master's Degree in Environmental Engineering from the University of Louisville. He has served as a corporate officer of the following public sewer utilities: Brentwood Wastewater Treatment Plant, Inc.; Bullitt Utilities, Inc.; Covered Bridge Utilities, Inc.; Farmdale Development Corporation; Hayfield Utilities; Lake Columbia Utilities; Orchard Grass Utilities Inc.; and Willow Creek Sewer System.¹¹

12. Mr. Smither has 30 years of experience operating and managing package wastewater treatment plants. He is currently certified by the Environmental and Public Protection Cabinet as a Class II Wastewater Treatment Plant Operator.¹²

13. Elizabethtown Utilities has operated Airview's sewage treatment system since September 1, 2004. There are no reported instances during this period in which the sewage treatment system has been out of compliance with applicable state statutes and regulations. During this period, Elizabethtown Utilities' expenses have been paid in a timely manner.¹³

⁹ Amended Application, Exhibit C, Articles of Organization of Elizabethtown Utilities, LLC.

¹⁰ Id. at ¶¶6.

¹¹ Id.; Elizabethtown Utilities' Evidence of Financial Integrity (filed March 31, 2005) at ¶¶1.

¹² Id. Application at ¶¶6.

¹³ Elizabethtown Utilities' Evidence of Financial Integrity (filed March 31, 2005) at ¶¶2.

14. In lieu of submitting a third party beneficiary agreement as evidence of its financial integrity to own and operate Airview, Elizabethtown Utilities should file an irrevocable letter of credit in the amount of \$20,000 with a minimum term of 10 years.

15. In Case No. 2003-00494,¹⁴ the Commission authorized Airview to collect a monthly surcharge of \$17.31 per customer for a period of 36 months or until \$118,990 had been collected. Airview was directed to use its surcharge proceeds to fund the following system repairs and to follow the construction schedule:

| <u>Repair Description</u> | <u>Itemized Cost</u> | <u>Month Construction to Begin</u> |
|---|----------------------|------------------------------------|
| 1) Remote Lift Station (Guide Rail, Pumps, & Control Panel) | \$ 22,552 | 7 |
| 2) 2 Blower Motors & Control Panel | 11,893 | 11 |
| 3) 13 ¼" Diffuser Drops with 3/8" Diffusers | 4,145 | 12 |
| 4) Pump-Out & Dispose of Lagoon Sludge | 75,000 | 35 |
| 5) Video Inspection of Mains | + 5,400 | 36 |
| Totals | \$ 118,990 | |

16. As of February 5, 2005, Airview has collected and deposited \$19,494.58 in surcharge revenues.¹⁵

17. The surcharge investments and receivables will be transferred from Airview to Elizabethtown Utilities at the closing of the proposed transaction.¹⁶

18. Airview has pending before the Commission a request to modify its surcharge construction schedule that was established in Case No. 2003-00494.¹⁷

¹⁴ Case No. 2003-00494, Application of Airview Estates, Inc. for an Adjustment of Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities (Ky. PSC June 14, 2004).

¹⁵ Elizabethtown Utilities' Response to Commission Staff's Interrogatories and Requests for Production of Documents, Item 6(a).

¹⁶ *Id.*, Item 5 and Item 6(e).

¹⁷ Case No. 2005-00050, Request of Airview Estates, Inc. to Modify Construction Schedule for Plant Improvements Financed Through a Customer Surcharge.

19. Upon its acquisition of Airview's sewage treatment system, Elizabethtown Utilities will assess the same rates and charges as Airview presently assesses.

Based upon these findings, the Commission makes the following conclusions of law:

1. Airview is a utility that is subject to Commission jurisdiction. KRS 278.010(3)(f).

2. Elizabethtown Utilities is not a utility and is therefore currently not subject to Commission regulation. KRS 278.010(3)(f).

3. Elizabethtown Utilities is a "person" for purposes of KRS Chapter 278. KRS 278.010(2).

4. KRS 278.020(5) provides that "[n]o person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission . . . without prior approval by the commission." As Elizabethtown Utilities is a person and is acquiring ownership of Airview's sewage treatment facilities, this statute is applicable to and requires Commission approval of the proposed transfer.

5. KRS 278.020(6) provides that "[n]o 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." As Elizabethtown Utilities is acquiring control of Airview's utility operations through the acquisition of the facilities that Airview uses to provide utility service, this statute is applicable to and requires Commission approval of the proposed transfer.

6. Elizabethtown Utilities has the financial, technical, and managerial abilities to provide reasonable service to the present customers of Airview.

7. The proposed transfer is in accordance with law and for a proper purpose but will be consistent with the public interest only if the conditions set forth in Ordering Paragraph 1 of this Order are met.

8. Upon completion of the proposed transfer, the Airview sewage treatment facilities will continue to be subject to Commission jurisdiction.

IT IS THEREFORE ORDERED that:

1. The proposed transfer of the utility assets of Airview to Elizabethtown Utilities is approved subject to the conditions set forth below that:

a. Within 30 days of the date of this Order, Elizabethtown Utilities obtain an irrevocable letter of credit in the amount of \$20,000 with a minimum term of 10 years and payable to any receiver appointed by a court of competent jurisdiction to operate the Airview sewage treatment system upon Elizabethtown Utilities or any successor's failure to properly operate that system or abandonment of that system.

b. Elizabethtown Utilities file with the Commission a copy of such letter of credit within 30 days of the date of this Order.

c. Elizabethtown Utilities obtain all necessary permits for the operation of the Airview sewage system, including a Kentucky Pollutant Discharge Elimination System Permit, before the transfer occurs.

d. The proposed transfer occur within 90 days of the date of this Order.

e. Elizabethtown Utilities abide by the conditions regarding Airview's surcharge that are set forth in Appendix A of this Order.

2. Within 10 days of the date of this Order, Elizabethtown Utilities and its principals shall file with the Commission written acknowledgements that each accepts and agrees to the conditions set forth in Ordering Paragraph 1 of this Order.

3. Within 10 days of completion of the proposed transfer of assets, Elizabethtown Utilities and Airview shall notify the Commission in writing of the completion of the transfer of assets.

4. Within 10 days of the completion of the proposed transfer, Elizabethtown Utilities shall file with the Commission a signed and dated adoption notice in accordance with Administrative Regulation 807 KAR 5:011, Section 11.

5. Within 10 days of the filing of its adoption notice, Elizabethtown Utilities shall issue and file with the Commission in its own name Airview's tariff, or such other tariff as it proposes to put into effect in lieu thereof, in the form prescribed in Administrative Regulation 807 KAR 5:011, Sections 2 through 5, with proper identifying designation.

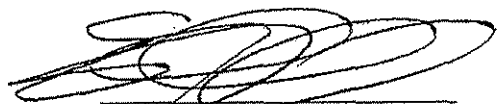
6. Airview shall be responsible for submitting to the Commission a financial and statistical report, as described in Administrative Regulation 807 KAR 5:006, Section 3, for the period in calendar year 2005 that it owned and operated the transferred assets.

7. Within 10 days of the completion of the proposed transfer, Elizabethtown Utilities shall file with the Commission the journal entry that it proposes to record the asset acquisition. The acquisition shall be recorded in accordance with the Uniform System of Accounts for Sewer Utilities.

Done at Frankfort, Kentucky, this 28th day of April, 2005.

By the Commission

ATTEST:



Executive Director

Case No. 2005-00022

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2005-00022 DATED APRIL 28, 2005

1. The surcharge collections will be placed in a separate interest-bearing account and the monthly transfers to the surcharge account will be no less than \$3,306.21.
2. The transfer of the monthly surcharge collections from gross revenues will be made prior to those revenues being dispersed for another purpose.
3. Quarterly activity reports will be filed with the Commission within 15 days of the close of the reporting quarter. The quarterly reports shall contain the monthly surcharge billings and collections, the monthly surcharge bank statement, a detailed listing of the payments made from the surcharge account, and copies of the invoices supporting the payments made from the surcharge account.
4. Except as provided in paragraph 5 no revisions to the surcharge approved in Case No. 2003-00494 shall be made unless the Commission so orders.
5. Elizabethtown Utilities shall cease billing and collecting the surcharge for service provided on and after June 30, 2007 or after Elizabethtown Utilities and its predecessor have collected \$118,900 in proceeds from the surcharge, whichever occurs first.
6. Upon ceasing to bill the surcharge, Elizabethtown Utilities shall give notice of such action to the Commission and all parties of record in Case No. 2003-00494.
7. The surcharge will appear as a separate line item on the customer's bill.

8. If an entity or person that is affiliated with Elizabethtown Utilities is used to perform any of the surcharge construction projects, Elizabethtown Utilities shall obtain bids or estimates from 3 nonaffiliated sources. Copies of the three competitive bids, an explanation of the criteria used in awarding the construction, and the affiliated entity bid should be filed with the next quarterly report.

9. Elizabethtown Utilities shall comply with the construction schedule set forth in the Commission's Order of June 14, 2003 in Case No. 2003-00494 or subsequently directed by the Commission.

10. Elizabethtown Utilities' failure to comply with the conditions 1 through 9 will warrant the revocation of the surcharge and the refunding of the monies already collected, plus interest.