

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF THE CITY OF WEST LIBERTY,	)	
KENTUCKY FOR APPROVAL TO ACQUIRE	)	CASE NO.
THE UTILITY ASSETS OF ELAM UTILITY	)	2010-00302
COMPANY, INC. AND FOR APPROVAL OF A	)	
MANAGEMENT AGREEMENT	)	

ORDER

On July 19, 2010, the city of West Liberty, Kentucky ("West Liberty") petitioned the Commission for approval to acquire the assets of Elam Utility Company, Inc. ("Elam Utility"). By this Order we grant the requested approval.

PROCEDURE

Upon receipt of the application, Commission Staff ("Staff") scheduled an informal conference for July 20, 2010, which was attended by West Liberty, the Attorney General of the Commonwealth of Kentucky ("AG") and Staff. On July 26, 2010, the Commission approved the AG's motion to intervene. Pursuant to the procedural schedule established for this proceeding, the AG and Staff issued information requests to West Liberty to which it responded. A second informal conference was held on August 4, 2010. At the request of Staff, both parties filed briefs on West Liberty's ability to provide service to all of Elam Utility's customers and the Commission's authority regarding the transfer. A hearing was neither requested nor conducted and the Commission makes its decision on the written record.

## BACKGROUND

Elam Utility, a corporation organized under the laws of Kentucky, owns and operates facilities in Morgan and Wolfe counties in Kentucky<sup>1</sup> that are used for and in connection with the distribution, sale and furnishing of natural gas to the public for compensation. Accordingly, it is a utility subject to the Commission's regulation and jurisdiction. KRS 278.010(3)(b); KRS 278.040.

West Liberty is a city of the fourth class pursuant to KRS 81.010(4) with its principal office in West Liberty, Morgan County, Kentucky. Its population, which includes the Eastern Kentucky Correctional Complex, is 3,277.<sup>2</sup>

Columbia Gulf Transmission Company and Columbia Gas Transmission, LLC (collectively "Columbia Transmission") provide gas transportation and storage service to Elam Utility pursuant to a Service Agreement governed by Columbia Transmission's Federal Energy Regulatory Commission ("FERC") tariffs. Elam Utility has been in arrears to Columbia Transmission since approximately 2006 due to its failure to pay its gas imbalance charges and its transportation services.<sup>3</sup> It is indebted to Columbia Transmission for services rendered through June 1, 2010 in the amount of \$688,629.76. As a result of this large indebtedness, Columbia Transmission, pursuant to its FERC tariffs, gave

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<sup>1</sup> Elam Utility serves approximately 410 customers in West Liberty, Morgan County, Kentucky and approximately 50 customers in Wolfe County, Kentucky.

<sup>2</sup> Application, p. 3.

<sup>3</sup> Application, Exhibit 2, Letter of June 22, 2010, from NiSource Gas Transmission & Storage to Elam Utility. (NiSource Gas Transmission & Storage is the parent company of Columbia Transmission).

notice to Elam Utility on June 22, 2010 of its intent to discontinue service on July 26, 2010 unless Elam Utility met certain credit-worthiness conditions. Elam Utility did not meet the required conditions, but did enter into an Asset Purchase Agreement to sell its assets to West Liberty.

### PROPOSED TRANSACTION

West Liberty's city council approved the acquisition of Elam Utility's stock at an emergency council meeting on July 13, 2010. It subsequently approved the acquisition of assets rather than stock and approved the Asset Purchase Agreement filed herein at an emergency council meeting held on July 15, 2010. Elam Utility adopted a resolution approving the sale of all utility assets to West Liberty.

Elam Utility and West Liberty entered into the Asset Purchase Agreement on July 16, 2010, which provides that Elam Utility will transfer all of its utility assets to West Liberty in consideration of West Liberty's assumption of Elam Utility's: (1) outstanding indebtedness to Columbia Transmission in the approximate amount of \$700,000; (2) outstanding indebtedness to Commercial Bank in West Liberty in the approximate amount of \$10,000; and (3) a mortgage debt in favor of Community Trust Bank of approximately \$180,000.

In addition to the agreement with Elam Utility, West Liberty entered into a Memorandum of Understanding with Columbia Transmission to avoid the planned termination of gas service on July 26, 2010. Pursuant to the Memorandum of Understanding, Columbia Transmission agrees, *intra alia*, to hold the termination of service to Elam Utility in abeyance on condition that (1)

the Commission rule on West Liberty's proposed acquisition of Elam Utility on or before August 13, 2010; (2) West Liberty escrows \$64,416.00 to be paid to Columbia Transmission immediately if the acquisition is approved;<sup>4</sup> and (3) West Liberty pay the remainder of Elam Utility's outstanding indebtedness to Columbia within 14 days of Commission approval of the acquisition.

#### STANDARD OF REVIEW

KRS 278.020 requires Commission review and approval of any change in or transfer of control of a utility that is subject to its jurisdiction. KRS 278.020(5) provides:

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.

KRS 278.020(6) provides in part:

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. Any acquisition of control without prior authorization shall be void and of no effect . . . . The commission shall approve any proposed acquisition when it finds that the same is to be made in accordance with law,

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<sup>4</sup> The Memorandum of Understanding required West Liberty to execute an Escrow Agreement and deposit \$64,416 before the close of business on July 23, 2010. West Liberty filed a statement from Commercial Bank evidencing the required escrow balance of \$64,416 on July 23, 2010.

for a proper purpose and is consistent with the public interest.

### DISCUSSION

Based on the above standard of review, the Commission must first determine if the person who is acquiring control of Elam Utility has the requisite abilities to provide reasonable utility service. Second, it must determine whether the proposed transfer is lawful, for a proper purpose and consistent with the public interest.

#### Financial, Technical and Managerial Ability

West Liberty's application includes its audited financial statements for the fiscal year ended June 30, 2009, which show a balance of \$12.9 million in net assets.<sup>5</sup> Its application also includes a letter from the Commercial Bank of West Liberty, which shows that West Liberty has secured a short-term loan for up to \$700,000 to repay the obligations of Elam Utility.<sup>6</sup> It plans to refinance the debt with a long-term, low-interest-rate loan and states that the USDA Office of Rural Development and the Kentucky League of Cities have both expressed interest in providing such financing.<sup>7</sup> West Liberty does not anticipate a need to increase rates to service this debt.<sup>8</sup>

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<sup>5</sup> Nearly \$10.4 million of the \$12.9 million in net assets represents West Liberty's existing utilities' net assets.

<sup>6</sup> West Liberty states that it will repay Columbia primarily with replacement gas. See West Liberty's response to the AG's Data Request, Question 15(e).

<sup>7</sup> West Liberty's Response to AG Data Request, Question 10.

<sup>8</sup> Id.

West Liberty currently owns and operates its own water and sewer utility. Its water utility was one of 31 water treatment plants that received an award from the Energy and Environmental Cabinet for meeting or exceeding state water quality standards in 2010 and received awards from the same Cabinet in 2006 and 2007 for meeting Area-Wide Optimization Program goals for both settled and filtered water. West Liberty intends to retain Elam Utility's two long-term employee operators in order to maintain technical expertise with the gas system.<sup>9</sup>

The Commission finds that West Liberty's financial condition, its experience with operating utilities, and its intention to hire Elam Utility's current operators provide sufficient evidence that West Liberty has the financial, technical and managerial abilities to provide reasonable service to Elam Utility's customers.

In Accordance with Law, For a Proper Purpose and in the Public Interest

Having determined that West Liberty has the requisite abilities to operate Elam Utility's gas system, the Commission must determine that the proposed acquisition is lawful, for a proper purpose and in the public interest.

In Accordance with Law

The parties acknowledge that Elam Utility serves customers outside the city of West Liberty, but both assert that it is lawful and in the public interest for West Liberty to acquire and serve the entire Elam Utility system. Both parties affirmatively state that KRS 96.190 authorizes a fourth class city such as West

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<sup>9</sup> One employee has 8 years' experience and the other 15 years' experience with Elam Utility's gas distribution system. See West Liberty's response to AG's Data Request, Question 1(a).

Liberty to provide natural gas service to its residents and that neither that statute nor any other statute explicitly prohibits a city from providing service outside its boundaries. The AG has specifically stated that the Commission has the authority to approve the transaction, that such transaction is lawful and in the public interest, and that he has no objection to approval of the acquisition on the existing record.

West Liberty also asserts that its proposal meets all the criteria necessary for approval. It states that its desire to protect its residents and its neighbors from losing gas service is certainly in the public interest.

The Commission, having reviewed the record and all applicable statutes, finds that KRS 96.190 supports the parties' position that it is lawful for West Liberty to own natural gas facilities that are located outside its boundaries to provide natural gas service to its residents. We also agree that there is no statutory provision that directly prohibits West Liberty from acquiring facilities that are situated outside its boundaries to provide service to non-residents. We find, therefore, that the proposed acquisition is lawful.

#### For a Proper Purpose and in the Public Interest

The statute does not define public interest; however, the Commission has previously held that a proposed transfer is in the public interest if it will not adversely affect the existing level of utility service or rates or that any potentially adverse effects can be avoided through the Commission's imposition of

reasonable conditions on the acquiring party.<sup>10</sup> The Commission has also required a showing that the proposed transfer is likely to benefit the public through improved service quality, enhanced service reliability, the availability of additional services, lower rates, or a reduction in utility expenses to provide present services.

West Liberty has stated that it does not anticipate a change in rates or service at this time; that it has secured an agreement to suspend termination of gas; and that it is negotiating contracts, which it plans to enter soon, with Jefferson Gas Transmission and Seminole Energy for gas supply.<sup>11</sup>

The Commission finds that it is without question that Elam Utility faced imminent termination of its gas supply and that its customers, including a nursing home, several businesses, a state medium-security prison, an industrial park and several hundred residents, faced inevitable disruptions in their daily routines. It was West Liberty's quick response, its willingness to protect its citizens and its neighbors, and its success in negotiating a suspension of Columbia Transmission's planned termination that prevented such unwanted consequences.

The Commission, having reviewed the record and the case in toto, finds that West Liberty's acquisition of Elam Utility meets the proper purpose and public interest standard. As stated above, the public interest standard is a two-step process – the acquirer in this case must demonstrate that there will

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<sup>10</sup> Case No. 2002-00018, Application for Approval of the Transfer of Control of Kentucky-American Water Company to RWE Aktiengesellschaft and Thames Water Aqua Holdings GmbH (Ky. PSC May 30, 2002) at 7.

<sup>11</sup> West Liberty's Response to Staff's Data Request, Question 1.

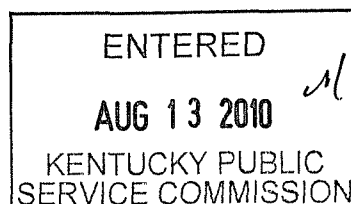


be no adverse effect on service or rates and that there will be some benefits. West Liberty has shown that its proposed ownership and control meets this standard in that it does not plan to increase rates to the customers and that it will provide enhanced reliability of gas.

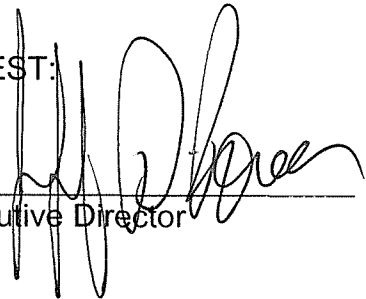
IT IS THEREFORE ORDERED that:

1. West Liberty's application for approval to acquire the assets of Elam Utility is approved.
2. Within 20 days of the date of transfer, West Liberty shall file a written notice setting forth the actual date of transfer and state whether all commitments in the Memorandum of Understanding have been met.

By the Commission



ATTEST:

  
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