City of Elkins

Regular Council Meeting

December 21, 2023
7:00 PM
401 Davis Avenue
Council Chamber, 2nd Floor

AGENDA

1. **Invocation and Pledge of Allegiance**
2. **Call to order and roll call**
3. **Public comment**
4. **Minutes**
   a. Proposed minutes for the meeting of December 7, 2023
5. **Correspondence and Notifications**
6. **Committee Reports**
7. **Staff reports**
   a. Treasurer's report
8. **Approval of vendor invoice payments**
   a. Vendor invoices presented for approval: December 4-15, 2023.

   (Available for public review in the city clerk's office two business days before this meeting, as required by W. Va. Ethics Commission Open Meetings Advisory Opinion 2012-04.)
9. **New business**
   a. Review of bids received for Welcome to Elkins signs
   b. City Attorney's Update on Pending Litigation
   c. Ordinance 319: Amending and Re-Enacting City Code Chapter 30.20 Et Seq.: Competitive Bidding (first of two readings)
   d. Resolution 1700: Authorizing the City Treasurer to open a bank account for the newly created Fund 26—Opioid Settlement (corrected)
   e. Resolution 1705: Authorizing Execution of Right-of-Way Permit Application to W. Va. DOT/DOH for Construction of a Gold Star Famiiles Memorial Monument on DOH Property Leased by City of Elkins
   f. Resolution 1706: Authorizing Reimbursement of Certain Tax Monies Collected from Altice (Optimum)
   g. Resolution 1707: Authorizing the opening of a bank account at Grant County Bank
   h. Resolution 1708: Appointing C. Friddle to the Board of Zoning Appeals

i. Resolution 1709: Accepting Conditions of Contract between Delmonte Market dba Tammy’s Floral and the City of Elkins, and Authorizing Execution of Contract

j. Resolution 1710: Reappointing L. Harris to the Board of the Elkins Housing Authority

10. Mayor’s comments

11. Adjournment

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	Minutes
Category:	Action Item
Agenda Item Name:	Proposed minutes for the meeting of December 7, 2023
Recommended By:	City Clerk
Summary:	Minutes proposed for council's meeting of December 7, 2023
Fiscal Impact:	n/a
Recommendation:	Consider for approval
Attachments:	1. city council - 2023_12_07 - minutes_proposed

ELKINS COMMON COUNCIL REGULAR COUNCIL MEETING MINUTES

401 Davis Avenue
Council Chamber, 2nd Floor
December 7, 2023
7:00 p.m.

Elkins Common Council met in regular session in the council chamber of city hall. Present were Mayor Jerry A. Marco; Councilpersons N.E. Bross-Fregonara, A.C. Carroll, R.C. Chenoweth, G.M. Hinchman, B.C. Kerns, C.C. Lowther, D.C. Parker, E. L. Plishka, L.S. Severino, and C.H. Thompson; City Treasurer T. Judy; Fire Chief S.D. Himes; Police Chief T. Bennett; Operations Manager M. Kesecker; City Attorney G. S. Roberts; and City Clerk S.R. Stokes (recording secretary).

MINUTES

Lowther **MOVED APPROVAL OF THE MINUTES OF THE MEETING OF NOVEMBER 16, 2023.** The motion carried.

APPROVAL OF VENDOR INVOICE PAYMENTS

Hinchman **MOVED APPROVAL OF THE INVOICES PRESENTED.** The motion carried.

The invoices in question were as specified on the following list, which is attached and made part of this record:

- Accounts Payable check transactions for the period November 13-December 1, 2023.

NEW BUSINESS

Lowther **MOVED APPROVAL OF GRANTING HALF-DAY HOLIDAY ON FRIDAY, DECEMBER 22 AND FRIDAY, DECEMBER 29.** The motion carried.

Carroll **MOVED APPROVAL OF ORDINANCE 317: AN ORDINANCE OF THE COMMON COUNCIL OF ELKINS, WEST VIRGINIA AMENDING SECTIONS OF CITY CODE, CHAPTER 152, ZONING REGARDING THE ZONING OF UNZONED PARCELS (FINAL READING).** The motion carried.

No action was taken on **ORDINANCE 319: AMENDING AND RE-ENACTING CITY CODE CHAPTER 30.20 ET SEQ.: COMPETITIVE BIDDING (FIRST OF TWO READINGS).**

Hinchman **MOVED APPROVAL OF RESOLUTION 1704: APPOINTING V. WHITE TO THE BOARD OF ZONING APPEALS.** The motion carried.

The meeting was adjourned at 7:42 p.m.

Approved by council at the meeting of MONTH DAY, YEAR

Jerry A. Marco, Mayor

Attest:

Sutton Stokes, City Clerk

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	Staff reports
Category:	Presentation
Agenda Item Name:	Treasurer's report
Recommended By:	City Treasurer
Summary:	Report from the City Treasurer showing General Fund Revenue Details, bank account balances as of 11/30, and FY 2024 Budget Control Summary, also as of 11/30.
Fiscal Impact:	n/a
Recommendation:	Review report
Attachments:	1. Treasurer's Report - 2023_12_21

General Fund Revenue Detail

	November Revenues	YTD Revenues	Percent of Revenues Collected Per Budget	Percent of Yr. Completed 41.67
Unassigned Fund Balance				384,359.00
County Tax	$56,192.42	$775,956.64	65.30%	1,188,238.00
B & O Tax	$90,307.10	$797,101.15	56.53%	1,410,000.00
Hotel/Motel Tax	$27,067.13	$132,921.13	68.16%	195,000.00
Gas & Oil Severance Tax	$0.00	$70,881.19	283.52%	25,000.00
2% City Utility Tax	$7,203.63	$34,874.86	49.82%	70,000.00
Utility Excise Tax	$15,821.20	$128,295.38	42.77%	300,000.00
Liquor Tax	$0.00	$43,360.76	47.13%	92,000.00
Police	$332.43	$3,098.57	12.91%	24,000.00
Municipal Court	$1,513.43	$11,222.00	18.10%	62,000.00
Code Enforcement	$2,428.17	$12,269.81	47.74%	25,700.00
Business License	$140.00	$7,810.00	26.93%	29,000.00
Intergovernmental	$86,611.11	$238,324.26	130.61%	182,471.00
Franchise/IRP Fees	$3,520.46	$60,544.91	43.25%	140,000.00
Phil Gainer Community Center	$4,212.00	$24,983.00	64.06%	39,000.00
Misc. Revenue	$11,234.09	$66,246.25	62.94%	105,260.00
Municipal Sales Tax	$0.00	$720,429.20	51.46%	1,400,000.00
TOTAL	**$306,583.17**	**$3,128,319.11**	**55.15%**	5,672,028.00

Bank Account Name	Balance as of 11/30/2023
ARPA	$797,110.11
Elkins Building Comm. Sinking Fund	$0.00
Elkins Municipal Building Comm.	$0.00
Financial Stabilization	$938,813.90
Fire Pension Fund	$2,559,400.69
Firemen's Pension & Relief Fund	$0.00
Landfill Access Escrow	$1,831,665.66
Landfill Post Closure	$48,707.97
Payroll	$176,154.42
Police Forfeitures	$1,849.99
Police Pension Fund	$4,356,906.48
Police Seizures	$26,600.46
Policemen's Pension & Relief Fund	$0.00
Pooled Cash-Coal Severance Fund	$168,839.73
Pooled Cash-Fire Fund	$398,561.26
Pooled Cash-General Fund	$1,896,401.27
Pooled Cash-Landfill Fund	$125,443.89
Pooled Cash-Parks Fund	$890,402.03
Pooled Cash-Sanitation Fund	$1,002,215.18
Pooled Cash-Sewer Fund	$98,645.05
Pooled Cash-Water Fund	$363,330.11
Sewer Depreciation	$203,617.00
Sewer O&M	$406,193.54
Sewer Project	$49.84
Water Depreciation	$157,413.62
Water O&M	$382,232.42

FY2024 Budget Control Summary

General Fund	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Revenues Over Expenses	YTD TOTALS
Revenues	$854,865.33	$331,004.66	$543,271.68	$1,092,594.27	$306,583.17	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$962,414.54	$3,128,319.11
Expenses	$443,407.34	$412,330.24	$403,541.70	$527,153.29	$379,472.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00		$2,165,904.57

Sanitation Fund	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Revenues Over Expenses	YTD TOTALS
Revenues	$122,635.34	$129,954.36	$112,998.62	$126,649.07	$130,951.32	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	-$242,032.38	$623,188.71
Expenses	$375,747.22	$112,032.55	$128,365.08	$150,347.04	$98,729.20	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00		$865,221.09

Sewer Fund	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Revenues Over Expenses	YTD TOTALS
Revenues	$216,491.85	$207,080.31	$217,303.75	$243,124.25	$247,921.27	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	-$35,993.62	$1,131,921.43
Expenses	$244,836.96	$222,640.35	$240,905.73	$229,691.95	$229,840.06	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00		$2,139,198.04

Water Fund	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Revenues Over Expenses	YTD TOTALS
Revenues	$364,356.67	$405,886.10	$373,182.41	$458,593.81	$458,742.01	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$289,610.91	$2,060,761.00
Expenses	$335,401.84	$355,984.86	$420,000.69	$399,733.39	$260,029.31	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00		$1,771,150.09

Fire Fund	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Revenues Over Expenses	YTD TOTALS
Revenues	$38,221.11	$80,333.83	$156,435.78	$50,400.39	$79,747.35	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	-$42,913.90	$405,138.46
Expenses	$90,744.77	$70,132.37	$84,702.51	$125,616.17	$76,856.54	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00		$448,052.36

Landfill Fund	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Revenues Over Expenses	YTD TOTALS
Revenues	$5,921.54	$6,126.90	$6,122.09	$5,838.48	$568.43	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$23,364.62	$24,577.44
Expenses	$1,019.07	$6.95	$168.69	$6.97	$11.14	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00		$1,212.82

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	Approval of vendor invoice payments
Category:	Action Item
Agenda Item Name:	Vendor invoices presented for approval: December 4-15, 2023. *(Available for public review in the city clerk's office two business days before this meeting, as required by W. Va. Ethics Commission Open Meetings Advisory Opinion 2012-04.)*
Recommended By:	City Treasurer
Summary:	Accounts payable transactions in all funds Dec. 4-15, 2023.
Fiscal Impact:	Report details $474,259.77 in transactions from all funds.
Recommendation:	Consider for approval
Attachments:	1. AP Check Report - 2023_12_21

VENDOR SET: 01 Elkins

BANK: Pool Pooled Cash

DATE RANGE:12/04/2023 THRU 12/15/2023

VENDOR I.D.		NAME	STATUS	CHECK DATE	INVOICE AMOUNT	DISCOUNT	CHECK NO	CHECK STATUS	CHECK AMOUNT
00741		Great-West Trust Company LLC							
	I-VF 202312121602	Voya	D	12/12/2023	595.00		005376		
	I-VF2202312121602	Voya AT	D	12/12/2023	100.00		005376		695.00
02417		US Bank Corporate Payment Syst							
	I-VisaFleet 113023	Visa Fleet Pmt 113023	D	12/13/2023	15,992.99		005388		15,992.99
00082		Builders Group, Inc.							
	I-729537	plumbing parts	R	12/06/2023	64.94		014572		64.94
00126		City of Clarksburg							
	I-202312018337 1396	Yard Waste 11/30 Ticket 1396	R	12/06/2023	149.80		014573		149.80
00132		Clarksburg Water Board							
	I-M91052	Compliance samples	R	12/06/2023	230.00		014574		230.00
00143		COE General Fund 2							
	I-IND 12/2023	Indirects 12/2023	R	12/06/2023	12,955.92		014575		12,955.92
00149		COE Parks and Recreation							
	I-Support 12/2023	Monthly Support 12/2023	R	12/06/2023	25,483.00		014576		25,483.00
00235		Elkins Building Comm.							
	I-12/2023	Monthly Pmt 12/2023	R	12/06/2023	3,483.79		014577		3,483.79
00283		Frontier							
	I-11/20/2023	phone charges	R	12/06/2023	1,198.63		014578		1,198.63
00381		Grover C Jackson Jr							
	I-RENT 12/2023	Monthly Rent 12/2023	R	12/06/2023	1,800.00		014579		1,800.00
00430		Jonathan Distefano dba Mainten							
	I-1177	Service Call/codelock/labor	R	12/06/2023	260.00		014580		260.00
00471		Mon Power							
	I-31Barron 11/2023	consumption 101723-111423	R	12/06/2023	11,605.67		014581		
	I-90009347179	consumption/lighting	R	12/06/2023	42,839.52		014581		54,445.19
00479		Amtower Auto Supply, Inc.							
	C-Credits 11874	Overpayment CK 11874 071222	R	12/06/2023	148.06CR		014582		
	I-200907	SeaFoam/De-Icer	R	12/06/2023	155.76		014582		7.70
00483		Mountain Valley Bank							
	I-1202553-22 120723	1202553-22 12/07/2023	R	12/06/2023	292.28		014583		292.28

VENDOR SET: 01 Elkins

BANK: Pool Pooled Cash

DATE RANGE:12/04/2023 THRU 12/15/2023

VENDOR I.D.	NAME	STATUS	CHECK DATE	INVOICE AMOUNT	DISCOUNT	CHECK NO	CHECK STATUS	CHECK AMOUNT
00540	Pitney Bowes Bank Inc							
I-Pstg Alloc 11/2023	Postage Allocation 11/2023	R	12/06/2023	479.08		014584		479.08
00665	State Electric Supply Company							
I-16921075-00	Wire-Pump Controls	R	12/06/2023	1,061.66		014585		1,061.66
00701	Toshiba Financial Services							
I-515955607	Lex4150/Tosh E3005AC	R	12/06/2023	221.37		014586		221.37
00797	WV DEP Division of Water and W							
I-WV-I23-00043	Recert 24-25 Lab Cert Renewal	R	12/06/2023	430.00		014587		430.00
01594	Pace Analytical Services LLC							
I-2330485920	Analytical charges	R	12/06/2023	439.00		014588		
I-2330488813	Nov 2023 contract analysis	R	12/06/2023	2,424.00		014588		
I-Aug-Nov 2023	contract analysis 08/23-11/23	R	12/06/2023	2,461.00		014588		5,324.00
02157	Jerry A Marco							
I-Exp 112623-113023	Exp 2023 Smart Cities Conf	R	12/06/2023	653.92		014589		653.92
02238	Appalachian Equipment Solution							
I-102852-1	Battery	R	12/06/2023	172.85		014590		172.85
02322	Badger Meter							
I-80144861	MBL Hosting Service Nov 2023	R	12/06/2023	213.95		014591		213.95
02347	LEAF							
I-15631701	Tosh E4515AC 01/11/2024	R	12/06/2023	51.94		014592		
I-15649632	ToshES4515AC 121323	R	12/06/2023	128.53		014592		
I-15667696	Tosh E478S Baxter 121823	R	12/06/2023	96.74		014592		
I-15694825	Tosh/Lexmark 122423	R	12/06/2023	570.83		014592		
I-15707581	Toshiba 478S 122523	R	12/06/2023	109.47		014592		
I-15964825	Tosh 478S 401DavisAve 1218	R	12/06/2023	96.74		014592		1,054.25
02431	Ferguson Waterworks #527							
I-0854991	6 RSTRND FLG ADPT w/PIPE	R	12/06/2023	249.86		014593		249.86
02516	Diamond Blade Warehouse							
I-0575328-IN	Blades	R	12/06/2023	745.68		014594		745.68
00116	Child Support Enforcement							
I-CDS202312121602	Child Support	R	12/12/2023	600.33		014595		600.33

VENDOR SET: 01 Elkins

BANK: Pool Pooled Cash

DATE RANGE:12/04/2023 THRU 12/15/2023

VENDOR I.D.	NAME	STATUS	CHECK DATE	INVOICE AMOUNT	DISCOUNT	CHECK NO	CHECK STATUS	CHECK AMOUNT
00121	Citizens Bank of WVFP							
I-FP 202312121602	Fire Pension	R	12/12/2023	473.23		014596		473.23
00122	Citizens Bank of WVPP							
I-PP 202312121602	Police Pension	R	12/12/2023	171.71		014597		
I-PPN202312121602	Police Pension-2010 Forward	R	12/12/2023	407.85		014597		579.56
00147	COE Misc							
I-MIS202312121602	Misc Reimbursements	R	12/12/2023	709.46		014598		709.46
00150	COE Payroll							
I-T1 202312121602	Federal Withholding	R	12/12/2023	12,853.32		014599		12,853.32
00151	COE Payroll							
I-T3 202312121602	FICA	R	12/12/2023	19,455.22		014600		
I-T4 202312121602	Medicare	R	12/12/2023	4,927.00		014600		24,382.22
00152	COE Payroll							
I-T2 202312121602	State Withholding	R	12/12/2023	5,586.00		014601		5,586.00
00203	Davis Trust Company							
I-CC 202312121602	Employee Christmas Club	R	12/12/2023	2,760.00		014602		2,760.00
00747	Washington National Insurance							
I-WN 202312121602	Washington National Insurance	R	12/12/2023	641.85		014603		641.85
00837	COE Payroll Reimbursement							
I-001202312121602	Payroll Reimbursement	R	12/12/2023	55,257.68		014604		
I-006202312121602	Payroll Reimbursement	R	12/12/2023	5,144.07		014604		
I-036202312121602	Payroll Reimbursement	R	12/12/2023	13,351.88		014604		
I-400202312121602	Payroll Reimbursement	R	12/12/2023	24,345.51		014604		
I-401202312121602	Payroll Reimbursement	R	12/12/2023	12,912.28		014604		
I-404202312121602	Payroll Reimbursement	R	12/12/2023	11,995.94		014604		123,007.36
01885	Colonial Life							
I-CL 202312121602	Colionial Life-AT	R	12/12/2023	112.10		014605		
I-CLP202312121602	Colonial Life-PT	R	12/12/2023	52.52		014605		164.62
00150	COE Payroll							
I-T1 202312121603	Federal Withholding	R	12/12/2023	3,982.58		014606		3,982.58
00151	COE Payroll							
I-T3 202312121603	FICA	R	12/12/2023	1,954.38		014607		
I-T4 202312121603	Medicare	R	12/12/2023	457.08		014607		2,411.46

VENDOR SET: 01 Elkins

BANK: Pool Pooled Cash

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VENDOR I.D.		NAME	STATUS	CHECK DATE	INVOICE AMOUNT	DISCOUNT	CHECK NO	CHECK STATUS	CHECK AMOUNT
00152		COE Payroll							
	I-T2 202312121603	State Withholding	R	12/12/2023	753.00		014608		753.00
00837		COE Payroll Reimbursement							
	I-001202312121603	Payroll Reimbursement	R	12/12/2023	9,135.92		014609		
	I-400202312121603	Payroll Reimbursement	R	12/12/2023	683.86		014609		9,819.78
00047		Truist Governmental Finance							
	I-00007 121923	9948000234-07 12/19/2023	R	12/12/2023	4,984.55		014610		4,984.55
00075		Encova Insurance							
	I-36668565	WCB 1037869	R	12/12/2023	6,599.00		014611		6,599.00
00085		Burgess & Niple, Inc.							
	I-1110190	Engineering Services 09/2023	R	12/12/2023	573.00		014612		573.00
00154		COE Sanitation							
	I-202312055255	Hauling Fee-Brush #98	R	12/12/2023	299.48		014613		299.48
00158		COE Water Depreciation Account							
	I-11/2023	Water Depreciation 11/2023	R	12/12/2023	11,178.97		014614		11,178.97
00211		Elkins Depot Welcome Center							
	I-H/M Oct 2023	Hotel/Motel Coll 10/2023	R	12/12/2023	13,533.57		014615		13,533.57
00250		Elkins-Randolph County Regiona							
	I-Q2 FY23-24 Diff	Q2 FY23-24 Diff	R	12/12/2023	300.00		014616		300.00
00280		Tracy R Judy							
	I-Reim-09/30/23	Whitmer Meeting travel	R	12/12/2023	35.37		014617		35.37
00287		Garrett Equipment Rentals, LLC							
	I-68420	1 Trans Kit/Spinner	R	12/12/2023	469.84		014618		469.84
00483		Mountain Valley Bank							
	I-1202553-21 122823	1202553-21 #63 122823	R	12/12/2023	2,369.18		014619		2,369.18
00484		Mountaineer Gas Company							
	I-BHntr 111423	Bearhunter 101623-111423	R	12/12/2023	43.78		014620		
	I-Kump 111423	Kump Ctr 101623-111423	R	12/12/2023	256.60		014620		
	I-ScottFd 111423	Scott Fd Rd 101623-111423	R	12/12/2023	33.70		014620		334.08
00628		Seneca Designs							
	I-45875	Shirts/printing	R	12/12/2023	707.75		014621		707.75

VENDOR SET: 01 Elkins

BANK: Pool Pooled Cash

DATE RANGE:12/04/2023 THRU 12/15/2023

VENDOR I.D.	NAME	STATUS	CHECK DATE	INVOICE AMOUNT	DISCOUNT	CHECK NO	CHECK STATUS	CHECK AMOUNT
00670	Steptoe & Johnson PLLC							
I-1108938	Compliance w/USDC 10/2023	R	12/12/2023	9,293.13		014622		9,293.13
00711	Tygart Valley Transfer, Inc.							
I-00019314	Res	R	12/12/2023	581.90		014623		
I-00019315	Res	R	12/12/2023	533.17		014623		
I-00019316	Comm	R	12/12/2023	556.10		014623		
I-00019325	Comm	R	12/12/2023	593.37		014623		
I-00019334	Comm	R	12/12/2023	359.27		014623		
I-00019339	Comm/Clean out	R	12/12/2023	204.86		014623		
I-00019343	Comm	R	12/12/2023	156.70		014623		
I-00019347	Res	R	12/12/2023	590.50		014623		
I-00019348	Res	R	12/12/2023	556.10		014623		
I-00019349	Comm	R	12/12/2023	535.08		014623		
I-00019361	Comm	R	12/12/2023	378.38		014623		
I-00019364	Comm	R	12/12/2023	275.18		014623		
I-00019382	Comm	R	12/12/2023	740.51		014623		
I-00019383	Res	R	12/12/2023	431.89		014623		
I-00019384	Res	R	12/12/2023	596.23		014623		
I-00019409	Comm	R	12/12/2023	133.77		014623		
I-00019413	Comm	R	12/12/2023	346.85		014623		
I-00019424	Res	R	12/12/2023	232.19		014623		
I-00019425	Comm	R	12/12/2023	274.23		014623		
I-00019438	Res	R	12/12/2023	910.59		014623		
I-00019439	Res	R	12/12/2023	957.41		014623		
I-00019440	Comm	R	12/12/2023	859.95		014623		
I-00019458	Comm	R	12/12/2023	300.03		014623		
I-00019466	Comm	R	12/12/2023	539.86		014623		
I-00019476	Comm	R	12/12/2023	215.94		014623		
I-00019489	Res	R	12/12/2023	624.90		014623		
I-00019490	Comm	R	12/12/2023	588.59		014623		
I-00019492	Res	R	12/12/2023	535.08		014623		
I-00019505	Comm	R	12/12/2023	343.98		014623		
I-00019508	Comm	R	12/12/2023	90.77		014623		
I-00019524	Comm	R	12/12/2023	659.30		014623		
I-00019525	Res	R	12/12/2023	645.92		014623		
I-00019526	Res	R	12/12/2023	584.77		014623		
I-00019554	Res	R	12/12/2023	184.41		014623		
I-00019562	Res	R	12/12/2023	606.74		014623		
I-00019563	Comm	R	12/12/2023	587.63		014623		
I-00019566	Res	R	12/12/2023	675.54		014623		
I-00019579	Comm	R	12/12/2023	221.68		014623		
I-00019585	Comm	R	12/12/2023	306.72		014623		
I-00019593	Res	R	12/12/2023	474.88		014623		
I-00019594	Res	R	12/12/2023	647.83		014623		
I-00019596	Comm	R	12/12/2023	793.07		014623		
I-00019603	Comm	R	12/12/2023	189.19		014623		
I-00019629	Comm	R	12/12/2023	875.24		014623		

VENDOR SET: 01 Elkins

BANK: Pool Pooled Cash

DATE RANGE:12/04/2023 THRU 12/15/2023

VENDOR I.D.	NAME	STATUS	CHECK DATE	INVOICE AMOUNT	DISCOUNT	CHECK NO	CHECK STATUS	CHECK AMOUNT
I-00019631	Res	R	12/12/2023	923.01		014623		
I-00019636	Res	R	12/12/2023	800.71		014623		
I-00019650	Comm	R	12/12/2023	440.49		014623		
I-00019655	Comm	R	12/12/2023	236.01		014623		
I-00019660	Res	R	12/12/2023	102.24		014623		
I-00019661	Comm	R	12/12/2023	356.40		014623		
I-00019675	Res	R	12/12/2023	529.35		014623		
I-00019676	Res	R	12/12/2023	475.84		014623		
I-00019680	Comm	R	12/12/2023	488.26		014623		
I-00019709	Comm	R	12/12/2023	360.22		014623		
I-00019718	Res	R	12/12/2023	542.72		014623		
I-00019719	Comm	R	12/12/2023	580.94		014623		
I-00019721	Res	R	12/12/2023	622.03		014623		
I-00019737	Comm	R	12/12/2023	300.98		014623		
I-00019743	Comm	R	12/12/2023	215.94		014623		
I-00019748	Comm	R	12/12/2023	152.88		014623		
I-00019760	Res	R	12/12/2023	563.75		014623		
I-00019765	Res	R	12/12/2023	648.78		014623		
I-00019766	Comm	R	12/12/2023	599.10		014623		
I-00019791	Comm	R	12/12/2023	182.50		014623		
I-00019808	Comm	R	12/12/2023	266.58		014623		
I-00019813	Comm	R	12/12/2023	659.30		014623		
I-00019818	Res	R	12/12/2023	633.50		014623		
I-00019820	Res	R	12/12/2023	444.31		014623		
I-00019838	Comm	R	12/12/2023	644.01		014623		
I-00019840	Res	R	12/12/2023	460.55		014623		
I-00019842	Res	R	12/12/2023	651.65		014623		
I-00019872	Comm	R	12/12/2023	427.11		014623		
I-00019878	Comm	R	12/12/2023	184.41		014623		
I-00019894	Res	R	12/12/2023	601.97		014623		
I-00019895	Comm	R	12/12/2023	487.31		014623		
I-00019897	Res	R	12/12/2023	642.10		014623		
I-00019907	Comm	R	12/12/2023	559.92		014623		
I-00019923	Comm	R	12/12/2023	491.13		014623		
I-00019925	Res	R	12/12/2023	796.89		014623		
I-00019928	Comm	R	12/12/2023	965.06		014623		
I-00019929	Res	R	12/12/2023	601.97		014623		
I-00019939	Comm	R	12/12/2023	180.59		014623		
I-00019943	Comm	R	12/12/2023	282.83		014623		
I-00019948	Res	R	12/12/2023	962.19		014623		
I-00019949	Res	R	12/12/2023	1,030.98		014623		
I-00019950	Comm	R	12/12/2023	538.90		014623		
I-00019952	Res	R	12/12/2023	174.86		014623		
I-00019962	Comm	R	12/12/2023	1,418.92		014623		
I-00019973	Res	R	12/12/2023	603.88		014623		
I-00019989	Comm	R	12/12/2023	333.47		014623		
I-00019991	Comm	R	12/12/2023	141.41		014623		
I-00019994	Comm	R	12/12/2023	247.47		014623		

VENDOR SET: 01 Elkins

BANK: Pool Pooled Cash

DATE RANGE:12/04/2023 THRU 12/15/2023

VENDOR I.D.	NAME	STATUS	CHECK DATE	INVOICE AMOUNT	DISCOUNT	CHECK NO	CHECK STATUS	CHECK AMOUNT
I-00020003	Comm	R	12/12/2023	398.44		014623		
I-00020006	Res	R	12/12/2023	1,039.58		014623		
I-00020007	Res	R	12/12/2023	610.56		014623		
I-00020016	Comm	R	12/12/2023	99.37		014623		
I-00020020	Comm	R	12/12/2023	251.30		014623		
I-00020030	Res	R	12/12/2023	502.59		014623		
I-00020031	Comm	R	12/12/2023	363.09		014623		
I-00020033	Res	R	12/12/2023	594.32		014623		
I-00020044	Comm	R	12/12/2023	29.62		014623		
I-00020047	Comm	R	12/12/2023	420.42		014623		
I-00020052	Comm	R	12/12/2023	638.27		014623		
I-00020058	Comm	R	12/12/2023	242.70		014623		
I-00020064	Res	R	12/12/2023	724.27		014623		
I-00020065	Res	R	12/12/2023	713.76		014623		
I-00020066	Comm	R	12/12/2023	566.61		014623		53,246.62
00779	Woodford Oil Company							
I-4536292	CHV Multifax EP 2 10/1	R	12/12/2023	166.00		014624		166.00
00812	WV Regional Jail and Correctio							
I-11123B49F	19 days inmate housing TVRJ	R	12/12/2023	1,035.12		014625		1,035.12
00884	Colonial Court Service Station							
I-583881	Tires 14 F150	R	12/12/2023	880.00		014626		880.00
01427	K&K Collision & Towing							
I-13246574	21 Ford Repairs	R	12/12/2023	3,737.53		014627		3,737.53
01681	HdL Companies							
I-11302023	Collections 11/2023	R	12/12/2023	1,362.44		014628		1,362.44
01727	Enterprise FM Trust							
I-FBN4903738	Fleet Leases 12/2023	R	12/12/2023	19,489.60		014629		19,489.60
01751	COE WWTP							
I-202312045252	Backwash November 2023	R	12/12/2023	750.77		014630		750.77
01790	Crim Law Office PLLC							
D-389	DEP Grant 10/2023	R	12/12/2023	440.00		014631		
I-385	Attorney Services	R	12/12/2023	7,992.00		014631		
I-386	Municipal Ct 10/2023	R	12/12/2023	4,160.00		014631		
I-387	San Board 10/2023	R	12/12/2023	1,370.00		014631		13,962.00

VENDOR SET: 01 Elkins

BANK: Pool Pooled Cash

DATE RANGE:12/04/2023 THRU 12/15/2023

VENDOR I.D.	NAME	STATUS	CHECK DATE	INVOICE AMOUNT	DISCOUNT	CHECK NO	CHECK STATUS	CHECK AMOUNT
01942	Elkins Municipal Building Comm							
I-1214756-11 121523	1214756-11 #28 12/15/23	R	12/12/2023	4,833.20		014632		4,833.20
02216	CivicPlus							
I-269942	CivicClerk Annual Fee/BCModule	R	12/12/2023	6,637.05		014633		6,637.05
02220	Long Branch Equipment LLC							
I-LB360	Salt spreader repairs	R	12/12/2023	475.00		014634		475.00
02347	LEAF							
I-15707582	Toshiba E4515AC	R	12/12/2023	180.03		014635		
I-15716144	Toshiba 100716139-001	R	12/12/2023	398.44		014635		578.47
02517	J.T. Lynne Flow Elements							
I-220/65028459	Freight charges on order	R	12/12/2023	37.42		014636		37.42

* * T O T A L S * *	NO			INVOICE AMOUNT	DISCOUNTS	CHECK AMOUNT
REGULAR CHECKS:	65			457,571.78	0.00	457,571.78
HAND CHECKS:	0			0.00	0.00	0.00
DRAFTS:	2			16,687.99	0.00	16,687.99
EFT:	0			0.00	0.00	0.00
NON CHECKS:	0			0.00	0.00	0.00
VOID CHECKS:	0	VOID DEBITS	0.00			
		VOID CREDITS	0.00	0.00	0.00	

TOTAL ERRORS: 0

	NO	INVOICE AMOUNT	DISCOUNTS	CHECK AMOUNT
VENDOR SET: 01 BANK: Pool TOTALS:	67	474,259.77	0.00	474,259.77
BANK: Pool TOTALS:	67	474,259.77	0.00	474,259.77
REPORT TOTALS:	67	474,259.77	0.00	474,259.77

SELECTION CRITERIA

VENDOR SET: 01-Elkins

VENDOR: ALL

BANK CODES: Exclude: PCARD

FUNDS: All

CHECK SELECTION

CHECK RANGE: 000000 THRU 999999

DATE RANGE: 12/04/2023 THRU 12/15/2023

CHECK AMOUNT RANGE: 0.00 THRU 999,999,999.99

INCLUDE ALL VOIDS: YES

PRINT OPTIONS

SEQUENCE: CHECK NUMBER

PRINT TRANSACTIONS: YES

PRINT G/L: NO

UNPOSTED ONLY: NO

EXCLUDE UNPOSTED: NO

MANUAL ONLY: NO

STUB COMMENTS: NO

REPORT FOOTER: NO

CHECK STATUS: NO

PRINT STATUS: * - All

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	New business
Category:	Action Item
Agenda Item Name:	Review of bids received for Welcome to Elkins signs
Recommended By:	Operations Manager
Summary:	Operations Manager will brief council on bids received for the Welcome to Elkins sign. Given that this discussion may include proprietary information, an executive session may be appropriate.
Fiscal Impact:	TBD
Recommendation:	Consider for next steps
Attachments:	None

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	New business
Category:	Presentation
Agenda Item Name:	City Attorney's Update on Pending Litigation
Recommended By:	City Attorney
Summary:	The City Attorney will provide an update to council on pending litigation. Given that this will be an attorney/client consultation concerning an ongoing court case, an executive session may be warranted.
Fiscal Impact:	n/a
Recommendation:	No action recommended
Attachments:	None

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	New business
Category:	Action Item
Agenda Item Name:	Ordinance 319: Amending and Re-Enacting City Code Chapter 30.20 Et Seq.: Competitive Bidding (first of two readings)
Recommended By:	Rules & Ordinances Committee; prepared by city attorney
Summary:	The city's current purchasing policy ordinance (City Code Chapter 30.20) imposes bidding requirements for purchases of "goods and services" costing $25,000 or more. When the bid requirement is complied with, the current ordinance requires no action by council, either to authorize request for bids or to approve the eventual purchase from the winning bidder. Under the current ordinance, the only role for council is approve a request to waive the bidding requirement (which can be granted under circumstances specified in the ordinance). The proposed new ordinance attached makes only one substantive change, i.e., imposes a requirement that all purchases of "materials, supplies, equipment, or services" costing $25,000 or more would have to be authorized by council. The marked-up version also adds a reference to "Applicable state requirements concerning bid bonds and other details." This is intended to ensure that bid-bond requirements are not overlooked by city staff.
Fiscal Impact:	n/a
Recommendation:	Consider for approval on first reading
Attachments:	1. O-319 - Amending Chap 30.20 Competitive Bidding

ORDINANCE 319

AN ORDINANCE OF THE COMMON COUNCIL OF ELKINS, WEST VIRGINIA AMENDING AND RE-ENACTING CITY CODE CHAPTER 30.20 *ET SEQ.* COMPETITIVE BIDDING

WHEREAS, the Common Council of the City of Elkins, West Virginia previously adopted ordinances, which are codified and reflected in City Code, Chapter § 30.20 *et seq*., Competitive Bidding.

WHEREAS, subsequent to the passages of the ordinances, it has become apparent that certain provisions of the City Code , Chapter § 30.20 *et seq*. Competitive Bidding needed to be changed and amended to reflect changes in State law , for clarity and for enforceability issues; and

WHEREAS the Common Council has determined that by making these amendments to said Chapter it is in the best interests of the citizens of the City.

NOW THEREFORE BE IT ORDAINED and ENACTED by the Common Council that City Code, Chapter 30.20 *et seq*, Competitive Bidding, be amended as follows:

COMPETITIVE BIDDING

§ 30.20 WHEN REQUIRED; PUBLICATION OF NOTICE.

(A) Every contract for the procurement of materials, supplies, equipment, or services by the city, except as hereinafter provided, shall be by competitive bidding and shall not be approved and let until after at least fourteen days public notice made as 1) the public posting at City Hall of the notice for bids, request for proposal, or other written solicitation by the City, 2) the public posting of such notice, request, or solicitation on the City's website and social media accounts, and 3) a Class I legal advertisement in compliance with the provisions of article three [§§ 59-3-1, et seq.] Chapter fifty-nine of the Code of West Virginia, and after a public opening for bids. Provided that the Council, or the Administrative Officer having issued such request for competitive bidding, may reject all bids and advertise again; further provided, that the above requirements shall not apply to any contract for a gross amount of less than $25,000; further provided, that purchases of materials, supplies, equipment, or services costing $25,000 or more shall in all cases be memorialized by a contract, or other writing, authorized by City Council prior to execution, even in the event that the above requirements concerning competitive bidding are waived under the provisions of division (B), below; further provided that the City Council may by motion subsequently ratify purchases made by its employees or agents in the event of a mistake of law or fact. Nothing in this section shall preclude the use by the city of or be applicable to the purchasing of goods or services through the State Director of the Purchasing Division of the State Department of Finance and Administration as provided by the W.Va. Code § 5A-3-9.

(B) (1) The provision of division (A) above, concerning competitive bidding, shall not be applicable when the Council, by vote, finds that:

(a) Compliance therewith would be inimical to the public welfare;

(b) Procurement of the contemplated goods or services is of such urgency as to brook no delay;

(c) Other circumstances exist which would render the interests of the city better served by noncompliance than by compliance with division (A) above;

(d) As a practical matter it is determined that there exists only one supplier of the goods or services sought to be obtained;

(e) The goods or services sought to be obtained are for the purpose of maintenance or repair of existing city goods or equipment; or

(f) No suppliers of goods or services sought to be obtained are located within the general circulation area of any of the city newspapers.

(2) When the Council determines that the provisions of division (A) above, concerning competitive bidding, are not applicable, the Council shall, at the time of the approval of the contract for the procurement of goods and services, refer to the applicable provision of this division (B) which is relied upon for the waiver of the bidding process.

(C) (1) Notwithstanding other provisions of this subchapter, in any instance that a purchase of goods or services by the city is required under the provisions of this subchapter to be made upon competitive bids, such purchase shall be made from a vendor resident in the city if such bid does not exceed the lowest qualified bid from a nonresident vendor by more than 2% of the latter bid, and if such resident vendor has made written claim for such preference at the time the bid was submitted.

(2) A vendor shall be deemed to be a resident of the city if such vendor is an individual, partnership, association or corporation that maintains an active, bona fide place of business within the city and maintains therein a representative inventory of the commodities on which the bid is submitted and, in the case of a corporation, is duly qualified to do business in the state as is in good standing under the laws of the state and under the ordinances of the city.

(1991 Code, § 2-3) (Ord. passed 11-1-1979; Ord. 175, passed 3-20-2014)

Statutory reference:

Authority of city to require competitive bidding for purchases of supplies and the like, see W.Va. Code § 8-12-10

Availability to municipalities of facilities of state division of purchases, see W.Va. Code § 5A-3-9

Applicable state requirements concerning bid bonds and other details, see W.Va. Code §5-22-1

§ 30.21 TRANSMITTING AND RECEIVING BIDS; BONDS; SPECIFICATIONS AND THE LIKE.

The form and manner of transmitting and receiving bids under the provisions of § 30.20, the amount of deposit or performance bond, if any, to accompany such bids, the terms, specifications, reservation of right to reject bids or waive irregularities therein shall be determined by the Council prior to each respective advertisement for bids and, insofar as is practical, be stated in the published notice.

(1991 Code, § 2-4)

If any portion of this Ordinance shall, for any reason, be declared invalid by any court of competent jurisdiction, such invalidity shall not affect the remaining provisions hereof and Common Council determines that it would have adopted this Ordinance without the invalid provision.

This Ordinance shall become effective upon passage.

PASSED AND APPROVED ON THE FIRST READING: ____________________, 2023.

PASSED AND APPROVED ON THE SECOND AND FINAL READING: _______________, 2023.

CITY OF ELKINS, WEST VIRGINIA

____
Jerry A. Marco, Mayor

Attest:

____
Sutton Stokes, City Clerk

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	New business
Category:	Resolution
Agenda Item Name:	Resolution 1700: Authorizing the City Treasurer to open a bank account for the newly created Fund 26—Opioid Settlement (corrected)
Recommended By:	City Treasurer
Summary:	Council previously approved Resolution 1700 at its December 4 meeting, authorizing the City Treasurer to open a new bank account for monies received as a result of the statewide opioid settlements. The bank where this account is to be opened requested some wording changes to further clarify council's intention. The attached version updates the wording as requested by the bank. The original and corrected version are attached, with the corrected version identified by the bold black "Corrected" designation in the header.
Fiscal Impact:	n/a
Recommendation:	Consider for approval
Attachments:	1. R-1700 - CORRECTED Authorizing the Creation of Fund #026 – Opioid Settlement Funds 2. R-1700 - SUPERSEDED Authorizing the Creation of Fund #026 – Opioid Settlement Funds

Corrected

IN THE COMMON COUNCIL OF THE CITY OF ELKINS, WV

A RESOLUTION OF COMMON COUNCIL

(#1700)
November 16, 2023

Authorizing the Creation of Fund #026 – Opioid Settlement Funds, and the Opening of a Bank Account for the Purpose of Administering the Fund

---

WHEREAS, West Virginia Code Section Two, Article Nine, Chapter six (§6-9-2) authorizes the State Auditor ("Auditor"), as Chief Inspector, to formulate, prescribe and install a system of accounting for local governments, including a standard Chart of Accounts to be used by all local governments; and,

WHEREAS, West Virginia Code Section Two, Article Nine, Chapter six (§6-9-2) also charges the Auditor with the responsibility of overseeing and conducting audits on local governments; and,

WHEREAS, Opioid Settlement monies recently received by the State of West Virginia shall be administered and disbursed to local jurisdictions by the WV First Foundation; and,

WHEREAS, the Auditor has directed that these funds must be administered and accounted for as follows:

1. A new special revenue fund (FUND #026 – Opioid Settlement Funds) is to be designated on the Chart of Accounts used for internal accounting purposes by the City of Elkins, West Virginia ("City"); and,
2. An interest-bearing, two-signature bank account is to be created by the City for Opioid Settlement Funds assigned to Fund #026, with any interest earned to remain in this bank account; and,
3. Revenues received by this fund are to be recorded in the City's internal accounting records using Account #367 – "Other Grants"; and,
4. Documentation supporting disbursements from this fund must be maintained in accordance with all applicable laws, rules, and regulations, including any additional stipulations imposed by the WV First Foundation; and,
5. The City of Elkins must comply with reporting requirements to be imposed by the WV First Foundation later; and,

WHEREAS, the Treasurer of the City of Elkins is required by City Code to administer the funds of the City held for various purposes in accounts established at financial institutions; now**, therefore, be it**,

RESOLVED, that

Corrected

- The Treasurer is authorized to designate a new special revenue fund (FUND #026 – Opioid Settlement Funds) on the Chart of Accounts used for internal accounting purposes; and
- The Treasurer is authorized to open an interest-bearing, two-signature bank account to be used for Opioid Settlement Funds; and
- The signatories for the new bank account are to be Jerry Marco (Mayor), Tracy Judy (City Treasurer), and Sutton Stokes (City Clerk).

______________________________ ______________________________

Attest: Sutton Stokes, City Clerk Jerry A. Marco, Mayor

Superseded Version

<u>IN THE COMMON COUNCIL OF THE CITY OF ELKINS, WV</u>

<u>A RESOLUTION OF COMMON COUNCIL</u>

(#1700)
November 16, 2023

Authorizing the Creation of Fund #026 – Opioid Settlement Funds, and the Opening of a Bank Account for the Purpose of Administering the Fund

---

WHEREAS, West Virginia Code Section Two, Article Nine, Chapter six (§6-9-2) authorizes the State Auditor (“Auditor”), as Chief Inspector, to formulate, prescribe and install a system of accounting for local governments; and,

WHEREAS, West Virginia Code Section Two, Article Nine, Chapter six (§6-9-2) also charges the Auditor the responsibility of overseeing and conducting audits on local governments; and,

WHEREAS, Opioid Settlement monies recently received by the State of West Virginia shall be administered and disbursed to local jurisdictions by the WV First Foundation; and,

WHEREAS, the Auditor has directed that these funds must be accounted for as follows:

1. A new special revenue fund (FUND #026 – Opioid Settlement Funds) is to be established by the City of Elkins, West Virginia (“City”); and,
2. A separate, interest-bearing, two-signature bank account is to be created by the City to accompany this fund, with any interest earned to remain in this account, subject to the same restrictions as other revenues in this fund; and,
3. Revenues received by this fund are to be recorded using Account #367 – “Other Grants”; and,
4. Documentation supporting disbursements from this fund must be maintained in accordance with all applicable laws, rules, and regulations, including any additional stipulations imposed by the WV First Foundation; and,
5. The City of Elkins must comply with reporting requirements to be imposed by the WV First Foundation later; and,

WHEREAS, the Treasurer of the City of Elkins is required by City Code to administer the funds of the City held for various purposes in accounts established at financial institutions; now**, therefore, be it**,

RESOLVED, that the Treasurer is authorized to establish Special Revenue Fund #026 – Opioid Settlement Funds and to open a separate, interest-bearing bank account for the City of Elkins to administer all Opioid Settlement Funds received.

Attest: Sutton Stokes, City Clerk

Jerry A. Marco, Mayor

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	New business
Category:	Resolution
Agenda Item Name:	Resolution 1705: Authorizing Execution of Right-of-Way Permit Application to W. Va. DOT/DOH for Construction of a Gold Star Famiiles Memorial Monument on DOH Property Leased by City of Elkins
Recommended By:	Municipal Properties Committee
Summary:	This action will allow application to W. Va. DOT/DOH for permission to construct a Gold Star Families Memorial Monument (GSFMM) on land owned by DOH but leased to the City of Elkins, near the intersection of Railroad, Randolph, and Harrison Avenues, where the All Veterans Memorial is located. Funds and planning for the GSFMM are being arranged by Rotary Club International. See attached report and proposed plan. If council approves this resolution and DOH approves the construction plan, the project will proceed without further council action. Another, separate effort is underway to install a Rosie the Riveter statue at this location. Funds and planning for that statue are being managed by the Emma Scott Garden Club (with funds for design stage having already been pledged by the Randolph County Commission).
Fiscal Impact:	Provisions will eventually need to be made for maintaining the expanded "park" area, such as contracting with a landscaper.
Recommendation:	Consider for approval, authorizing signature on the right-of-way application to WV DOH/DOT
Attachments:	1. R-1705 - ROW application to DOH for gold star memorial 2. 231113 DOH ROW Permit Application 3. Elkins-Gold Star Family Memorial 4. 230901 Elkins GSFMM Background paper

IN THE COMMON COUNCIL OF THE CITY OF ELKINS, WV

A RESOLUTION OF COMMON COUNCIL

(#1705)
September 21, 2023

Authorizing Execution of Right-of-Way Permit Application to W. Va. DOT/DOH for Construction of a Gold Star Families Memorial Monument on DOH Property Leased by City of Elkins

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WHEREAS, The West Virginia Department of Transportation, Division of Highways ("DOH") is the owner of real property, containing 1.840 acres more or less and located southeast of the intersection of Railroad Avenue and Randolph Avenue, in the City of Elkins, West Virginia, where the All-Veterans Memorial is located; and,

WHEREAS, the City of Elkins, West Virginia ("City") has leased this property from DOH since an agreement first entered into on July 29th, 1993, and renewed every five years since; and,

WHEREAS, Rotary Club International is managing the funding, design, and installation of a Gold Star Families Memorial Monument on this property, requiring submission of a Right-of-Way Permit Application to DOH; and,

WHEREAS, it appears that authorizing execution of this Right-of-Way Permit Application is in the best interests of the citizens of the City of Elkins;

NOW, THEREFORE, BE IT RESOLVED, THAT:

The Elkins Common Council hereby accepts the terms of and authorizes execution of this Right-of-Way Permit Application to DOH by Rotary Club International on behalf of the City of Elkins.

____
Jerry A. Marco, Mayor

Attest:

____
Sutton R. Stokes, City Clerk

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

Division of Highways

Office of the District Engineer/Manager
District Eight
Post Office Box 1516 · Elkins, West Virginia 26241-1516 · (304) 637-0220

Alanna J. Keller, P.E.
Deputy Secretary of Transportation
Deputy Commissioner of Highways

Jimmy Wriston, P. E.
Secretary of Transportation
Commissioner of Highways

November 6, 2023

Rotary International District 7545
Attn: Justin D. McCarthy
P. O. Box 604
Fayetteville, WV 25840

Dear Mr. McCarthy:

Please sign the enclosed Encroachment Permit where indicated and return in the self-addressed, self-stamped envelope. Retain one copy for your records. A final copy with the District Engineer's signature will be mailed to you after processing. The Permit is not valid until the Permit is approved and signed by the District Engineer.

Thank you for your attention in this matter. If you have any questions, please contact me at (304) 637-0220.

Sincerely,

J. G. Goins

J. Greg Goins
Permits Supervisor

JGG
Enclosure

Keep this copy for your records

West Virginia Department of Transportation
Division of Highways
Right of Way Entry Permit Application

PERMIT NO. 08-2023-0222

By signing below, APPLICANT agrees to all terms and conditions (see page 2) associated with this permit to enter upon, under, over, or across the state road right(s) of way of the State of West Virginia.

Applicant: **ROTARY INTERNATIONAL DISTRICT 7545**

Address: **P. O. BOX 604** City: **FAYETTEVILLE** State: **WV** Zip **25840**

Phone Number: **3047105206** Email:

Route Type: ☐ US ☐ WV ☐ County Route Number: **N/A** Milepost: **n/a** County: **42 - Randolph**

☐ Interstate ☐ HARP

Latitude/Longitude at/along Roadway (in decimal degrees): **38.92908/-79.85098**

Description of Work: **Permit is to construct and maintain a Gold Star Families Memorial Monument per the existing Plans/Sketches on State Right of Way in the City of Elkins, WV adjacent to the existing Veterans Memorial near the intersection of U. S. 33 and Railroad Avenue.**

Length of Installation: Estimated Construction Duration:

DOH Project Number/Name (if applicable):

Inspection Fees (must check one):

☐ For any inspection fees incurred under this permit
☐ At $0.85 per linear foot of water line installed under this permit
☐ At $3.37 per linear foot of sewer line installed under this permit

Applicant: Applicant Title:

Applicant Printed Name: Date: **11/1/2023**

DOH Reviewer: **JGG** J. S. Goins DOH Reviewer Title: PERMIT SUPERVISOR

DOH Approver: DOH Approver Title:

FOR DIVISION USE ONLY

DEPOSIT/BOND REQUIRED: ☐ YES ☐ NO DEPOSIT/BOND AMOUNT: $

☐ Check Attached ☐ Bond Attached ☐ Bond On File BOND NUMBER: DATE:

INSPECTION: ☐ By Owner/Consultant ☐ By Division
☐ Full Time ☐ Part Time ☐ Periodic
☐ Reimbursable (Authorization) ☐ No Cost

PERMIT ISSUE DATE: **11/6/2023**

TERMS AND CONDITIONS

1. This permit, between the WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a statutory corporation, hereinafter called "DIVISION" and APPLICANT, a person, firm or corporation, listed on page one.
2. In consideration of the conditions hereinafter set forth and in accordance with all state and federal laws, including but not limited to, W. Va. Code §17-2E-1 et seq., §17-4-8, §17-16-6, §17-16-9, §31H-1-1 et seq., and any related rules, regulations, policies, manuals, or guidelines, APPLICANT does hereby apply to enter DIVISION's right(s) of way listed on page one, for the purpose listed in Description of Work on page one.
3. APPLICANT shall deposit with DIVISION an official, certified or cashier's check, or executed bond with surety satisfactory to DIVISION to cover any damage and inspection costs DIVISION may sustain by reason of the issuing of this permit, including any expense incurred in restoring said right(s) of way to original condition or the proper repair of any and all damages arising from, related to, or otherwise connected to said entry.
4. APPLICANT agrees to reimburse DIVISION for inspection costs as listed on page one.
5. **APPLICANT shall notify DIVISION at least 48 hours in advance of the date the work will begin. Failure to comply may result in cancellation of this permit.**
6. APPLICANT shall notify DIVISION upon completion of any work authorized under this permit. If APPLICANT's work is anticipated to extend beyond the estimated construction duration indicated on page one, APPLICANT shall notify the DIVISION as soon as possible. Failure to comply may result in additional charges.
7. APPLICANT agrees to protect all users of the road right(s) of way, as well as all employees and equipment of APPLICANT and DIVISION, at all times in accordance with the current Division of Highways manual, "Manual on Temporary Traffic Control for Streets and Highways" (https://transportation.wv.gov/highways/traffic/Pages/default.aspx).
8. APPLICANT agrees to comply with all applicable state and federal laws related to the entry that is the subject of this permit, including but not limited to the requirement to provide DIVISION copies of any NEPA clearance documentation for utility installations along or across the Interstate Highway System and/or controlled-access right(s) of way.
9. The person, firm or corporation to whom a permit is issued agrees to defend, indemnify, and hold the State of West Virginia and DIVISION harmless on account of any damages to persons or property which may arise during the process of the work authorized by this permit or by reason thereof.
10. Applications for permission to perform work within highway right(s) of way shall be made on DIVISION's standard permit form and shall be signed by the authorized representative of the person, firm or corporation applying.
11. The APPLICANT shall give detailed information concerning the nature of the entry and any work to be performed, and the application must include plans sufficient to show the same.
12. Any work authorized under this permit shall be completed on or before one calendar year from the issue date listed on page one, unless otherwise specified or approved by DIVISION.
13. APPLICANT, its agents, successor, heirs or assigns, contractors or any other person, firm or corporation working under APPLICANT's real or apparent authority, shall perform the work in a manner satisfactory to DIVISION. Damage to the right(s) of way resulting at any time from work authorized under this permit shall be repaired by APPLICANT. Unsatisfactory repairs, at the sole discretion of DIVISION, may be corrected by DIVISION or its authorized agent and the cost thereof paid by APPLICANT.
14. DIVISION shall not be liable for any damage or costs incurred by APPLICANT arising from or related to DIVISION's construction or maintenance of DIVISION's facilities.
15. Utility installation(s) shall be in accordance with the current manual, "Accommodation of Utilities on Highway Right of Way" (https://transportation.wv.gov/highways/right-of-way/Pages/Utility-Publications.aspx).
16. Driveway construction shall be in accordance with the current manual, "Rules and Regulations for Constructing Driveways on State Highway Rights-of-Way" (https://transportation.wv.gov/highways/traffic/Pages/default.aspx).
17. DIVISION reserves the right to cancel this permit at any time.
18. This permit is issued only insofar as DIVISION has a right to do so. APPLICANT has sole responsibility to secure all necessary rights or permissions for any third-party property interests related to the entry, known or unknown. APPLICANT, by signing on page one, hereby warrants that, to the extent its entry onto DIVISION's right(s) of way involves or affects any other entity's property, real or personal, on or within DIVISION's right(s) of way, that APPLICANT has full legal authorization or the legal right to do so. To the fullest extent permitted by law, APPLICANT agrees to defend, indemnify, and hold harmless DIVISION for damage to any persons or property arising from APPLICANT's breach of this representation and warranty.
19. All attachments are incorporated into this permit. To the extent of any conflict, the terms of this permit shall control.
20. APPLICANT agrees to keep any surface facilities installed pursuant to this permit clear of vegetation for so long as APPLICANT's facilities are located on DIVISION's rights of way. APPLICANT agrees to remove promptly any vegetation in, on, or around such facilities that poses a risk or hazard to the safety of the travelling public.

GOLD STAR FAMILY MEMORIAL MONUMENT

ELKINS, WV

Preliminary Area Plan

GOLD STAR FAMILY MEMORIAL MONUMENT

ELKINS, WV

Preliminary Area Plan

April 9, 2023

PROJECT TITLE: Gold Star Families Memorial Monument (GSFMM), Elkins WV

PURPOSE: Gold Star Families Memorial Monuments are established for three reasons:

- Provide a space the Gold Star Families can call their own in honor of their Loved Ones and their family.
- Provide a site in which to host Gold Star Family Outreach event programs
- Educate and raise awareness in the American public about Gold Star Families and the sacrifices that have been made for the freedoms we enjoy every day as Americans.

PROJECT PLAN: The project consists of design and construction of the memorial monument and surrounding plaza consistent with the guidelines required by The Wood Williams Foundation. The final monument design will feature components relevant to Elkins and Randolph County and be placed in a landscaped plaza approximately 25' in radius, similar in appearance to that of the monument at the State Capitol shown here.

The plaza will contain marble benches marked to recognize up to three platinum level donors as well as three markers similar to that shown in the photo:

- One will describe the monument itself and its purpose
- One will honor Woody Williams as the nation's last surviving WWI Medal of Honor recipient as well as of his life of service in support of veterans and Gold Star Families and as a Rotarian of Rotary International District 7545
- One will recognize donors at the Platinum, Gold and Silver level

LEADERSHIP: This project is under the auspices of The Woody Williams Foundation a 501(c)(3)[1] whose mission is: *"to honor, recognize, and serve Gold Star Families and the legacy of their Loved Ones who have paid the ultimate sacrifice."* (see https://woodywilliams.org/)

[1] EIN **06-1840409**

The Executive Committee overseeing this project consists primarily of the senior leadership of Rotary International (RI) District 7545 in West Virginia, specifically:

- Justin D. McCarthy, VADM, SC, USN (ret), District Governor, RI District 7545 of Fayetteville, WV
- Jeff Disibbio, District Governor-elect, RI District 7545 of Bluefield, WV
- Richard "Rick" Macak, LtCol, USMC (ret), District Governor-nominee, RI District 7545 of Daniels, WV
- Kristie Vandevander, Immediate Past President, Rotary Club of Elkins, WV
- James G. Peterson, Member, Rotary Club of Milton, WV (Woody's home club)
- SSgt Donald Lambert, WVANG, District Commander, American Legion District 9, of Valley Bend, WV

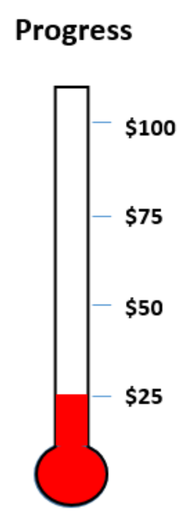
WHY ELKINS? Four primary reasons:

- Woody's wishes to build GSFMM's in locations not within an hour's drive of existing monuments
- A location in his home state of West Virginia and within the boundaries of his home Rotary District (7545)[2]
- The high concentration of veterans in Randolph County, including 672 known Gold Star Families in the surrounding area
- The historical significance of Elkins to West Virginia and its draw as a tourist destination (Randolph County typically sees ~300,000 visitors annually)

BUDGET:

- Granite monument $51,000
- Granite benches 6,000
- Site prep and construction 33,000
- Landscaping and lighting 8,000
- Design and WWF support 7,000
- Special events 5,000

TOTAL EXPENSES **$110,000**



SCHEDULE:

- Project registered FEB 2023
- Primary fundraising period FEB 2023 – FEB 2024
- Design finalized DEC 2023
- Construction contract awarded JAN 2023

[2] Rotary International District 7545 encompasses all of West Virginia other than the eastern panhandle and includes 53 Rotary Clubs and approximately 2,000 Rotary members

- Groundbreaking ceremony APR 2024
- Dedication ceremony SEP 2024

SPONSORSHIPS: Contributors are being sought at four levels:

- Platinum (up to three): $10,000 (one sold)
- Gold (up to six): $ 5,000 (three sold)
- Silver (up to twelve): $ 2,500
- Bronze (unlimited) $ 1,000

REGISTERED SPONSORS

- Platinum
  - Rotary Club of Milton, WV
- Gold
  - Natural Resource Partners, L.P., Huntington WV
  - Western Pocahontas Properties, L.P., Huntington, WV
  - Pocahontas Royalties, LLC, Huntington WV
- Silver
- Bronze
  - VADM & Mrs. Justin D. McCarthy, SC, USN (ret), Fayetteville WV

HOW TO DONATE

- Donations in any amount are gratefully accepted.
- All donations should be made directly to The Woody Williams Foundation[3]
  - On-line at https://www.woodywilliams.org/monuments/elkins-wv.html
  - By check:
    - Checks should be made out to: The Woody Williams Foundation and marked in the memo field "Donation for Elkins WV GSFMM"
    - Mail checks to: The Woody Williams Foundation, 12123 Shelbyville Road, Ste 100, Louisville KY 40243

[3] The Woody Williams Foundation is designated by the Internal Revenue Service (IRS) as a 501(c)(3) non-profit organization; EIN: 06-1840409.

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	New business
Category:	Resolution
Agenda Item Name:	Resolution 1706: Authorizing Reimbursement of Certain Tax Monies Collected from Altice (Optimum)
Recommended By:	
Summary:	The City has received a request from Altice on behalf of Suddenlink/Optimum (taxpayer) for a refund of B&O taxes paid to the City for all quarterly periods after June 30,2020 which total the amount of $22,690.74. In the attached memo, the City Attorney confirms that this refund is required as a result of the expiration of a grandfather clause in the U.S. Tax Freedom Act of 1998 (ITFA). The City Attorney confirms that other West Virginia cities (e.g., Charleston, Beckley) have received and complied with similar requests. Note that the refunded taxes will be returned by Altice pro rata to current and former customers, not into Altice coffers.
Fiscal Impact:	City would return $22,690.74 in previously received revenues
Recommendation:	Consider for approval
Attachments:	1. R-1706 - Altice tax refund 2. Elkins City Attorney - Altice Memo 3. Altice Refund Request 4. ITFA opinion

<u>IN THE COMMON COUNCIL OF THE CITY OF ELKINS, WV</u>

<u>A RESOLUTION OF COMMON COUNCIL</u>

(#1706)
December 21, 2023

Authorizing Reimbursement of Certain Tax Monies Collected from Altice (Optimum)

WHEREAS, the U.S. Internet Tax Freedom Act of 1998 included certain provisions allowing local jurisdictions to collect taxes on internet access under certain conditions; and,

WHEREAS, the City of Elkins, West Virginia ("City") collected such taxes as then allowed; and

WHEREAS, the conditions under which such tax collections were allowed have expired as of June 30, 2020; and,

WHEREAS, City of Elkins, West Virginia ("City") has received a request from Altice, the parent company of Optimum (then Suddenlink) for a refund of such taxes collected since June 30, 2020, in the amount of $22,690.74; and,

WHEREAS, the City Attorney has reviewed this request and finds that a refund is required under federal law;

NOW, THEREFORE, BE IT RESOLVED, THAT:

The Elkins Common Council hereby authorizes the City Treasurer to refund the requested $22,690.74 to Altice or its designee.

____
Jerry A. Marco, Mayor

Attest:

____
Sutton R. Stokes, City Clerk

Not Privileged

MEMO

TO: **Members Finance Committee and Mayor Marco**

FROM: **Geraldine S. Roberts**

RE: **Altice Refund Request**

DATE: **December 8, 2023**

The City has received a request from Altice on behalf of Suddenlink (taxpayer) for a refund of B&O taxes paid to the City for all quarterly periods after June 30,2020 which total the amount of $22,690.74. This amount reflects a reduction in the gross receipts for those quarters for internet access services. They have provided the original returns and the amended returns with this letter and Tracy has those. (See attached letter).

I have researched the Tax Freedom Act of 1998 (" ITFA") . ITFA created a moratorium on state and local governments imposing taxes on internet access and certain internet transactions. If there was a tax imposed by a state or local government prior to 10/1/1998, a grandfather clause permitted the continuation of the imposition of the tax . This grandfather clause expired on 6/30/2020. After that date, state and local governments could no longer impose taxes (here B&O taxes) because the grandfather clause expired. This is the basis for the request for a refund.

I reached out to the cities of Charleston and Beckley through their attorneys because I knew that they had franchise agreement with Suddenlink. They both confirmed that they had received a similar Altice letter and made a refund. Kevin Baker, Charleston's attorney, also forwarded a letter prepared by a former tax commissioner that explained the ability to tax under the grandfather clause and citing the expiration of it on 6/30/2020 despite the fact that the letter was written prior to 2020. (See attached).

I also had a conference call with a representative from Altice and their attorney to discuss this request.

Based on my research, the information from Charleston and Beckley, and the call with Altice and their counsel, it is my recommendation that the refund of B&O

taxes be made. The refunded taxes will not be a benefit to Altice and end up in their coffers. A pro rata share will go to each current and former customer because of what the customers have paid on their billings since 6/30/2020. Altice is working out the details as to how the refunds will be made.

Cc:Sutton Stokes
Tracy Judy

altice

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

September 5, 2023

City of Elkins
Attn: Jennifer Shreve
401 Davis Ave
Elkins, WV 26241

RE: Suddenlink Communications ("SDL" or "Taxpayer")
Business and Occupation Tax ("B&O")
West Virginia ("WV") Tax Registration No.: 1415100
Refund Period: 7/1/2020 to 12/31/2022

Dear Sir or Madam:

We are respectfully requesting a refund in the amount of $22,690.74 for B&O Taxes reported by the above referenced Taxpayer for the above referenced periods (i.e., all periods after June 30, 2020) paid to the City of Elkins, WV on internet access services. Please note that the reporting entity is Cebridge Acquisition ("Cebridge") (EIN 20-4394384), which is a wholly owned subsidiary of Altice USA, Inc. ("Altice") but doing business as Suddenlink in Elkins, WV.

For a historical background, the Internet Tax Freedom Act of 1998 ("ITFA") provided for a moratorium on the ability of state and local governments to impose taxes on internet access and certain internet transactions (hereinafter referred to as the "Moratorium"). The Moratorium included a grandfather clause (i.e., an exclusion from the Moratorium) permitting states that imposed and enforced taxes on internet access prior to October 1, 1998, to continue imposing such taxes on otherwise protected services (e.g., internet access); however, as of June 30, 2020, all grandfather clauses expired. See ITFA, Public Law 105-277 § 1100 et seq. (Oct. 21, 1998) (as amended by the Trade Facilitation and Trade Enforcement Act of 2015, Public Law 114-125, § 922 (Feb. 24, 2016) (setting up a June 30, 2020 expiration date for all grandfathered taxes)). As of June 30, 2020, the ITFA prohibits all state and local taxes on internet access and other internet transactions. As such, Suddenlink is requesting a refund of B&O taxes paid by Suddenlink to the City of Elkins on internet access services for the period of July 1, 2020 to December 31, 2022 which follows the expiration of the aforementioned grandfather clause.

Altice USA
One Court Square West
Long Island City, NY 11120
alticeusa.com

altice

To assist with this refund request, we are enclosing the original filed returns which included the gross receipts associated with internet access services and the amended returns which remove the gross receipts associated with internet access services for the refund period noted above.

We reserve the right to supplement this material or to respond to any request made by the City of Elkins with any documents deemed necessary by the City Clerk, Controller, or any other Administrator within the City of Elkins.

If you have any questions please contact either David Prebut at david.prebut@alticeusa.com or call 929-260-5230; or Laura La Neve at laura.minhas@alticeusa.com or call 516-803-1683; or Ajay Arora at Ajay.Arora@alticeusa.com or call 347-324-1671.

Thank you for your courtesy.

Sincerely,

David S. Prebut
Altice USA, Inc.

Altice USA
One Court Square West
Long Island City, NY 11120
alticeusa.com

SPILMAN THOMAS & BATTLE, PLLC
ATTORNEYS AT LAW

Dale W. Steager
304.340.1692
e-mail: dsteager@spilmanlaw.com

November 3, 2011

Mr. Michael Kelemen
Director of Government Relations
Suddenlink, Inc.
P. O. Box 1220
Scott Depot, WV 25560

Re: City of Charleston, West Virginia, Business and Occupation Taxes

Dear Mr. Kelemen:

You asked whether Suddenlink's charges for Internet access are subject to the City of Charleston's municipal business and occupation tax. The answer to this question turns on whether the City's municipal business and occupation tax is prohibited by Section 1101(a)(1) of the Internet Tax Freedom Act (hereinafter "Act"), codified as 47 U.S.C. § 151 note, or is permitted under Section 1101 (b) and the grandfather clause found in Section 1104 of the Act.[1] Because the City's business and occupation tax is a privilege tax imposed on businesses doing business in the City, measured by gross income or gross proceeds of sale, depending upon the privilege being exercised, and was imposed and generally enforced for many years prior to enactment of the Internet Tax Freedom Act, we believe the tax is grandfathered under Section 1104 of the Act. Therefore, the tax applies to the gross income of Suddenlink from furnishing services within the City without excluding Internet access charges from the measure of tax.

Internet Tax Freedom Act

Section 1101(a) of the Act, as amended,[2] provides that "[n]o State or political subdivision thereof may impose any of the following taxes during the period beginning November 1, 2003,

[1] The Internet Tax Freedom Act was enacted in 1998 as part of the Omnibus Appropriations Act of 1998, Title XI of Pub. L. 105-277. The Act imposed a three-year moratorium on new taxes on Internet access charges and did several other things not relevant here. The Act was amended in 2001 to extend the moratorium, Pub. L. 107-75, § 2 (November 28, 2001). The Act again amended in 2004 and 2007. Pub. L. 108-435, §§ 2-6A (December 3, 2004); and Pub. L. 110-108 (October 31, 2007).

[2] As enacted in 1998, Section 1101(a) read:

> (a) Moratorium. – No State or political subdivision thereof shall impose any of the following taxes during the period beginning on October 1, 1998, and ending 3 years after the date of enactment of this Act –
>
> (1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998; and

and ending November 1, 2014: (1) Taxes on Internet access [and] (2) Multiple or discriminatory taxes[3] on electronic commerce.[4]

---

(2) multiple or discriminatory taxes on electronic commerce..

[3] "Multiple tax" is defined in Section 1105(6) as follows:

(6) *Multiple tax.* --

(A) *In general.* -- The term "multiple tax" means any tax that is imposed by one State or political subdivision thereof on the same or essentially the same electronic commerce that is also subject to another tax imposed by another State or political subdivision thereof (whether or not at the same rate or on the same basis), without a credit (for example, a resale exemption certificate) for taxes paid in other jurisdictions.

(B) *Exception.* -- Such term shall not include a sales or use tax imposed by a State and 1 or more political subdivisions thereof on the same electronic commerce or a tax on persons engaged in electronic commerce which also may have been subject to a sales or use tax thereon.

(C) *Sales or use tax.* -- For purposes of subparagraph (B), the term "sales or use tax" means a tax that is imposed on or incident to the sale, purchase, storage, consumption, distribution, or other use of tangible personal property or services as may be defined by laws imposing such tax and which is measured by the amount of the sales price or other charge for such property or service.

"Discriminatory tax" is defined in Section 1105(2) of the Act as follows:

(2) *Discriminatory tax.* -- The term 'discriminatory tax' means --

(A) any tax imposed by a State or political subdivision thereof on electronic commerce that --

(i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;

(ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period;

(iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means;

(iv) establishes a classification of Internet access service providers or online service providers for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means; or

(B) any tax imposed by a State or political subdivision thereof, if --

(i) the sole ability to access a site on a remote seller's out-of-State computer server is considered a factor in determining a remote seller's tax collection obligation; or

(ii) a provider of Internet access service or online services is deemed to be the agent of a remote seller for determining tax collection obligations solely as a result of --

(I) the display of a remote seller's information or content on the out-of-State computer server of a provider of Internet access service or online services; or

"Internet access" is defined in Section 1105(5) of the Act as follows:

(5) *Internet access*. -- The term "Internet access" –

(A) means a service that enables users to connect to the Internet to access content, information, or other services offered over the Internet;

(B) includes the purchase, use or sale of telecommunications by a provider of a service described in subparagraph (A) to the extent such telecommunications are purchased, used or sold --
(i) to provide such service; or
(ii) to otherwise enable users to access content, information or other services offered over the Internet;

(C) includes services that are incidental to the provision of the service described in subparagraph (A) when furnished to users as part of such service, such as a home page, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity;

(D) does not include voice, audio or video programming, or other products and services (except services described in subparagraph (A), (B), (C), or (E)) that utilize Internet protocol or any successor protocol and for which there is a charge, regardless of whether such charge is separately stated or aggregated with the charge for services described in subparagraph (A), (B), (C), or (E); and

(E) includes a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity, that are provided independently or not packaged with Internet access.

(II) the processing of orders through the out-of-State computer server of a provider of Internet access service or online services.

[4] "Electronic commerce" is defined in Section 1105(3) of the Act as follows:
(3) *Electronic commerce*. -- The term "electronic commerce" means any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access.

"Tax on Internet access" is defined in Section 1105(10) of the Act as follows:

(10) *Tax on internet access.* --

(A) *In general.* -- The term 'tax on Internet access' means a tax on Internet access, regardless of whether such tax is imposed on a provider of Internet access or a buyer of Internet access and regardless of the terminology used to describe the tax.

(B) *General exception.* -- The term 'tax on Internet access' does not include a tax levied upon or measured by net income, capital stock, net worth, or property value.

(C) *Specific exception.* --

(i) *Specified taxes.*—Effective November 1, 2007, the term 'tax on Internet access' also does not include a State tax expressly levied on commercial activity, modified gross receipts, taxable margin, or gross income of the business, by a State law specifically using one of the foregoing terms, that --

(I) was enacted after June 20, 2005, and before November 1, 2007 (or, in the case of a State business and occupation tax, was enacted after January 1, 1932, and before January 1, 1936);

(II) replaced, in whole or in part, a modified value-added tax or a tax levied upon or measured by net income, capital stock, or net worth (or, is a State business and occupation tax that was enacted after January 1, 1932 and before January 1, 1936);

(III) is imposed on a broad range of business activity; and

(IV) is not discriminatory in its application to providers of communication services, Internet access, or telecommunications.

(ii) *Modifications.*—Nothing in this subparagraph shall be construed as a limitation on a State's ability to make modifications to a tax covered by clause (i) of this subparagraph after November 1, 2007, as long as the modifications do not substantially narrow the range of business activities on which the tax is imposed or otherwise disqualify the tax under clause (i).

> (iii) *No inference.* -- No inference of legislative construction shall be drawn from this subparagraph regarding the application of subparagraph (A) or (B) to any tax described in clause (i) for periods prior to November 1, 2007.

Section 1101(b) of the Act, which preserves State and local taxing authority, reads:

> (b) *Preservation of State and Local Taxing Authority.* – Except as provided in this section, nothing in this title shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or superseding of, and State or local law pertaining to taxation that is otherwise permissible under the Constitution of the United States or other federal law and in effect on the date of enactment of this Act [October 21, 1998].

Section 1104 of the Act grandfathered State and local taxes on Internet access services that were imposed and enforced prior to October 1, 1998. That Section reads:

> (a) *Pre-October 1998 Taxes.* --
>
> (1) *In general.* -- Section 1101 (a) does not apply to a tax on Internet access that was generally imposed and actually enforced prior to October 1, 1998, if, before that date --
>
> (A) the tax was authorized by statute; and
>
> (B) either --
>
> (i) a provider of Internet access services had a reasonable opportunity to know, by virtue of a rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; or
>
> (ii) a State or political subdivision thereof generally collected such tax on charges for Internet access.
>
> (2) *Termination.*—
>
> (A) *In general.* -- Except as provided in subparagraph (B), this subsection shall not apply after November 1, 2014.
>
> (B) *State telecommunications service tax.* --

(i) *Date for termination.* -- This subsection shall not apply after November 1, 2006, with respect to a State telecommunications service tax described in clause (ii).

(ii) *Description of tax.* -- A State telecommunications service tax referred to in subclause (i) is a State tax—

(I) enacted by State law on or after October 1, 1991, and imposing a tax on telecommunications service; and

(II) applied to Internet access through administrative code or regulation issued on or after December 1, 2002.

(3) *Exception.* -- Paragraphs (1) and (2) shall not apply to any State that has, more than 24 months prior to the date of enactment of this paragraph [Oct. 31, 2007], enacted legislation to repeal the State's taxes on Internet access or issued a rule or other proclamation made by the appropriate agency of the State that such State agency has decided to no longer apply such tax to Internet access.

(b) *Pre-November 2003 Taxes.* --

(1) *In general.*—Section 1101 (a) does not apply to a tax on Internet access that was generally imposed and actually enforced as of November 1, 2003, if, as of that date, the tax was authorized by statute and --

(A) a provider of Internet access services had a reasonable opportunity to know by virtue of a public rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; and

(B) a State or political subdivision thereof generally collected such tax on charges for Internet access.

(2) *Termination.* -- This subsection shall not apply after November 1, 2005.

(c) *Application of Definition.* --

(1) *In general.*—Effective as of November 1, 2003 --

(A) for purposes of subsection (a), the term "Internet access" shall have the meaning given such term by section 1104(5) of this Act, as enacted on October 21, 1998;[5] and

(B) for purposes of subsection (b), the term "Internet access" shall have the meaning given such term by section 1104(5) of this Act as enacted on October 21, 1998, and amended by section 2(c) of the Internet Tax Nondiscrimination Act (Public Law 108–435).

(2) *Exceptions*. -- Paragraph (1) shall not apply until June 30, 2008, to a tax on Internet access that is –

(A) generally imposed and actually enforced on telecommunications service purchased, used, or sold by a provider of Internet access, but only if the appropriate administrative agency of a State or political subdivision thereof issued a public ruling prior to July 1, 2007, that applied such tax to such service in a manner that is inconsistent with paragraph (1); or

(B) the subject of litigation instituted in a judicial court of competent jurisdiction prior to July 1, 2007, in which a State or political subdivision is seeking to enforce, in a manner that is inconsistent with paragraph (1), such tax on telecommunications service purchased, used, or sold by a provider of Internet access.

(3) *No inference*. -- No inference of legislative construction shall be drawn from this subsection or the amendments to section 1105 (5) made by the Internet Tax Freedom Act Amendments Act of 2007 [Pub. L. 110–108] for any period prior to June 30, 2008, with respect to any tax subject to the exceptions described in subparagraphs (A) and (B) of paragraph (2).

The State business and occupation tax in effect prior to July 1, 1987, was enacted in 1935. *See* 1935 Acts of Legislature, chapter 86.[6] *See also* the discussion of State business and occupation taxes, *infra*.

---

[5] Section 1104(5) of the Internet Tax Freedom Act enacted on October 21, 1998 defined "Internet access" as follows:

(5) Internet Access. -- The term "Internet Access" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to users. Such term does not include telecommunication services.

[6] Variations of the tax were enacted prior to that. See 1921 Acts of Legislature, chapter 110; 1925 Acts of Legislature, extraordinary session, chapter 1; and 1933 Acts of Legislature extraordinary session, chapter 33.

The City will likely argue that cable television companies have been subject to municipal business and occupation taxes since at least 1981, if not before that, when the issue of taxability, under the State's business and occupation tax, was resolved by the Court's decision in *Capitol Cablevision Corp. v. Hardesty*, 168 W. Va. 631, 285 S.E.2d 412 (1981); and that gross income from service activity is taxable regardless of the type of the service activity unless an exemption applies or the State did not delegate to municipalities the authority to tax a particular business, such as railroads, pipelines, motor carriers, and telephone and telegraph companies.

As new services became available in the marketplace, gross income from furnishing the new services automatically became subject to the State's business and occupation tax as in effect prior to July 1, 1987. By analogy, when a retailer of tangible personal property sells goods that only recently came on the market, gross proceeds from sales of those goods were automatically subject to the State's business and occupation tax, without any action by the State.

Municipal business and occupation taxes apply in like manner. The City will likely argue that, in this context, the municipal taxation of cable television companies on their charges for providing Internet access falls under the grandfather rule of the Internet Tax Freedom Act, as enacted in 1998, and that Suddenlink's charges for Internet access are subject to the City's municipal business and occupation tax.

Additionally, State and municipal business and occupation taxes are privilege taxes imposed on the business for the privilege of doing business within the taxing jurisdiction. Business activities were divided into broad classifications, e.g., privilege of producing natural resources, privilege of making retail sales of tangible personal property, etc. The tax was imposed on the privilege of doing business and was not on the particular good or service that is sold or furnished.

Charleston's B & O Tax

You also asked when the City of Charleston began imposing its business and occupation tax on service business or callings not otherwise specifically taxed.

All municipalities in West Virginia have been authorized since 1949 to impose a municipal business and occupation tax similar to the State business and occupation tax in effect prior to July 1, 1987. It appears that prior to 1949, a municipality could impose a business and occupation tax if the tax was authorized in the charter for that municipality enacted by the West Virginia Legislature.

We believe that the City's business and occupation tax has been imposed generally, and specifically on service business or callings not otherwise specifically taxed, since the City first began imposing a business and occupation tax similar to that imposed by the State of West Virginia (prior to July 1, 1987), either pursuant to authority found in the charter granted to the City of Charleston by the West Virginia Legislature or pursuant to the general authority grant to municipalities in 1949.

1. Current City Code

The business and occupation tax of the City of Charleston, West Virginia, is presently codified in Article II, Chapter 110 of the Charleston City Code of 2000, as amended.[7] The service classification of the tax, which applies to any service business or calling not otherwise specifically taxed, is codified in Section 110-58. (Otherwise specifically taxed service businesses include contracting, banking, certain public utilities and rental businesses.) Section 110-58 reads:

> **§ 110-58. Service business or calling not otherwise specifically taxed.**
>
> (a) Upon every person engaging or continuing within the city in any service business or calling not otherwise specifically taxed under this article, there is hereby levied, and shall be collected, a tax equal to one percent of the gross income of any such business.
>
> (b) Gross income or gross proceeds of sales derived from services within West Virginia which is not taxed or taxable by any other municipality are included in the measure of the city business and occupation tax if the services are either directed from a Charleston location or the taxpayer's principal West Virginia office is located in the city. Without limiting the generality of the foregoing, when a taxpayer has only one (1) office location and this office is located within the municipal limits of the city and its activities elsewhere in West Virginia are neither taxed nor taxable by another municipality, the gross income or gross proceeds from those activities are taxable by the city.

[7] In 2000, the City's business and occupation tax was recodified and moved from chapter 6, article III of the Charleston City Code of 1975, to chapter 110, article II of the Code of 2000, and Section 6-115 (of the 1975 Code) was recodified as Section 110-58 (of the 2000 Code). In 2002, §§ 110-31 -- 110-34, 110-51 -- 110-63, 110-111 -- 110-115, and 110-141 -- 110-149 of the business and occupation tax were repealed in their entirety, and replacement sections were enacted.

(Bill No. 6799, § 6-115, 1-22-2002)

The 2002 amendment was to Subsection 110-58(b).

"Service business or calling" is defined in Section 110-31 of the Charleston City Code of 2000, as amended, and means:

> all activities engaged in by a person for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible property, but not including the services rendered by an employee to his employer. The term shall include, but not be limited to:
>
> (1) Persons engaged in manufacturing, compounding or preparing for sale, profit or commercial use articles, substances or commodities which are owned by another or others;
>
> (2) Persons engaged as independent contractors in producing natural resource products which are owned by another or others, as personal property, immediately after the same are severed, extracted, reduced to possession and produced; and
>
> (3) The repetitive carrying of accounts, in the regular course and conduct of business, and extension of credit in connection with the sale of any tangible personal property or service, except as to persons taxed pursuant to the provisions of section 110-60.[8]

2. Prior City Code

Prior to 2000, Charleston's business and occupation tax was codified in chapter 6, article III, of the Charleston City Code, as adopted in 1975.

The term "service business or calling" was defined in Section 6-107 of the Code of 1975 and reads:

> **Service business or calling.** All activities engaged in by a person for other persons for a consideration, which involve the rendering of a service

[8] Section 110-60 of the Charleston Code of 2000, as amended, taxes banks and other financial businesses.

as distinguished from the sale of tangible property, but not including the services rendered by an employee to his employer. The term shall include, but not be limited to:

(1) Persons engaged in manufacturing, compounding or preparing for sale, profit or commercial use articles, substances or commodities which are owned by another or others;

(2) Persons engaged as independent contractors in producing natural resource products which are owned by another or others, as personal property, immediately after the same are severed, extracted, reduced to possession and produced; and

(3) The repetitive carrying of accounts, in the regular course and conduct of business, and extension of credit in connection with the sale of any tangible personal property or service, except as to persons taxed pursuant to the provisions of section 6-117.[9]

The service classification was found in Section 6-115, which reads:

Sec. 6-115. Service business or calling not otherwise specifically taxed.

Upon every person engaging or continuing within the city in any service business or calling not otherwise specifically taxed under this article, there is hereby levied, and shall be collected, a tax equal to one percent of the gross income of any such business.

For purposes of this section, gross income shall not include income from services rendered to persons outside the city which is taxed by any other municipality of this state pursuant to section 8-13-5 of the Code of West Virginia.

(Ord. No. 1232, 4-18-72, § 9; Ord. No. 1300, § 11-20-72, § 9; Ord. No. 2405, 3-27-79; Ord. No. 4369, 11-21-88.

[9] Section 6-117 of the Charleston Code of 1975 taxed banks and other financial businesses.

It appears that the 1988 amendment either added the second paragraph to Section 6-115 or amended the language of that paragraph to reflect an amendment to W. Va. Code § 8-13-5 enacted by the West Virginia Legislature in 1985.

3. State B & O Tax

The State business and occupation tax in effect prior to July 1, 1987, was imposed for the privilege of engaging in certain enumerated business activities. One such privilege was engaging in any service business or calling not otherwise specifically taxed. "Service business or calling" was defined in W. Va. Code § 11-13-1 (definitions) as follows:

> "Service business or calling" shall include all activities engaged in by a person for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible property, but shall not include the services rendered by an employee to his employer. This term shall include, but not be limited to:
>
> (a) Persons engaged in manufacturing, compounding or preparing for sale, profit or commercial use articles, substances or commodities which are owned by another or others;
>
> (b) Persons engaged as independent contractors in producing natural resource products which are owned by another or others, as personal property, immediately after the same are severed, extracted, reduced to possession and produced; and
>
> (c) The repetitive carrying of accounts, in the regular course and conduct of business, and extension of credit in connection with the sale of any tangible personal property or service, except as to persons taxed pursuant to the provisions of section two-k of this article.[10]

This definition was last amended in 1972.

Service businesses or callings not otherwise specifically taxed were taxed under W. Va. Code § 11-13-2h, which reads:

[10] W. Va. Code § 11-13-2k taxed banks and other financial businesses.

§ 11-13-2h. Service business or calling not otherwise specifically taxed.

> Upon every person engaging or continuing within this State in any service business or calling not otherwise specifically taxed under this law, there is hereby levied and shall be collected, a tax equal to one and fifteen one-hundredths percent of the gross income of any such business.

The language of Section 11-13-2h had been in the West Virginia Code since at least 1935. The amendments to Section 11-13-2h in 1959 and 1971 were to the rate of tax. (Section 11-13-2h was repealed by the Legislature in 1989.)

Summary

In summary, the City of Charleston has imposed and generally enforced its business and occupation tax on all businesses doing business in the City[11] that were subject to the State business and occupation tax prior to July 1, 1987, including, but not limited to, service businesses or callings not otherwise specifically taxed, since at least 1975, which was 23 years prior to enactment by Congress of the Internet Tax Freedom Act, which was effective October 21, 1998. Consequently, including charges for Internet access in the gross income subject to tax under Section 110-58 of the Charleston City Code is not prohibited by the Internet Tax Freedom Act because the tax is grandfathered under Section 1104 of the Internet Tax Freedom Act, as amended.[12]

[11] Businesses not subject to the City's business and occupation tax include, and are limited to, those businesses the City is prohibited from taxing by State law, W. Va. Code § 8-13-5. Those businesses include businesses that were exempt from the State business and occupation tax under W. Va. Code § 11-13-3 (such as insurance companies, nonprofit cemeteries, certain fraternal societies, organizations and associations, and corporations, associations and societies organized exclusively for religious or charitable purposes), and those businesses that prior to July 1, 1987, were subject to the annual tax on incomes of certain carriers, such as telephone and telegraph companies, motor carriers, railroads, barge lines and pipelines.

[12] Prior to amendment of the Internet Tax Freedom Act, the City's business and occupation tax was grandfathered under language in Section 1101(a) of the Act, for state and local taxes imposed and generally enforced prior to October 1, 1998.

After you have had an opportunity to read this letter, we will be happy to discuss it with you and answer any questions you may have.

Very truly yours,

Dale W. Steager

Dale W. Steager

DWS/ljr

cc: Michael Zarrilli

3197493 (13213.9)

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	New business
Category:	Resolution
Agenda Item Name:	Resolution 1707: Authorizing the opening of a bank account at Grant County Bank
Recommended By:	City Attorney and City Treasurer
Summary:	The Elkins Water Board has been ordered by the W. Va. Public Service Commission to operate the Whitmer Water System. The order is attached. Because the board will be receiving funds on behalf of the Whitmer Water System, there must be a dedicated bank account to receive and hold those funds. This resolution authorizes the City Treasurer to open such an account at Grant County Bank.
Fiscal Impact:	n/a
Recommendation:	Consider for approval
Attachments:	1. R-1707 opening bank account for water O&M for Whitmer 2. 09-13-2023 Final Order in Whitmer 19-A with hightlighted language regarding modification of O M agreement (01863337-2xA377B) 3. 12-14-2023 draft modified Interim O M agreement (01891273xA377B)

IN THE COMMON COUNCIL OF THE CITY OF ELKINS, WV

A RESOLUTION OF COMMON COUNCIL

(#1707)
December 21, 2023

Authorizing the Opening of a Bank Account at Grant County Bank for the Operation and Maintenance of the Whitmer Water System

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WHEREAS, the Treasurer of the City of Elkins is required by City Code to administer the funds of the City held for various purposes in accounts established at financial institutions, including the funds of the Elkins Water Board; and,

WHEREAS, the Elkins Water Board has been ordered by the W. Va. Public Service Commission to operate the Whitmer Water System, as the most capable proximate water utility; and,

WHEREAS, the Elkins Water Board will, while serving in this capacity, receive funds for the operation and maintenance of the Whitmer Water System; and,

WHEREAS, the West Virginia Public Service Commission requires a separate bank account for these funds; now, ***therefore, be it***

RESOLVED, that the Treasurer is authorized to establish a bank account with Grant County Bank for the Elkins Water Board for the funds that are received by the Board for the operation and maintenance of the Whitmer Water System. The account signatories will be Jerry A. Marco (Mayor), Tracy Judy (City Treasurer), and Sutton Stokes (City Clerk).

____
Jerry A. Marco, Mayor

Attest:

____
Sutton R. Stokes, City Clerk

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 13th day of September 2023.

CASE NO. 23-0590-W-19A-PC

ELKINS MUNICIPAL WATER DEPARTMENT and
WHITMER WATER ASSOCIATION, INC.
Joint Application for consent and approval of an Asset Purchase Agreement, approval of an Interim Operating Agreement, and emergency rate relief for Whitmer Water Association, Inc.

COMMISSION ORDER

The Commission approves interim rates for Whitmer Water Association, Inc. (Whitmer), grants its consent and approval of a modified Interim Operating Agreement and an Asset Purchase Agreement, and orders notice.

BACKGROUND

On July 13, 2023, Elkins Municipal Water Department (Elkins) and Whitmer (together, Joint Applicants) filed a Joint Application requesting Commission consent and approval of an Interim Operating Agreement (Operating Agreement) and Asset Purchase Agreement (Purchase Agreement). The Joint Applicants requested Commission approval of emergency interim rates for Whitmer sufficient to pay Elkins a monthly O&M fee of $9,000.00 and other costs related to Elkin's operations of Whitmer pursuant to the Operating Agreement. The Joint Applicants stated that on and after closing, Elkins will serve Whitmer's customers under a separate Elkins tariff schedule at rates identical to the emergency Whitmer rates approved by the Commission and as may be revised prior to closing.

The Joint Applicants explained that in an Order issued May 5, 2023, final on May 25, 2023, in Case No. 22-0993-W-DU (DU Proceeding) an Administrative Law Judge determined that Whitmer is a distressed utility and ordered its acquisition by Elkins by a mutual agreement made at arms-length pursuant to W. Va. Code § 24-2H-7(b)(5). The Joint Applicants stated that following issuance of that final Order declaring Whitmer a distressed utility, Whitmer adopted (i) a resolution reactivating the association and (ii) a plan of dissolution that authorized Whitmer to enter into an interim operating agreement with Elkins. Application ¶¶ 2-4.

Whitmer operates a water distribution and treatment system serving a localized community of approximately 94 water customers/members in Randolph County. The system consist of water supply facilities, water transmission and distribution lines, a storage tank, valves, connections, service lines, and other facilities and equipment used and useful in providing water service. Whitmer currently has no full-time staff or manager and relies on volunteers to operate the water system. Application ¶ 1.

Elkins is willing to acquire Whitmer and provide service to Whitmer customers conditioned upon receipt of appropriate funds for the acquisition and upgrade of the Whitmer systems. Application ¶ 5. As consideration, Elkins will assume the unpaid balance of water bonds of Whitmer held by the West Virginia Municipal Bond Commission as of closing and make post-closing investments necessary to carry out its responsibilities as the new owner of Whitmer. Application ¶ 8.

The Joint Applicants asserted that Whitmer's rates are insufficient to pay an operation and maintenance fee to Elkins to cover Whitmer's debt service, estimated projected costs for Elkins to operate the Whitmer System as contained in the Operating Agreement, all other costs to be reasonably incurred by Elkins, and to provide sufficient funds to make new connections. The Joint Applicants determined that Whitmer's rates should be increased in an amount sufficient to cover a fee of $9,000.00 per month plus all of Whitmer's going-level expenses. Application at ¶ 10.

The Joint Applicants also requested a waiver of the requirement to file certain financial information pursuant to Rule 21 of the Commission's Rules of Practice and Procedure, 150 C.S.R. 1 (Procedural Rules). The Joint Applicants stated that the Commission is familiar with Elkins' current financial condition and Whitmer's provision of Procedural Rule 21 data is unnecessary because Whitmer will no longer be in existence upon closing of the transaction. Application ¶ 14.

On July 28, 2023, the Commission ordered Staff to file a report regarding interim operations and emergency interim rates within ten days.

On August 7, 2023, the Commission Staff filed its Initial Joint Staff Memorandum Including Interim Rate Recommendations. Staff recommended that the Commission approve the Purchase Agreement without approving the specific terms and conditions, conditioned on bondholder approval. Staff further recommended that the Commission approve the Operating Agreement without approving the specific terms and conditions and with a revision stating that Elkins will be compensated for its operation and maintenance of the Whitmer system through collection of customer payments less the required debt payments paid to the lender and placement 2-1/2 percent of collections in the Renewal and Replacement (R&R) Account for Whitmer for the 2010 A bonds. Staff further recommended that the Commission specify that the approval of the agreements does not bind the Commission to any ratemaking decisions in the future.

Staff recommended that the Commission deny the Joint Applicants' request for waiver of Procedural Rule 21 financial information until Whitmer files its Annual Report for the fiscal year ended December 30, 2022. Staff recommended that Whitmer file the Annual Report by September 11, 2023 and that the Commission extend Staff's final report due date to January 9, 2024. Staff also recommended that Whitmer or Elkins file support for each line item calculation on Exhibit E, "FY2024 Whitmer Budgeted Expenses", detailing how Elkins arrived at $9,000 per month for interim operating expenses. Staff noted that the line items, aside from payroll and benefits, appear to be arbitrary estimations, rather than known and measurable changes consistent with determining rates based on the cost of service. Staff stated that the $9,000 per month or $108,000 annually will need to be reviewed in its entirety during the 19A proceeding in this case.

In the interim, before Staff issues its final recommendation on the rate request, Staff recommended that the Commission approve Staff Recommended Interim Rates, subject to refund, to be effective upon the Operating Agreement becoming effective. Staff's Recommended Interim Rates would generate an increase of $26,793 or 42.89 percent over the current rates. The difference between Staff's Recommended Interim Rates and the $9,000 per month, or $108,000, annually requested by the Joint Applicants is a result of Staff's adjustments to the bond payment, Renewal & Replacement Account, contingency provision, and Senate Bill 234 funds (cash working capital reserve (CWCR) account).

On August 17, 2023, the Joint Applicants filed a Response to Staff's August 7, 2023 memorandum. The Joint Applicants stated that Staff's recommendation to deny a waiver of Procedural Rule 21 financial information until Whitmer files its 2022 Annual Report was unreasonable. The Joint Applicants explained that the Commission is familiar with the current financial condition of Elkins and that Whitmer is a distressed utility without the resources to prepare an annual report for 2022. Furthermore, the Joint Applicants explained that an annual report for Whitmer will be irrelevant once the transfer to Elkins is complete.

In addition, the Joint Applicants disagreed with the Staff adjustments removing the CWCR and Contingency provision. Regarding the CWCR increment, they stated that Elkins is required to include a CWCR in the rates it charges all of its customers, and Whitmer's payment to Elkins to provide service to Whitmer's customers should be passed through to the Whitmer customers. In regards to the Contingency provision, the Joint Applicants stated that a contingency within the proposed O&M fee is to provide funds for unanticipated expenses associated with the O&M of the Whitmer system. They argue that by eliminating the contingency and the CWCR, Staff is placing Elkins at risk of being unable to address unanticipated expenses.

Lastly, the Joint Applicants suggested that rather than approving interim rates subject to refund, the Commission require any amount higher than necessary at the time of transfer to Elkins to be used to address future needs of the Whitmer system.

DISCUSSION

Elkins agreed to purchase the Whitmer system pursuant to the Asset Purchase Agreement. As consideration, Elkins will assume the unpaid balance of water bonds of Whitmer held by the West Virginia Municipal Bond Commission as of Closing and make post-closing investment necessary to carry out its responsibilities as the new owner and operator of Whitmer. Application at ¶¶ 7-8. Staff noted that Whitmer's debt service consists of 2010 A Bonds. Staff's Initial Memorandum at 3. The Commission will grant its consent and approval of the Asset Purchase Agreement, subject to bondholder approval.

As noted in the DU Proceeding, there are several issues with the current operation and maintenance of Whitmer's system, including an inactive board of directors, lack of paid employees, and no field personnel. The Joint Applicants seek Commission approval of an Operating Agreement that will enable Elkins to operate the Whitmer system on an interim basis, pending Closing on the Asset Purchase Agreement. Commission Staff stated its understanding that an acquisition could take months, and that Whitmer cannot continue under the current arrangement of volunteer labor and no water operator. Staff concurred that Elkins should operate the Whitmer system in the interim. Staff's Initial Memorandum at 3.

Staff did not agree however, with the requirement that Whitmer pay Elkins an O&M fee of $9,000.00 per month for operating and maintaining the Whitmer System. Instead, Staff recommended increased Whitmer rates to cover the cash operating requirements of $74,965, the debt service requirements of $12,336, and a cash surplus of $2,233. The rates would generate an increase of $26,793 or 42.89 percent over the current Whitmer rates. Staff stated that Whitmer's debt service consists of 2010 A Bonds which require a 2-1/2 percent Renewal and Replacement Reserve. Elkins should not retain the reserve and should, instead, deposit it in the appropriate bank account. Staff's Initial Memorandum at 3-4, 5-6. Staff also made certain adjustments, some of which the Joint Applicants objected to. Staff's Initial Memorandum at 6, Response to Initial Joint Staff Memorandum at 3-5.

The Joint Applicants did not file a revenue requirement schedule or a tariff for Whitmer customers based on the proposed Operating Agreement payments of $9,000 per month. If we use only the proposed payments under the Operating Agreement of $9,000 per month or $108,000 per year and calculated a new tariff for Whitmer customers using Staff's approach, we arrive at a rate increase for the Whitmer customers of 169 percent.[1]

Considering that Whitmer has been operating, albeit without a licensed plant operator, for less than $50,000 per year, and further considering that Elkins should be using existing employees and equipment to operate the Whitmer system, Elkins should be able to operate the Whitmer system at a more reasonable incremental cost than $108,000 per year. A proposed budget of estimated costs, which does not indicate incremental additional costs to Elkins, is not sufficient support for the estimated cost of $108,000 per year. As we explain below, revising the Whitmer tariff to impose a $108,000, or greater, revenue requirement on the small number of Whitmer customers will result in a very large absolute and percentage increase for those customers and is contrary to a goal of single tariff pricing for different geographical service territories of a utility.

Elkins intends to acquire the system in the future. The Commission has expressed a preference for single tariff pricing rather than differential pricing for different groups of customers within the same class. We recognize that a utility acquiring another utility may request geographically differentiated rates but the Commission requires evidence to support the different rate schedules, particularly when the differentials are extreme. It is not reasonable to create an extreme differential between the rates paid by Whitmer customers and the rates paid by Elkins customers at this time. We will establish a more reasonable rate for the Whitmer customers under its present ownership, which will be the same rates that those customers will pay when they become Elkins customers after Elkins' acquisition of the Whitmer system is completed.

Whitmer's current rates are lower than Elkins' rates. Considering the lack of management, available personnel to maintain and operate the system, and the fact that there is no licensed operator for the Whitmer system, the Commission finds that allowing the Whitmer rates to immediately increase to be the same as the Elkins rates is necessary and reasonable when Elkins takes over operation of

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[1] $108,000 revenue requirement less $40,157 per books revenue = $67,843 increase. $67,843 increase divided by $40,157 per books revenue = 169 percent increase.

the Whitmer system and after the acquisition of the Whitmer system by Elkins is completed.

Whitmer customers presently use an average of 2,600 gallons per month. The Whitmer tariff has a minimum bill of $35.34 per month, which is based on 3,000 gallons per month. Thus, any Whitmer customer with monthly usage of 3,000 gallons or less, currently receives a bill of $35.34.

The Elkins tariff has a minimum bill of $41.50 per month, based on 2,000 gallons per month. Under the Elkins tariff, a Whitmer customer using 2,600 gallons (the average monthly usage of Whitmer's customers) would be billed $48.40, an increase of $13.06, ($48.40 - $35.34), or 37 percent. A Whitmer customer using 3,000 gallons would be billed $53.00 at the Elkins tariff rates, an increase of $17.66 ($53.00 - $35.34) or 50 percent.

The rate proposed by the Staff would result in a monthly bill of $50.49 for a Whitmer customer using either 2,600 gallons or 3,000 gallons. This would be an increase of $15.15, or 42.9 percent for a Whitmer customer using either 2,600 or 3,000 gallons in a month.

A Whitmer customer using 4,000 gallons per month would be billed $47.12 under the Whitmer rates. The same usage would be billed $64.50 under the Elkins tariff, an increase of $17.38, or 37 percent.

The Joint Applicants did not file a revenue requirement schedule or a tariff for Whitmer customers based on the proposed Operating Agreement payments of $9,000 per month. If we use only the proposed payments under the Operating Agreement of $9,000 per month, or $108,000 per year, and calculate a new tariff for Whitmer customers using Staff's calculation approach, we arrive at a rate increase for the Whitmer customers of 169 percent.[2]

The Commission regards a 169 percent increase for Whitmer customers as unreasonable and not justified by the limited information presented in this proceeding. We further find that increases in the range of 37 percent to 50 percent for Whitmer customers would be reasonable when the Whitmer customers begin receiving the benefits of operation of the system by Elkins as well as when they become customers of Elkins after the acquisition. Therefore, the Commission determines that it would be reasonable for the Whitmer customers to immediately pay bills calculated at the current Elkins rates if the proposed Interim Operating Agreement, except for the $108,000 per year payment to Elkins, is approved.

[2] $108,000 revenue requirement less $40,157 per books revenue = $67,843 increase. $67,843 increase divided by $40,157 per books revenue = 169 percent increase.

Therefore, Whitmer should immediately begin using current Elkins rates as Emergency Interim Rates, subject to refund pending public notice. Elkins should collect payments from Whitmer customers which will be billed at new rates equal to the Elkins rates. Elkins should deposit debt service funds into the appropriate Bond Revenue and Reserve Accounts. After paying Whitmer's debt service requirements the remaining cash collected by Elkins should be retained to defray the incremental costs it incurs to operate the Whitmer system. Subject to these revisions, the Commission will grant its consent and approval of the Interim Operating Agreement.

Whitmer should publish the Notice of Interim Rate Increase (Notice), attached as Attachment B, as a Class I legal advertisement in a qualified newspaper in each of the counties where service is provided. Alternatively, Whitmer may mail, as a bill insert or separate mailing, a copy of the Notice to each of its customers.

The Joint Applicants requested a waiver of the filing of financial information required by Procedural Rule 21. In response, Staff recommended denying the Joint Applicants' request until Whitmer files an Annual Report for the year ended 2022. The Commission does not believe that financial information in the form of either that required by Procedural Rule 21 or an Annual Report is necessary in this matter. The Commission will grant the Joint Applicant's request to waive certain financial information required by Procedural Rule 21 and deny Staff's request to require the filing of an Annual Report for the year ended 2022. The Commission will require Whitmer to publish notice in the form attached as Attachment B. Elkins and Whitmer should not close on the Acquisition until the protest period has expired and the Commission issues a further order finalizing the Whitmer rates.

FINDINGS OF FACT

1. The Joint Applicants seek approval of an Interim Operating Agreement, interim rates, an Asset Purchase Agreement, and waiver of the filing of Procedural Rule 21 information. July 13, 2023 Joint Application.

2. Whitmer currently has no staff or manager and relies on volunteers to operate the water system. Application ¶ 1.

CONCLUSIONS OF LAW

1. The Commission should grant its consent and approval of the Interim Operating Agreement and Asset Purchase Agreement, subject to the revisions as discussed herein.

2. The Commission should approve of the use of emergency interim rates subject to refund for Whitmer as set forth in Attachment A.

3. Whitmer should file an appropriate tariff reflecting the emergency interim rates as approved in this Order.

4. Whitmer should give notice of the approved emergency interim rate and file proof of notice with the Commission.

ORDER

IT IS THEREFORE ORDERED that the Approved Emergency Interim Rates set forth in Attachment A are approved subject to refund, for use by Whitmer Water Association, Inc. for use for all bills rendered on and after the date of this Order.

IT IS FURTHER ORDERED that the Whitmer Water Association, Inc. file an original and six copies of an appropriate tariff reflecting the interim rates as approved herein, and attached as Attachment A, within thirty days of the date of this Order.

IT IS FURTHER ORDERED that the Whitmer Water Association, Inc. publish the Notice of Interim Rate Increase, attached as Attachment B, as a Class I legal advertisement in a qualified newspaper in each of the counties where service is provided. Alternatively, Whitmer Water Association, Inc. may mail, as a bill insert or separate mailing, a copy of the Notice to each of its customers. Whitmer Water Association, Inc. shall file a certificate of publication and mailing in the form of Tariff Form 6-B with the Commission as soon as the publication or mailing has been met.

IT IS FURTHER ORDERED that the Commission grants its consent and approval of the proposed Interim Operating Agreement and Asset Purchase Agreement, subject to the revisions as discussed herein.

IT IS FURTHER ORDERED that the parties not close on the Asset Purchase Agreement until after expiration of the protest period and further Order of the Commission finalizing the Whitmer rate.

IT IS FURTHER ORDERED that Whitmer Water Association, Inc. and Elkins Municipal Water Department file copies of the executed Interim Operating Agreement, with revisions as discussed herein, within thirty days of this Order.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this Order by electronic service on all parties of record who have filed an e-service agreement, by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Staff by hand delivery.

A True Copy, Teste,

Karen Buckley

Karen Buckley, Executive Secretary

NET/lcw
230590ca

ATTACHMENT A

WHITMER WATER ASSOCIATION, INC.
CASE NO. 23-0590-W-19A-PC

COMMISSION-APPROVED INTERIM RATES

Effective for bills rendered on and after September 13, 2023.

APPLICABILITY
Applicable within the entire territory served.

AVAILABILITY OF SERVICE
Available for general domestic, commercial, industrial and sale for resale water service.

METERED RATES (Customers with metered water supply)

(I)	First	2,000 gallons used per month	\$20.75 per 1,000 gallons
(I)	Next	3,000 gallons used per month	\$11.50 per 1,000 gallons
(I)	Next	5,000 gallons used per month	\$ 9.60 per 1,000 gallons
(I)	All over	10,000 gallons used per month	\$ 7.10 per 1,000 gallons

(I) FLAT RATE CHARGE (Customers with non-metered water supply)
Equivalent to 4,500 gallons of water used per month, \$70.25

(I) MINIMUM CHARGE
No bill will be rendered for less than the following amounts, according to the size of the meter installed:

5/8	- inch meter	\$ 41.50 per month
3/4	- inch meter	\$ 62.25 per month
1	- inch meter	\$ 103.75 per month
1-1/4	- inch meter	\$ 145.25 per month
1-1/2	- inch meter	\$ 207.50 per month
2	- inch meter	\$ 332.00 per month
3	- inch meter	\$ 622.50 per month
4	- inch meter	\$1,037.50 per month
6	- inch meter	\$2,075.00 per month
8	- inch meter	\$3,320.00 per month

(I) SALE FOR RESALE
All water for resale will be billed in accordance to the approved rate of \$6.51 per 1,000 gallons used per month.

(I) Indicates increase

RETURNED CHECK CHARGE
A service charge equal to the actual bank fee assessed to the water utility or a maximum of $25.00 will be imposed upon any customer whose check for payment is returned by the bank due to insufficient funds.

DELAYED PAYMENT PENALTY
The above schedule is net. On all accounts not paid in full when due, ten percent (10 percent) will be added to the net current amount unpaid. This delayed payment penalty is not interest and is to be collected only once for each bill where it is appropriate.

(C) DISCONNECT CHARGE/RECONNECTION CHARGE
Water service will not be restored until all past due water bills have been paid in full and all accrued penalties plus a disconnection charge of $25.00 have been paid.

There shall be a $25.00 reconnection charge paid prior to restoration of water service which has been previously disconnection for any reason.

SHUTOFF FEE - $25.00
To be charged whenever the water utility is requested by the customer to turn off water at the meter outside of the normal business hours, as defined by the Public Service Commission of West Virginia.

(N) AFTER HOURS SERVICE FEE
A service fee of $25.00 will be charged for each separate service call after regular working hours and holidays.

(C) (I) TAP FEE
The charge for an approved service connection to the water system will be seven hundred and fifty dollars ($750.00) or the actual cost of connection (solely determined by the Water Board), whichever is greater, for all new taps to the system.

LEAK ADJUSTMENT
$0.58 per 1,000 gallons is to be used when a bill reflects unusual consumption which can be attributed to eligible leakage on the customer's side of the meter. This rate shall be applied to all such consumption above the customer's historical usage.

SECURITY DEPOSIT
Not to exceed two-twelfths (2/12) of the average estimated charge for residential service or one-sixth (1/6) of the annual estimated charge for commercial service, or fifty dollars, whichever is greater.

(C) Indicates change in text
(N) Indicates new
(I) Indicates increase

ATTACHMENT B

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO. 23-0590-W-19A-PC

ELKINS MUNICIPAL WATER DEPARTMENT and
WHITMER WATER ASSOCIATION, INC.
Joint Application for consent and approval of an Asset Purchase Agreement, approval of an Interim Operating Agreement, and emergency rate relief for Whitmer Water Association, Inc.

NOTICE OF INTERIM RATE INCREASE

On May 25, 2023, a Final Order was issued in Case No. 22-0993-W-DU wherein the Division of Administrative Law Judges determined that Whitmer Water Association, Inc. (Whitmer) is a distressed utility and ordered its acquisition by Elkins Municipal Water Department (Elkins) by a mutual agreement made at arms-length pursuant to W. Va. Code § 24-2H-7(b)(5).

On July 13, 2023, Elkins and Whitmer (together, Joint Applicants) filed a Joint Application requesting Commission consent and approval of an Interim Operating Agreement and Asset Purchase Agreement. The Joint Applicants requested Commission approval of emergency interim rates for Whitmer sufficient to pay to Elkins a monthly O&M fee of $9,000.00 and other costs related to Elkin's operations of Whitmer pursuant to the Interim Operating Agreement. The Joint Applicants stated that on and after closing, Elkins shall serve Whitmer's customers under a separate Elkins tariff schedule at rates identical to the emergency Whitmer rates approved by the Commission and as may be revised prior to closing.

By Order entered September 13, 2023, the Commission granted its consent and approval for the Joint Applicants to enter a revised Interim Operating Agreement and the Asset Purchase Agreement. The Commission also determined that the appropriate emergency interim rates to be charged by Whitmer, subject to refund, are the rates currently charged by Elkins to Elkins customers. The Commission also determined that Elkins should continue to charge its current rates to former Whitmer customers after closing on the Asset Purchase Agreement.

The present rates are as follows:

PRESENT RATES

First 3,000 gallons used per month	$11.78 per 1,000 gallons
Over 3,000 gallons used per month	$11.78 per 1,000 gallons

No bill will be rendered for less than	$35.34 per month

The Commission-approved interim rates are as follows:

COMMISSION-APPROVED INTERIM RATES

METERED RATES (Customers with metered water supply)

First	2,000 gallons used per month	$20.75 per 1,000 gallons
Next	3,000 gallons used per month	$11.50 per 1,000 gallons
Next	5,000 gallons used per month	$ 9.60 per 1,000 gallons
All over	10,000 gallons used per month	$ 7.10 per 1,000 gallons

FLAT RATE CHARGE (Customers with non-metered water supply)

Equivalent to 4,500 gallons of water used per month, $70.25

MINIMUM CHARGE

No bill will be rendered for less than the following amounts, according to the size of the meter installed:

5/8	- inch meter	$ 41.50 per month
3/4	- inch meter	$ 62.25 per month
1	- inch meter	$ 103.75 per month
1-1/4	- inch meter	$ 145.25 per month
1-1/2	- inch meter	$ 207.50 per month
2	- inch meter	$ 332.00 per month
3	- inch meter	$ 622.50 per month
4	- inch meter	$1,037.50 per month
6	- inch meter	$2,075.00 per month
8	- inch meter	$3,320.00 per month

SALE FOR RESALE

All water for resale will be billed in accordance to the approved rate of $6.51 per 1,000 gallons used per month.

The monthly bill for the average residential customer using 2,600 gallons per month would increase by $13.06 or 36.9 percent.

Anyone desiring to protest the emergency changed rates and charges must do so, in writing, within ten (10) days of the date of publication of this notice. All protests may be filed online through the Commission website using the "Submit a Comment" link or may be mailed to the Executive Secretary, Public Service Commission of West Virginia, at P.O. Box 812, 201 Brooks Street, Charleston, WV 25323, or hand-delivered to the Public Service Commission. To help the Commission determine the justification for additional review and investigation, protests must be specific as to the reasons that the changed rates and charges should be modified. In addition, anyone desiring a hearing in this matter must demand a hearing in the written protest.

WHITMER WATER ASSOCIATION, INC.

INTERIM OPERATING AGREEMENT

This **INTERIM OPERATING AGREEMENT** is entered into as of this _______ day of ____________, 2023, by and between **THE CITY OF ELKINS**, a West Virginia municipal corporation ("City"), and **WHITMER WATER ASSOCIATION, INC.**, a West Virginia nonprofit corporation ("Whitmer" and together with the City, "Parties").

WITNESSETH:

Whereas, the Parties own and operate separate public water systems in Randolph County, West Virginia, which are subject to regulation by the Public Service Commission of West Virginia ("Commission"); and

Whereas, the Whitmer water system consists of a well, groundwater treatment facility, storage tank, distribution system with approximately 10 miles of main line and related appurtenances (collectively, "Whitmer System"); and

Whereas, Whitmer serves approximately 94 customers along Whitmer Road and in the rural communities of Whitmer and Job; and

Whereas, Whitmer is struggling both operationally and financially to continue to provide reliable and safe water service due to an inactive board of directors and a lack of employees, maintenance, and finances; and

Whereas, Whitmer has one office employee, no field personnel, and the volunteers who operate the Whitmer System have stated their intention to resign due to family and economic reasons; and

Whereas, on February 9, 2023, in Case No. 22-0993-W-DU ("DU case"), the Staff of the Commission ("Staff") filed a Joint Staff Memorandum and recommended that the Commission declare Whitmer to be a failing utility as defined by *W. Va. Code* § 24-2H-3(b) under the provisions of *W. Va. Code* § 24-2H-1 et seq., the Distressed and Failing Utilities Improvement Act ("the Act"); and

Whereas, the Staff further recommended that the City is the most capable proximate water utility under the Act and that the City acquire the Whitmer System; and

Whereas, the City provides water utility service to more than 4,000 customers in Randolph County; and

Whereas, the City has sufficient expertise to operate the Whitmer System; and

Whereas, the Parties have determined that it is in the best interests of the Parties and their customers for the City to acquire the Whitmer System and assume the water service obligation of Whitmer; and

Whereas, the Parties are in the process of negotiating the sale of the Whitmer System to the City; and

Whereas, on May 5, 2023, a Recommended Decision was issued in the DU case finding that Whitmer is a distressed utility and the City is the most suitable capable proximate water utility in relation to Whitmer and directing Whitmer to be acquired by the City through a mutual agreement; and

Whereas, on May 25, 2023, the Recommended Decision became a final Order of the Commission; and was issued in the DU case finding that Whitmer is a distressed utility and the City is the most suitable capable proximate water utility in relation to Whitmer; and

~~Whereas, the Parties intend to jointly file with the Commission an Application for prior consent and approval of the sale and transfer to the City of the Whitmer System as a result of the DU case for Whitmer; and~~

Whereas, on May 25, 2023, Whitmer adopted a Resolution which. among other things, approved a plan of dissolution and the sale and transfer of the Whitmer System and the entry into necessary agreements with the City; and

Whereas, on July 13, 2023, the Parties filed a Joint Application with the Commission for prior consent and approval of the sale and transfer to the City of the Whitmer System as a result of the DU case for Whitmer which was docketed as Case No. 23-0590-W-19A-PC; and

Whereas, the July 13, 2023 Joint Application filed with the Commission included a request for an immediate ~~Whitmer intends to file a Rule 19A Application with the Commission to~~ increase in Whitmer's~~its~~ water rates; and

Whereas, to provide reliable service to the Whitmer customers as quickly as possible and to transition the Whitmer System to the City, the Parties wish to enter into this Interim Operating Agreement by which the City will operate the Whitmer

System on an interim basis, pending a Commission decision on the Joint Petition for approval of the Application for the City to acquire the Whitmer System; ~~.~~and

Whereas, on September 13, 2023, the Commission entered order in Case No. 23-0590-W-19A-PC which approved Interim Rates subject to refund which would be identical to the City's rates and granted its consent and approval to a modified Interim Operating Agrement.

Now, Therefore, for and in consideration of the preceding Recitals, which are hereby made an integral part of this Interim Operating Agreement and which are not to be construed as mere recitals, the covenants and agreements contained herein, and other consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. The City will perform routine maintenance and operational services, including meter reading, on the Whitmer System for all current Whitmer customers and initiate new service upon receipt of a proper Application and any applicable deposit from new customers connecting to the Whitmer System.

2. Upon receipt from Whitmer of customer names and addresses, the City shall (i) issue bills, (ii) collect payment, (iii) utilize all legal remedies available to it to enforce payment from Whitmer customers, (iv) record payments, and (v) pay all routine costs incurred by the City in its operation of the Whitmer System. Any funds from customer payments remaining after operational expenses shall be deposited in a City account to be held for future operational needs of the Whitmer System.

3. The City is authorized by Whitmer to make service calls and perform necessary repairs or service on the Whitmer System without first obtaining approval from Whitmer.

4. The City shall (i) collect and timely submit to regulatory agencies all required water samples, (ii) maintain and submit such operating and maintenance records as may be required by regulatory authorities, (iii) have such operation, maintenance and repair crews available as are required to meet its obligations under this Interim Operating Agreement, and (iv) meet as required with regulatory agencies.

5. The City shall perform its duties pursuant to this Interim Operating Agreement in the ordinary and usual course of business and use its commercially reasonable best efforts to perform its duties.

6. The City shall not be liable for fines or penalties as a result of Whitmer's operation of the System or resulting from negligent acts or omissions of Whitmer.

7. The City will exercise reasonable care and diligence to prevent and avoid unplanned interruptions, restrictions and fluctuations in service. However, the City does not guarantee or warrant that unplanned interruptions, restrictions or fluctuations in service will not occur and the City shall have no liability for any unplanned interruptions, restrictions or fluctuations in service resulting from causes reasonably beyond the City's control, acts of God or Nature (including, but not limited to, fire, flood, earthquake, storm or other natural disaster), community-wide health event or pandemic, war, invasion, hostilities (whether war is declared or not), civil war, rebellion, riot, insurrection, military or usurped power or confiscation, terrorist activities, government sanction, labor dispute, strike, lockout, interruption or failure of the source of supply, interruption or failure of electricity, mechanical failure or other damage to plant and facilities or unavailability of materials or supplies (collectively "Force Majeure").

8. In the event of a shortage of water available at Whitmer's treatment plant, or any other restriction on the ability of the City to supply water in normal quantities and/or pressures, the water supplied to Whitmer customers may be reduced or diminished.

9. During operations under this Interim Operating Agreement, all risk of loss to the Whitmer System shall remain with Whitmer. Whitmer shall maintain adequate property and liability insurance coverage regarding the Whitmer System until and including the date of Closing.

10. The City shall neither acquire nor assume any environmental or other risks or obligations whatsoever regarding the condition or conditions of the Whitmer System existing at or arising during this Interim Operating Agreement (including fines, penalties, compliance obligations, and similar costs or assessments arising from any such risk), whether or not known or disclosed. All such pre-existing risks shall always remain with Whitmer.

11. Based upon u~~U~~pon Commission's September 13, 2023 order in Case No. 23-0590-W-19A-PC~~ approval ~~and the execution of this modified Interim Operating Agreement by the Parties, Whitmer and the City shall undertake the following activities:

(a) Access and Data: Whitmer shall provide the City access to its equipment, records, and data so that the City may perform interim operation and maintenance services as set forth above and continue its due diligence.

(b) Right of Entry: Whitmer shall grant the City a right of entry to its facilities and the right to repair, replace, and modify its facilities in accordance with this Interim Operating Agreement.

(c) Financial Obligations: Whitmer shall ~~pay an Operation and Maintenance (O&M) fee of **$9,000.00** to the City each month, and~~ transfer to the City all funds held or received in its name necessary to meet its financial obligations such as debt payments ~~, the monthly O&M Fee,~~ and vendor payments in addition to any necessary authority for the City to use funds collected by the City from Whitmer customer payments.

(d) ~~Necessary~~ Rates ~~Relief:~~ Whitmer shall ~~institute any necessary application with the Commission to increase the rates of Whitmer sufficient to cover the monthly O&M fee and the costs of the City in the operation of the Whitmer System pursuant to this Interim Operating Agreement~~file a tariff with the Commission containing rates identical to the City's rates which shall be subject to refund.

(e) Use of Whitmer Funds: Out of the receipt of Whitmer customer payments, the City shall deposit debt service funds into the appropriate Bond Revenue and Bond Reserve Accounts. After paying Whitmer's debt service requirements, the remaining cash collected by the City should be retained to defray the incremental costs it incurs to operate the Whitmer system.

12. Whitmer agrees to indemnify, defend and hold harmless the City from any and all liability arising from the maintenance and operation of the Whitmer System by the City, and to protect, defend, indemnify and hold the City and its officers, agents, representatives, and employees, completely harmless from and against any judgments arising by reason of the injury or death of any person or damage to or loss of any property, including all reasonable costs for investigation and defense thereof (including, but not limited to, attorney fees, court costs and expert fees), of any nature whatsoever arising out of the operation of the Whitmer System, unless such injury, death, loss or damage is caused by the negligence of the City, or its officers, agents, representatives, and employees. The provisions of this paragraph shall survive the expiration or earlier termination of this Interim Operating Agreement.

13. This Interim Operating Agreement shall continue until (i) the closing of an acquisition agreement between Whitmer and the City ("Closing"), or (ii) it is determined that no Closing will take place and the Parties notify the Commission of their plans for service to the customers going forward and reimbursement of the City for its investments in the Whitmer system.

14. This Interim Operating Agreement shall be binding upon the Parties and their respective members, heirs, officers, employees, agents, and assigns.

15. This Interim Operating Agreement shall not be assigned by either party without the prior written approval of the other party.

16. This Interim Operating Agreement is governed by the laws of the State of West Virginia.

17. Whitmer represents and warrants to the City that the execution, delivery, and performance of this Interim Operating Agreement by Whitmer has been duly authorized, and this Interim Operating Agreement constitutes a binding obligation of Whitmer enforceable in accordance with its terms, and the execution and performance of this Interim Operating Agreement by Whitmer will not violate any provision of the law, including *W. Va. Code* § 31E-13-1305 as made applicable by § 31E-13-1321(c), or violate any instruments relating to the construction of the Whitmer System.

18. The City represents and warrants to Whitmer that the execution, delivery, and performance of this Interim Operating Agreement by the City has been duly authorized, and this Interim Operating Agreement constitutes a binding obligation of the City enforceable in accordance with its terms, and the execution and performance of this Interim Operating Agreement by the City will not violate any provision of the law or violate any provisions of the City.

19. Whitmer and the City agree to cooperate fully with one another and with third parties to ensure that all required filings are made, notices given, consents granted or obtained and in taking all such actions as may be necessary to timely seek and obtain any approvals required under this Interim Operating Agreement.

20. The Parties agree to jointly pursue any regulatory permits, waivers or operational approvals necessary to effectuate this Interim Operating Agreement including that the City has received reasonable assurance from water quality regulators that any violations associated with the operation of the treatment plant will not be assessed against, or the responsibility of, the City.

21. The Parties agree to diligently pursue Commission approval of this Interim Operating Agreement and the Whitmer application to increase its rates.

22. All notices or other communications provided for or permitted hereunder shall be in writing and shall be served on the Parties at the addresses set forth below. Any such notice shall be given or served (a) by United States

certified mail, postage pre-paid, return receipt requested, (b) by overnight delivery using a nationally recognized overnight courier, (c) by personal delivery, or (d) by facsimile transmission during normal business hours with a confirmation copy delivered by another method permitted hereunder. Notice given in accordance herewith shall be effective upon the earlier to occur of actual delivery to the address of the addressee or refusal of receipt by the addressee (even if such addressee refuses delivery thereof).

A party's address may be changed by written notice to the other party but shall not become effective until such notice is received. Notices given by counsel for a party shall be deemed given by that party.

The City of Elkins
Attn.: Mayor
401 Davis Avenue
Elkins, WV 26241

Whitmer Water Association, Inc.
Attn.: Paula Teter
301 Church Hill Road
P.O. Box 23
Whitmer, WV 26296

23. This Interim Operating Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings, whether oral or written, express or implied. This Interim Operating Agreement may be modified or supplemented only by a written document signed by an authorized representative of each party. All exhibits and other attachments are incorporated herein by this reference for all purposes.

24. If the Commission should exercise its authority to alter, amend, or modify this Interim Operating Agreement, or should the Commission deem the Interim Operating Agreement to be applicable to situations not contemplated by the parties, either as a result of its initial review of the Interim Operating Agreement or in any subsequent case or proceeding, the Parties shall not be required to perform under the Interim Operating Agreement as so altered, amended, modified or expanded unless the Parties specifically agree, by a written instrument signed by an authorized representative of each party, to be bound by the Interim Operating Agreement as altered, amended, modified or expanded by the Commission.

25. The failure by either party to enforce against the other any term or provision of this Interim Operating Agreement shall not be deemed a waiver of such party's right to enforce against the other party the same or any other such term or provision in the future.

26. This Interim Operating Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of such counterparts shall constitute one Interim Operating Agreement.

[Signature page follows]

In witness whereof, the parties have signed this Interim Operating Agreement as of the date first above written.

THE CITY OF ELKINS

____
By: Jerry Marco
Its: Mayor

WHITMER WATER ASSOCIATION, INC.

____
By: Paula Teter
Its: President

STATE OF WEST VIRGINIA,
COUNTY OF RANDOLPH, to-wit:

The foregoing instrument was acknowledged before me this ____ day of _____________, 2023, by Jerry Marco, in his capacity as Mayor of the City of Elkins, on behalf of said city.

My commission expires: ________________________________

____
Notary Public

[Seal]

STATE OF WEST VIRGINIA,
COUNTY OF RANDOLPH, to-wit:

The foregoing instrument was acknowledged before me this ____ day of ___________, 2023, by Paula Teter, in her capacity as President of the Whitmer Water Association, Inc., on behalf of the Association.

My commission expires: _______________________________

____
Notary Public

[Seal]

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	New business
Category:	Resolution
Agenda Item Name:	Resolution 1708: Appointing C. Friddle to the Board of Zoning Appeals
Recommended By:	City clerk
Summary:	Two vacancies exist on the Board of Zoning Appeals. The BZA hears appeals of zoning decisions and fulfills other responsibilities assigned by city code, including hearing applications for conditional uses under the zoning code. Mr. Friddle, who has served on city council and the Elkins Planning Commission, desires appointment to the BZA.
Fiscal Impact:	n/a
Recommendation:	Consider for approval
Attachments:	1. R-1708 - Appointment of C. Friddle to the BZA

<u>IN THE COMMON COUNCIL OF THE CITY OF ELKINS, WV</u>

<u>A RESOLUTION OF COMMON COUNCIL</u>

(#1708)
December 21, 2023

Appointment of C. Friddle to the Board of Zoning Appeals for the City of Elkins

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WHEREAS, a vacancy exists on the Board of Zoning Appeals for the City of Elkins; and,

WHEREAS, C. Friddle has submitted an application for appointment to the Board of Zoning Appeals; and,

WHEREAS, Mr. Friddle meets the qualifications determined to serve on said Board and has agreed to do so;

NOW, THEREFORE, BE IT RESOLVED, THAT:

The Elkins Common Council hereby appoints C. Friddle to the Board of Zoning Appeals effective immediately and with a term ending December 31, 2026.

____
Jerry A. Marco, Mayor

Attest:

____
Sutton R. Stokes, City Clerk

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	New business
Category:	Resolution
Agenda Item Name:	Resolution 1709: Accepting Conditions of Contract between Delmonte Market dba Tammy's Floral and the City of Elkins, and Authorizing Execution of Contract
Recommended By:	Operations Manager
Summary:	The city received one bid for the 2024 downtown flowers program, from Tammy's Floral/Delmonte Market. This resolution awards the contract accordingly. The scope of the 2024 program was decreased to allow for purchase of replacement baskets and other equipment. For more information about downtown flowers, see the following blog posts: • https://cityofelkinswv.com/costs-for-2021-downtown-flowers-program/ • https://cityofelkinswv.com/contractor-replacing-downtown-flowers-at-no-cost-to-the-city/ • https://cityofelkinswv.com/city-really-spend-45000-downtown-flowers/
Fiscal Impact:	Total contract cost is $24,114.
Recommendation:	Consider for approval
Attachments:	1. R-1709 - Accepting Contract between Tammy's Floral and COE 2. 2024_12_13_Flower Contract_from city attorney

<u>IN THE COMMON COUNCIL OF THE CITY OF ELKINS, WV</u>

<u>A RESOLUTION OF COMMON COUNCIL</u>

(#1709)
December 21, 2023

Accepting Conditions of Contract between Delmonte Market dba Tammy's Floral and the City of Elkins, and Authorizing Execution of Contract

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WHEREAS, the City of Elkins, West Virginia ("City") has, per Resolution #1154, adopted the 2018-2023 Strategic Plan, including milestones and deadlines to serve as a guide in decision-making and resource assignment for the City; and,

WHEREAS, Strategic Focus Area #1, Section C identifies beautification, including hanging flower baskets, as a goal; and,

WHEREAS, the City has received a proposed Contract with Delmonte Market dba Tammy's Floral (copy attached and included with record) for the provision of such service; and,

WHEREAS, it appears that contracting for these goods and services is in the best interests of the citizens of the City of Elkins;

NOW, THEREFORE, BE IT RESOLVED, THAT:

The Elkins Common Council hereby accepts the terms of and authorizes execution of this Contract with Delmonte Market dba Tammy's Floral by the Mayor on behalf of the City of Elkins.

____
Jerry A. Marco, Mayor

Attest:

____
Sutton R. Stokes, City Clerk

CONTRACT

This Contract dated this 21st day of December 2023 between the City of Elkins, West Virginia, a municipality, (“City), and Delmonte Market dba Tammy’s Floral, (“Contractor”).

Whereas the City is desirous of retaining the services of Delmonte Market dba Tammy’s Floral.

In consideration of the promises and mutual covenants herein contained, it is hereby agreed that the Contractor shall provide to the City all services requested under the Scope of Work Proposal (attached) and pursuant to the terms and conditions of this Contract.

ARTICLE 1. SERVICES OF THE CONTRACTOR.

The Contractor shall provide all goods and services as stated in the Proposal Documents and the Scope of Work referenced therein, which are incorporated herein by reference, in accordance with the Contractor’s Scope of Work Proposal to that degree of care and skill ordinarily exercised, under similar circumstances, by reputable members of its profession practicing in the same or similar locality at the time the Work is provided. The total compensation for all goods and services referred to in the Scope of Work Proposal is $24,114.00.

ARTICLE 2. TERM/COMMENCEMENT DATE

This contract shall become effective May 1, 2024, and shall remain in effect until November 30, 2024, unless earlier terminated in accordance with Article 8. Any variation to the terms and conditions set forth herein shall be in writing and signed by both parties.

ARTICLE 3. CITY’S REPRESENTATIVE.

Unless otherwise specified by the City, the City’s representative shall be Mike Kesecker, Operations Manager.

ARTICLE 4. COMPENSATION

A. Generally – The City agrees to compensate the Contractor in accordance with the Scope of Work Proposal submitted by the Contractor. Contractor's Scope of Work Proposal is incorporated herein by reference. The total and cumulative amount of this contract shall not exceed the amount of funds budgeted for these services nor shall said fees exceed the amounts as set forth in the Scope of Work Proposal.

B. Payments – Invoices received from the Contractor pursuant to this Contract will be sent to the Treasurer's Office for payment. Contractor will invoice the City for each payment period.

ARTICLE 5. INDEMNIFICATION

A. To the fullest extent permitted by applicable laws and regulations, the Contractor shall indemnify and save harmless and defend the City, its officials, agents, servants, and employees from and against any and all claims, liability, losses, and/or causes of action arising out of or in any way related to the services furnished by the Contractor pursuant to this Contract, including, but not limited to, those caused by or arising out of any act, omission, negligence or default of the Contractor and/or its subcontractors, agents, servants or employees.

ARTICLE 6. PERSONNEL.

A. The Contractor represents that it has, or will secure at its own expense, all necessary personnel required to perform the Work under this Contract. Such personnel shall not be employees of or have any contractual relationship with the City.

B. All the Work required hereunder shall be performed by the Contractor or under its supervision, and all personnel engaged in performing the Work shall be fully qualified and, if required, authorized, or permitted under state and local law to perform such Work.

ARTICLE 7. INSURANCE

A. Prior to execution of this Contract by the City the Contractor shall provide certificates evidencing insurance coverage as required hereunder. The Certificates shall clearly indicate that the Contractor has obtained insurance of the type, amount, and classification as required for strict compliance with this Article and that no material change, or cancellation of the insurance shall be effective without thirty (30) days prior written notice to the City's representative. Compliance with the foregoing requirements shall not relieve the Contractor of its liability and obligations under this Contract.

B. The Contractor shall maintain, during the life of this Contract, Commercial General Liability insurance in the amount of $1,000,000 in aggregate to protect the Contractor from claims for damages for bodily and personal injury, including wrongful death, as well as from claims of property damages which may arise from any operations under this Contract, whether such operations be by the Contractor or by anyone directly employed by or contracting with the Contractor.

C. The Contractor shall maintain, during the life of this Contract, comprehensive automobile liability insurance in the minimum amount of $1,000,000 combined single limit for bodily injury and property damages liability to protect the Contractor from claims for damages for bodily and personal injury, including death, as well as from claims for property damage, which may arise from the ownership, use, or maintenance of owned and non-owned automobiles, including rented automobiles whether such operations be by the Contractor or by anyone directly or indirectly employed by the Contractor.

D. The Contractor shall carry Workers' Compensation Insurance and Employer's Liability Insurance for all employees as required by West Virginia law.

E. All insurance, other than Workers' Compensation, to be maintained by the Contractor shall specifically include the City as an "**Additional Insured**."

ARTICLE 8. TERMINATION AND RENEWALS.

Either party may terminate this Contract upon sixty (60) days written notice to the other party. Upon mutual agreement, the Contract can be extended for another year for an amount to be determined.

ARTICLE 9. INDEPENDENT CONTRACTOR RELATIONSHIP

A. The Contractor is, and shall be, in the performance of all work, services and/or activities under this Contract, an Independent Contractor, and not an employee, agent, or servant of the City. All persons engaged in any of the work, services and/or activities performed pursuant to this Contract shall at all times, and in all places, be subject to the Contractor's sole direction, supervision, and control. The Contractor shall exercise control over the means and manner in which it and its employees perform the work, and in all respects the Contractor's relationship and the relationship of its employees, agents, or servants to the City shall be that of an Independent Contractor and not as employees or agents of the City.

B. The Contractor does not have the power or authority to bind the City in any promise, agreement or representation other than as specifically provided for in this agreement.

ARTICLE 10. SEVERABILITY

If any term or provision of this Contract, or the application thereof to any person or circumstances shall, to any extent, be held invalid or unenforceable, to remainder of this Contract, or the application of such terms or provision, to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected, and every other term and provision of this Contract shall be deemed valid and enforceable to the extent permitted by law.

ARTICLE 11. NOTICE

All notices required in this Contract shall be sent by mail, return receipt requested, and if sent to the City shall be mailed to:

City of Elkins
401 Davis Avenue
Elkins, WV 26241

And if sent to the Contractor shall be mailed to:

Delmonte Market dba Tammy's Floral
316 Railroad Avenue
Elkins, WV 26241

ARTICLE 12. ENTIRETY OF CONTRACTUAL AGREEMENT

The City and the Contractor agree that this Contract sets forth the entire agreement between the parties, and that there are no promises or understandings other than those stated herein. None of the provisions, terms and conditions contained in this

Contract may be added to, modified, superseded, or otherwise altered, except by written instrument executed by the parties hereto.

Delmonte Market dba Tammy's Floral:

By: ________________________

Print Name__________________

Title: _______________________

City of Elkins

By: ________________________

____
Mayor

Scope or Work

1. The Contractor shall plant 24 - 24” hanging baskets and 10 - 44” hayracks owned by the City.
2. The Contractor shall water all hanging baskets and hayracks as often as 7 days a week, including all holidays, unless because of conditions less watering is needed.
3. The Contractor shall maintain all hanging baskets and hayracks which shall include fertilizing, dead heading and pest and disease control during the term of this contract.
4. The Contractor shall use its own equipment for watering and maintenance and the City shall provide the water which is to be obtained by the Contractor at the Elkins Fire Department.
5. All work completed by the Contractor shall be completed by its own employees.

CITY OF ELKINS
AGENDA ITEM REPORT

Meeting Date:	December 21, 2023
Section:	New business
Category:	Resolution
Agenda Item Name:	Resolution 1710: Reappointing L. Harris to the Board of the Elkins Housing Authority
Recommended By:	City Clerk
Summary:	The Elkins Housing Authority administers Gateway Apartments. (It is distinct from the Randolph County Housing Authority.) The Authority has a board of directors, appointed by council to five-year terms. L. Harris, a current member, seeks reappointment upon the expiration of her current term on January 31. She has served since 2006.
Fiscal Impact:	n/a
Recommendation:	Consider for approval
Attachments:	1. R-1710 - reappointing L. Harris to the Housing Authority

<u>IN THE COMMON COUNCIL OF THE CITY OF ELKINS, WV</u>

<u>A RESOLUTION OF COMMON COUNCIL</u>

(#1710)
December 21, 2023

Reappointing L. Harris to the Housing Authority of the City of Elkins

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WHEREAS, the term of Leesa M. Harris, member of the Housing Authority of the City of Elkins, expires January 31, 2024; and,

WHEREAS, the members of the Housing Authority recommend that L. Harris be reappointed for another five year term beginning February 1, 2024; and,

WHEREAS, Ms. Harris has faithfully served the Board since 2006 and wishes to continue in this role;

NOW, THEREFORE, BE IT RESOLVED, THAT:

The Elkins Common Council hereby reappoints Leesa M. Harris to the Housing Authority of the City of Elkins for a term ending January 31, 2029.

____
Jerry A. Marco, Mayor

Attest:

____
Sutton R. Stokes, City Clerk