

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

In the Matter of:

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

ATTORNEY GENERAL'S NOTICE OF NO OBJECTION TO ACQUISITION

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and tenders his notice that he does not object to the proposed acquisition of Elam Utility Company [hereinafter referred to as "Elam"] by the City of West Liberty [hereinafter referred to as "the City"] and agrees to submit the application on the record for decision unless the Commission orders a hearing. As grounds for his position the Attorney General states the following.

Because this case is on an expedited timeframe, the Attorney General will refrain from reciting at length those facts which are now in the record. However, a succinct summary is indeed in order to present the essential facts and issues at hand in the matter.

Elam is a natural gas company serving approximately 410 customers in Morgan County and 50 customers in Wolfe County. Since at least 2009, Elam has failed to make adequate payment to its gas suppliers – Columbia Gas Transmission, LLC and Columbia Gulf Transmission Company. As a consequence, the gas suppliers have stated publicly that they have planned to shut-off the natural gas to Elam. In fact, all

legal steps are presently underway to perform that task unless either all outstanding moneys are paid or the natural gas which Elam withdrew from the transmission line is replaced.

On or about 19 July 2010, the City filed an application with the Commission requesting approval to acquire the utility assets of Elam and for approval of a management agreement. In light of the filing of this application, the gas suppliers have agreed to a deadline of 13 August 2010 for approval of the request by the Commission with the commiserate demands of the gas suppliers from the City to immediately follow. In light of the offer by the City to acquire Elam and avoid the shut-off of gas to hundreds of citizens and compounded with the deadline by the gas suppliers, the Commission placed this case on a very expedited procedural schedule¹. Both the Attorney General and the Commission propounded numerous data requests to the City and several informal conferences were conducted over the ensuing days.

KRS 278.020(5) and (6) is the controlling law which must be considered in approving this application. The City must prove that it has "the financial, technical and managerial abilities to provide reasonable service." Moreover, the city must demonstrate that the transaction is in "accordance with the law, for a proper purpose and is consistent with the public interest."As a consequence of the discovery, the Attorney General has drawn the following conclusions:

¹ Prior to the City's offer to purchase Elam, the Commission held a number of informal conferences with the gas suppliers and Elam to resolve the matter. The Attorney General participated in most, if not all, of these meetings. Notwithstanding the discussions, the gas suppliers set in motion an imminent shut-off of the system on July 26th because of Elam's inability to provide the recourse demanded by the gas suppliers.

- But for West Liberty's offer to purchase Elam, the customers' gas will be shut-off unless the PSC grants the request².
- West Liberty's books indicate that the city is very liquid and can absorb the approximately \$900,000 for the purchase. (The purchase is to cover loans and the amounts owed to the gas suppliers. There is no premium to the owner of Elam.)
- West Liberty has a good track record of running its own water and sewer companies and the same clerical/managerial staff running those companies will oversee the gas utility operations . In fact, DOW has given the city recognition for its water company.
- West Liberty will keep the current technical staff of Elam which should enable it to have the technical ability to run a natural gas company.
- West Liberty does not currently contemplate raising the natural gas rates if it takes over Elam. This applies to the customers in both Morgan and Wolfe County. Obviously, this may change should the costs for providing the services increase.
- If the PSC denies the city's request, Elam's future is unknown. A bankruptcy could potentially happen. If that is the case, then the Federal Courts take over which could prolong the natural gas shut-off until a new owner is found.

In light of the above, West Liberty has met the criteria under KRS 278.020 for the purchase. Specifically, it has "the financial, technical and managerial abilities to provide

² The provision of natural gas is, of course, deemed an essential service in this day and age. While other energy services can be obtained to replace natural gas; time, resources and costs may render the replacement difficult if not financially impossible. Accordingly, depending on the consumer's type of usage of the service, his residence, business or other facility will be impacted in varying degrees.

reasonable service.” Moreover, the City has demonstrated the transaction is in “accordance with the law, for a proper purpose and is consistent with the public interest.”

A. THE COMMISSION HAS THE AUTHORITY TO APPROVE THE TRANSACTION EVEN THOUGH THE CITY WILL PROVIDE GAS SERVICES OUTSIDE OF ITS COUNTY LIMITS.

The Commission has more than adequate authority to approve the pending transfer of control. Two statutes and an Attorney General’s Opinion provide at least some guidance to the Commission in this regard, as discussed below.

As provided in 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.”

KRS 96.150 (1) provides in pertinent part:

“Any city that owns or operates a water supply or sanitary sewer system may extend the system into, and furnish and sell water and provide sanitary sewers to any person within, any territory contiguous to the city, and may install within that territory necessary apparatus; . . .”

As discussed in OAG 02-1³, there is no express statutory provision precluding a city from providing gas service to areas outside of its jurisdiction. An analogy can be drawn to KRS 96.150 which allows a city to extend its water supply or sanitary sewer system to any areas contiguous to the city. In the instant matter, the City of West Liberty seeks to take control of Elam’s natural gas operations, and provide service to

³ Copy attached hereto as “Exhibit A.”

Elam's existing customers, without actually extending the existing system. The fact that Elam maintains approximately 50 customers in neighboring Wolfe County should not be an obstacle to the PSC approving the change of control.

Moreover, OAG 02-1 discusses only the extension of service to non-residents. The case at bar does not deal with an *extension* of service to customers beyond the City of West Liberty's jurisdiction. OAG 2-1 does not discuss the transfer of control of an existing gas utility system that has existing customers in two counties, such as is the case with the instant matter. That 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**" (OAG 02-1, p. 2). In the case at bar, Elam's Wolfe County customers have been "**access[ing] the surplus**" now for a number of years. Elam obtained its gas from regional suppliers who operated in multiple counties. Elam did not obtain its gas from one single source located within the confines of West Liberty; rather, its gas is produced at many locations, some likely even out-of-state. In this sense, gas is a much more fungible commodity than water. Elam was fully capable of providing the 50 Wolfe County customers with service without any risk to the majority of its customers in West Liberty. The mere fact that the operation of the gas utility will now transfer to the City of West Liberty will in no manner affect the provision of service to its customers, either in West Liberty or Wolfe County. The Commission's approval of the instant application would, therefore, not be contrary to OAG 02-1 or any existing statutes.

To deny the transfer in the case at bar would thus insure that a shut-off of service to 460 customers would occur. Those customers include a nursing home, a prison with

1800 inmates, and an industrial park, which would all be left scrambling trying to find replacement energy sources as colder weather approaches. The Commission, however, is charged with insuring that utility service be maintained, and is provided with necessarily implied authority to insure the adequate provision of utility service. In *Public Service Comm'n v. Cities of Southgate and Highland Heights*, 268 S.W.2d 19, 21 (Ky. 1954), the Court found the Commission had necessarily implied authority in order to insure the continuation of utility service. The Court stated:

“. . . [W]e are of the opinion that jurisdiction is implied necessarily from the statutory powers of the commission to regulate the service of utilities . . . if a sale were made to a purchaser incapable of carrying on the service, the sale would be the practical equivalent of a discontinuance of service.⁴

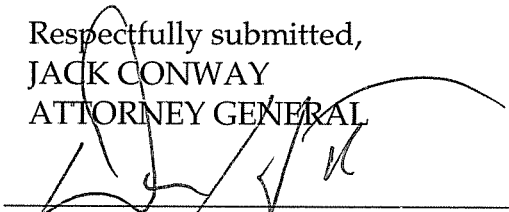
In this filing, the Commission is presented with a willing buyer who has the financial, technical and managerial capabilities to operate Elam's utility in an effective manner. No other party has stepped forward and offered to do so. Indeed, the approval of this petition is necessary in order to prevent a discontinuation of service to thousands of people. For all the foregoing reasons, the Attorney General believes the transfer of control to the City of West Liberty is in the public interest, and should be approved.

WHEREFORE, the Attorney General respectfully serves this notice of no objection to the City's request for the acquisition, recommends the matter be submitted

⁴ See also *In re Application of Farmdale Development Corp*, Case No. 2006-00028, in which the PSC approved a surcharge in order to make essential repairs to a sewage system, without which the utility would have ceased functioning.

for a final ruling on the record as it now stands, and waives his right to hearing unless the Commission otherwise orders same.⁵

Respectfully submitted,
JACK CONWAY
ATTORNEY GENERAL



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⁵ The brevity of the Attorney General's brief in this matter should not be interpreted as anything other than a comprehensive review on the application at hand. Rather, with time being of the essence and with the need of the PSC to render its decision in nine days to prevent the shut-off of natural gas to approximately 460 customers, the Attorney General has chosen to greatly truncate what otherwise could be a much lengthier brief thus taking up more of the Commission's time to review same and make a decision before the deadline at hand.

Certificate of Service and Filing

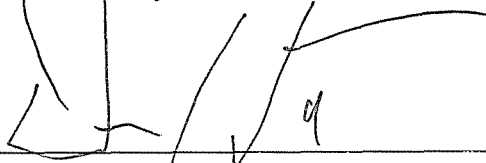
Counsel certifies that an original and ten photocopies of the foregoing were served and filed by hand delivery to Jeff Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601 on this 4th day of August, and that an electronic copy was sent via electronic mail this same date; counsel further certifies that true and accurate copies of the foregoing will on the 5th day of August be mailed via First Class U.S. Mail, postage pre-paid, to:

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