

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC JOINT APPLICATION OF	)	
BLUEGRASS WATER UTILITY OPERATING	)	
COMPANY, LLC FOR APPROVAL OF	)	
ACQUISITION AND TRANSFER OF OWNERSHIP	)	CASE NO.
AND CONTROL OF ASSETS OF	)	2023-00181
COMMONWEALTH WASTEWATER SYSTEMS,	)	
LLC, YUNG FARM ESTATE HOMEOWNERS'	)	
ASSOCIATION, INC., AND MOON RIVER MARINA	)	
AND RESORT, LLC	)	

ORDER

On October 12, 2023, Bluegrass Water Utility Operating Company, LLC (Bluegrass Water) filed a motion, pursuant to KRS 278.400 and 807 KAR 5:001, Section 5, requesting a partial rehearing of the Order entered September 22, 2023, regarding the denial of Bluegrass Water’s application for approval of acquisition and transfer of ownership and control of assets of Moon River Marina and Resort, LLC (Moon River).

LEGAL STANDARD

KRS 278.400, which establishes the standard of review for motions for rehearing, limits rehearing to new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful. A Commission Order is deemed unreasonable only when “the evidence presented leaves no room for difference of opinion among reasonable minds.”<sup>1</sup>

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<sup>1</sup> *Energy Regulatory Comm’n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980).

An order can only be unlawful if it violates a state or federal statute or constitutional provision.<sup>2</sup>

By limiting rehearing to correct material errors or omissions, and findings that are unreasonable or unlawful, or to weigh new evidence not readily discoverable at the time of the original hearings, KRS 278.400 is intended to provide closure to Commission proceedings. Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Order.

KRS 278.020(6) provides that:

No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.

KRS 278.020(7) similarly provides that no entity “shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtaining the approval of the commission.” That statute further provides that the Commission “shall approve any proposed acquisition when it finds that the same is to be made in accordance with law, for a proper purpose and is consistent with the public interest.”<sup>3</sup> However, when a transfer involves a sewage utility, as it does here, KRS 278.020(10) further provides that the Commission shall not approve any application made pursuant to subsections (6) or (7) unless the Commission finds that “the person

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<sup>2</sup> *Public Service Comm'n v. Conway*, 324 S.W.3d 373, 377 (Ky. 2010); *Public Service Comm'n v. Jackson County Rural Elec. Coop. Corp.*, 50 S.W.3d 764, 766 (Ky. App. 2000); *National Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 509 (Ky. App. 1990).

<sup>3</sup> KRS 278.020(7).

acquiring the utility has provided evidence of financial integrity to ensure the continuity of sewage service in the event that the acquirer cannot continue to provide service.”

Because KRS 278.020(6) and (7) apply only to the transfer of jurisdictional utilities, the Commission has previously held on some occasions that the acquisition of a non-jurisdiction utility by a jurisdictional utility did not require any prior approval pursuant to KRS 278.020. However, since Case No. 2020-00028,<sup>4</sup> the Commission held that a utility purchasing a non-jurisdictional system must obtain a Certificate of Public Convenience and Necessity (CPCN) pursuant to KRS 278.020(1)(a) before it commences operating the non-jurisdictional utility.

KRS 278.020(1)(a) states, in relevant part, that “[n]o person . . . shall commence providing utility service to or for the public or begin the construction of any plant . . . until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction.”

To establish that public convenience and necessity require the service or construction, a utility is generally required to demonstrate a need and an absence of wasteful duplication.<sup>5</sup> “Need” is defined, in part, as “a showing of a substantial inadequacy of existing service, involving a consumer market sufficiently large to make it economically feasible for the new system or facility to be constructed or operated.”<sup>6</sup> When reviewing whether to grant a CPCN authorizing a utility to purchase a non-jurisdictional system, the

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<sup>4</sup> Case No. 2020-00028, *Electronic Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC of Wastewater System Facilities and Subsequent Tariffed Service to Users Presently Served by Those Facilities* (Ky. PSC June 19, 2020), Order.

<sup>5</sup> *Kentucky Utilities Co. v. Pub. Serv. Comm 'n*, 252 S.W.2d 885 (Ky. 1952).

<sup>6</sup> *Kentucky Utilities Co.*, 252 S.W.2d at 890.

Commission also looks at whether the acquisition will impair the utility's ability to provide reasonable and adequate service to the utility's existing customers or the customers of the system the utility is acquiring.<sup>7</sup>

### BACKGROUND

On May 26, 2023, Bluegrass Water; Commonwealth Wastewater Systems, LLC (Commonwealth Wastewater); Yung Farm Estates Homeowners' Association, Inc. (Yung Farm); and Moon River Marina & Resort LLC (Moon River), filed a joint application, pursuant to KRS 278.020(1) and KRS 278.020(6), (7), and (10), requesting that the Commission approve the acquisition and transfer of control of the assets of wastewater systems currently owned and controlled by Commonwealth Wastewater, Yung Farm, and Moon River and authorize Bluegrass Water to operate those systems.<sup>8</sup>

On September 22, 2023, the Commission entered an Order (Final Order) approving Bluegrass Water's acquisition of Commonwealth Wastewater and Yung Farm but denied Bluegrass Water's acquisition of Moon River. The Commission found that Bluegrass Water failed to establish that its purchase and operation of the Moon River system was justified by a need that would entitle it to a CPCN pursuant to KRS 278.020(1), (6), (7), and (10).<sup>9</sup> Further, due to the remote location of the Moon River system, the fact that the system only serves one customer, and that an extensive capital investment in the system would be necessary, the Commission determined that the risk of the sole customer closing operations and therefore stranding the extensive capital

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<sup>7</sup> See Case No. 2020-00028, June 19, 2020 Order at 16

<sup>8</sup> Application at 1.

<sup>9</sup> Case No. 2023-00181, Sept. 22, 2023 Order at 17.

investment required to operate the system was too great and therefore denied Bluegrass Water's acquisition of the Moon River system.

On October 12, 2023, Bluegrass Water filed a motion for a partial rehearing concerning the Final Order's denial of the acquisition of Moon River. In support of its motion, Bluegrass Water argued that the Commission overlooked relevant facts establishing substantial inadequacy of existing service to Moon River as well as the need for improvements to the existing system. Citing the Commission's determination that there was a risk of Moon River ceasing operations in the near future, Bluegrass Water further argued that the Final Order overlooks the fact that allowing Bluegrass Water to repair and rehabilitate the Moon River system will help ensure the continued operation and marketability of Moon River in the future because it is situated on a preeminent natural resource and recreational area of the Commonwealth. Bluegrass Water cited Moon River's Facebook page as evidence that the resort had been operating since at least 2018. Bluegrass Water further cited Moon River's restaurant, accommodations, and boat rentals as evidence that Moon River was not likely to cease operations in the near future.

#### DISCUSSION AND FINDINGS

Although Bluegrass Water failed to state the legal basis for their request for rehearing, it appeared to request rehearing on this issue based upon a material error or omission in the Final Order. Nowhere in the request did Bluegrass Water allege that the Commission's Final Order was unreasonable or unlawful. The only additional information provided by Bluegrass Water were statements that the Moon River resort itself has been in operation since at least 2018, that it was purchased by new owners in 2021, and that

the new owners completed renovations. Bluegrass Water could have provided that information in its original application. Further, while Bluegrass Water was explicitly asked for financial information regarding the Moon River resort in Commission Staff's First Request for Information (Staff's First Request), that financial information has still not been provided.<sup>10</sup> Thus, no objective evidence was presented to indicate that this customer in particular is likely to require service during the life of the investments Bluegrass Water is likely to make in the Moon River system.

When analyzing "need" for the CPCN, Bluegrass Water argued that "need" is demonstrated because the Moon River system exhibits a substantial inadequacy of service and is in need of repair and skilled management. However, "need" is not only determined by the inadequacy of exiting service, but also "involving a consumer market sufficiently large to make it economically feasible for the new system or facility to be constructed or operated."<sup>11</sup> Bluegrass Water did not adequately address this portion of "need" for a CPCN, and has not presented new evidence that could not have been originally presented that establishes that Moon River is a sufficiently large and economically feasible customer to warrant the substantial risk of stranded costs in the event the resort ceases operations.

The capital investment required to repair and expand Moon River's system is extensive. According to Bluegrass Water's own engineering report, [REDACTED]  
[REDACTED].<sup>12</sup> The Moon River system is

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<sup>10</sup> Bluegrass Water's Response to Commission Staff's First Request for Information (Staff's First Request) (filed July 11, 2023), Item 7.

<sup>11</sup> *Kentucky Utilities Co. v. Pub. Serv. Comm 'n*, 252 S.W.2d 885, 890 (Ky. 1952).

<sup>12</sup> Application at 6, Exhibit 4.

designed for a capacity of [REDACTED]

[REDACTED].<sup>13</sup> In the final Order, the Commission expressed concern that the undersized system at Moon River would require extensive investments beyond those identified in Bluegrass Water's engineering report, and Bluegrass Water has not introduced any new evidence that would alleviate those concerns.

For the above reasons, the Commission finds that Bluegrass Water failed to meet its burden of proof for rehearing on the Commission's finding regarding the acquisition of the Moon River system, and therefore finds that rehearing should be denied for this issue.


IT IS THEREFORE ORDERED that:

1. Bluegrass Water's motion for partial rehearing is denied.
2. This case is closed and removed from the Commission's docket.


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<sup>13</sup> Application at 6, Exhibit 4.

PUBLIC SERVICE COMMISSION

  
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Chairman

  
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Vice Chairman

  
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Commissioner

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