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FACSIMILE TRANSMISSION SHEET		
DATE:	August 4, 2010	
	<u>RECIPIENT</u>	<u>COMPANY NAME</u> <u>FACSIMILE NUMBER</u>
TO:	Jeff DeRouen	KY Public Service Commission      (502) 564-3460
FROM:	W. Duncan Crosby III	(502) 627-8754 (Direct Fax) (502) 560-4263 (Direct Phone)
RE:	<u>Application of the City of West Liberty, Kentucky for Approval to Acquire the Utility Assets of Elam Utility Company, Inc. and for Approval of a Management Agreement</u> Case No. 2010-00302	
COMMENTS:	The City of West Liberty, Kentucky's brief is attached. The original and ten copies will be tendered for filing tomorrow morning. Thank you.	
NO. OF PAGES (INCLUDING COVER SHEET):	7	

If you encounter difficulty in receiving this transmission, please call Eloise Carlisle at (502) 568-5418.

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August 4, 2010

**VIA FAX AND HAND DELIVERY**

Jeff DeRouen  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, KY 40601

**RE: Application of the City of West Liberty, Kentucky for Approval to Acquire the Utility Assets of Elam Utility Company, Inc., and for Approval of a Management Agreement**  
**Case No. 2010-00302**

Dear Mr. DeRouen:

Enclosed please find and accept for filing the original and ten copies of the Brief of the City of West Liberty in the above-referenced matter. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me via our runner.

Should you have any questions, please contact me at your convenience.

Sincerely,

W. Duncan Crosby III

WDC:ec  
Enclosures  
cc: Parties of Record

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**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

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

**BRIEF OF THE CITY OF WEST LIBERTY**

The City of West Liberty ("City") respectfully submits that the Commission's approving the transfer of all of Elam Utility Company, Inc.'s ("Elam") assets, including its utility assets used to serve customers outside the City's municipal boundaries, would be consistent with the following provision of KRS 278.020(6): "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." Protecting its residents and neighbors from losing gas service, with all the economic and possibly physical harm that could result, and ensuring continued service at fair, just, and reasonable rates under competent management, is a proper purpose for the City's proposed asset purchase, and it is plainly in the public interest. Moreover, as argued below, the proposed transaction, which includes the acquisition of utility facilities to serve customers outside the City, would also be in accordance with law. For those reasons, in addition to those already provided in the City's Application and discovery responses concerning the requirements of KRS 278.020(5) and (6), the City respectfully requests the Commission to approve the proposed asset purchase, including the purchase of Elam's utility assets in Wolfe County, no later than August 13, 2010.

There can be no doubt that the proposed transfer of utility assets from Elam to the City, including those located in Wolfe County, is for a proper purpose and in the public interest. As

the City stated in its Application, the City is acting to protect its residents from losing service through no fault of their own, and is also acting to protect Elam's approximately 50 customers who reside in Wolfe County from Elam's all-but-certain and imminently impending financial collapse. A nursing home, several businesses, and hundreds of residential customers are among the approximately 410 customers in West Liberty whose natural gas service has been threatened by Elam's collapse. In neighboring Wolfe County, the 50 customers who could be harmed if the Commission does not approve the City's proposed acquisition of Elam's utility assets include a tri-county industrial park (owned by Morgan, Wolfe, and Magoffin Counties pursuant to an inter-local agreement) and numerous residential customers. A business in the industrial park currently employs approximately 40 people; it is hoped that the park will provide many more jobs over time as it expands and additional businesses move into it, which will improve and strengthen the economy of the City and surrounding counties. But an uncertain gas supply would deter additional businesses from moving to the park; indeed, recent discussions about just such an expansion have been imperiled by the recent uncertainty the Elam situation has created. In sum, protecting the City's residents and neighboring gas customers from harm, and seeking to protect opportunities for economic growth in the City and the surrounding area, is plainly a proper purpose and in the public interest.

In addition, the proposed asset purchase would be in accordance with law. As a city of the fourth class, the City may own and operate natural gas facilities, including facilities outside its municipal boundaries, to serve its residents;<sup>1</sup> however, the proposed acquisition would result

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<sup>1</sup> See KRS 82.081 ("Each city shall constitute a corporation, with capacity to sue and be sued, to contract and be contracted with, to acquire and dispose of property, and to have a common seal and change it at pleasure or act without a seal."); KRS 82.082 ("(1) A city may exercise any power and perform any function within its boundaries, including the power of eminent domain in accordance with the provisions of the Eminent Domain Act of Kentucky, that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision or statute. (2) A power or function is in conflict with a statute if it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes

in the City owning and operating natural gas distribution assets in neighboring Wolfe County, too. But this is not an uncommon situation; the City is aware on information and belief that a number of other similar cities have municipal gas utilities that serve customers outside their municipal boundaries. This is not surprising in view of the fact that, to the best of the City's knowledge, there is no explicit statutory or regulatory prohibition against providing such service. Moreover, a relatively recent Opinion of the Attorney General stating that a city may not "extend its [natural gas] facilities to provide extra-territorial service" does not assert that a city may not acquire a utility system with extra-territorial components when acquiring the whole system.<sup>2</sup> Indeed, the Opinion states, "To the extent there is a surplus of natural gas, the city may lawfully allow non-residents the opportunity to access the surplus."<sup>3</sup> So there is not a categorical prohibition against a city's acquiring utility assets outside its municipal boundaries, nor is there such a prohibition against a city's selling gas to persons outside its boundaries.

Moreover, nearly 90% of Elam's customers reside in the City, and the City's purpose in attempting to purchase Elam's utility assets is first and foremost to ensure that its residents do not lose their gas service, even temporarily. The customers outside the City will benefit from the acquisition, as well, by having a competent and solvent provider of natural gas utility service. And the City has committed not to charge discriminatory rates to customers outside the City limits,<sup>4</sup> which addresses the justification most often given for prohibiting municipalities from

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including, but not limited to, the provisions of KRS Chapters 95 and 96."); KRS 96.190(1) ("The legislative body of any city of the fourth class may provide the city and all persons in the city with water, gas, electric power, light, and heat, by contract with any person or by works and facilities owned or leased by the city and located within or beyond the city boundaries. Telecommunication service may be provided by any legislative body of any city of the fourth class by contract or by works of its own, except that any city of the fourth class that establishes municipal telephone service shall, for that service solely, be deemed a utility under KRS 278.010 and shall be regulated as to the telephone service, by the Public Service Commission.").

<sup>2</sup> Ky. OAG 02-01, 2002 WL 597401 at \*1 (Feb. 7, 2002).

<sup>3</sup> *Id.*

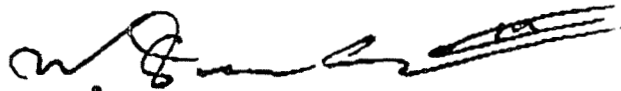
<sup>4</sup> City's Response to Commission Staff DR No. 4 ("Yes, West Liberty intends to serve all natural gas customers, including those in Wolfe County, under the same rates, terms and conditions.").

serving beyond their borders.<sup>5</sup> In short, Elam's Wolfe County customers have nothing to lose, and much to gain, from the City's acquisition of the entire Elam system.

In conclusion, it would be fully consistent with the legality, proper purpose, and public interest requirements of KRS 278.020(6) for the Commission to approve the City's Application to acquire all of Elam's assets, including those in Wolfe County. There is no explicit legal bar to such a transfer, and the City's proposed acquisition is designed to keep gas flowing to all of Elam's customers at non-discriminatory, fair, just, and reasonable rates, protecting all of Elam's customers and helping to ensure continuing economic development in the City and nearby areas.

Dated: August 4, 2010

Respectfully submitted,



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<sup>5</sup> See *Grayson Rural Electric Corp. v. City of Vanceburg*, 4 S.W.3d 526, 529 (Ky. 1999) ("Similarly, ... our predecessor Court recognized that voting power gave residents of a city some means of protection against excessive rates or inadequate service of a utility owned by the city. ... However, customers outside the city have no such protection.").

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Brief was served on the following persons on the 4th day of August, 2010, U.S. mail, postage prepaid:

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