

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF WATER)	
SERVICE CORPORATION OF KENTUCKY)	CASE NO.
ALONG WITH CORIX INFRASTRUCTURE (US))	2022-00396
INC. AND SW MERGER ACQUISITION CORP.)	
FOR APPROVAL OF TRANSFER OF CONTROL)	

ORDER

On April 17, 2023, Water Service Corporation of Kentucky (WSCK) Corix Infrastructure (US) Inc. (Corix US) and SW Merger Acquisition Corp. (SWMAC) (collectively, Joint Applicants) filed a petition for modification of certain commitments required by the Commission in its Order dated March 23, 2023.

LEGAL STANDARD

KRS 278.400, which establishes the standard of review for motions for rehearing, limits any new evidence on rehearing to 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.”¹ An Order can only be unlawful if it violates a state or federal statute or constitutional provision.²

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

² *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).

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.

PETITION FOR MODIFICATION

Joint Applicants stated they seek modification to certain commitments required by the Commission in its March 23, 2023 Order to provide clarity on future expectations and avoid unintended consequences while still maintaining the Commission's objectives. Joint Applicants argued they should be granted rehearing on this matter, as they have not had prior opportunity to address the proposed regulatory commitments.³

Joint Applicants also requested an extension to the April 18, 2023 deadline provided in the March 23, 2023 Order to file a written acknowledgment accepting and agreeing to be bound by the regulatory commitments required by the Commission. Joint Applicants requested a deadline of five business days after the Commission's ruling on this petition to file such an acknowledgment.

DISCUSSION AND FINDINGS

Joint Applicants requested modifications for the following regulatory commitments provided in the Appendix to the March 23, 2023 Order. The Commission would note that these commitments were addressed throughout this proceeding, with many of the proposed commitments closely corresponding to the commitments provided by Joint

³ Petition for Modification of Required Commitments (filed Apr. 17, 2023) at 3–4.

Applicants themselves in the application,⁴ and others, while not referred to directly as regulatory commitments, were addressed within Commission Staff's First Request for Information to Joint Applicants.⁵ However, the Commission acknowledges that the Joint Applicants should be given the opportunity to fully address any objection to the regulatory commitments the Commission has required acceptance of as a condition to the approval of the proposed merger, and therefore grants rehearing on this matter.

COMMITMENTS FOR WHICH MODIFICATION HAS BEEN REQUESTED

Commitment No. 2: "Corix US commits to having an independent director residing in Kentucky on WSCK's post-closing board of directors."

Joint Applicants argued that, while WSCK can commit to use commercially reasonable efforts to retain an independent director who resides in Kentucky, it cannot guarantee that a resident of the Commonwealth is willing to serve on its Board of Directors on such terms. They further argued that searching for and retaining an independent director who resides in Kentucky would likely increase the cost of operating WSCK. Joint Applicants requested a modification to Commitment No. 2 to state either:

A. Corix US commits to having a director residing in Kentucky on WSCK's post-closing board of directors.

or

B. Corix US commits to having an independent director residing in Kentucky on WSCK's post-closing board of directors with the understanding that any additional costs incurred would be eligible for rate recovery, notwithstanding any other commitments made in connection with Case No. 2022-00396. WSCK will use commercially reasonable efforts

⁴ Application at 16–17.

⁵ WSCK's Response to Commission Staff's First Request for Information (filed Jan. 12, 2023).

to have an independent director residing in Kentucky on WSCK's post-closing board of directors.

The Commission concludes that there should be no modification allowed to Commitment No. 2. The Commission requires this commitment to ensure the retention of an independent director residing in Kentucky on WSCK's board of directors, in order to protect the interests of WSCK's customers and to ensure the provision of safe and reliable water service for its customers. The requested modification is unnecessary to ensure this commitment from Corix US, and the Commission accordingly finds that the requested modification of Commitment No. 2 should be denied.

Commitment No. 3: "Corix US commits that it will not utilize push-down accounting in any manner arising from the transaction contemplated in this case."

Corix US and SWMAC stated they are unsure of the format and nature of the acquisition journal entries that will result from the merger, and therefore do not want to preclude this option in the future. Joint Applicants stated that Corix US can commit that any premium paid will not be recovered from WSCK customers. Joint Applicants requested a modification to Commitment No. 3 to state:

Any premium paid related to the Proposed Transaction will not be 'pushed down' to Water Service Corporation of Kentucky and will not be recovered from Water Service Corporation Kentucky's ratepayers.

Joint Applicants further argued this proposal is consistent with a commitment provided in a 2012 case approving the acquisition of WSCK which required that "[n]either Corix Utilities nor Utilities, Inc. shall 'push down' to Water Service Corporation any transaction-related costs or any premium that Corix Utilities may pay for Hydro Star stock," as well as the following commitment:

Any premium that Corix Utilities pays for Hydro Star, LLC stock, as well as all transaction-related costs, will not be “pushed down” to Water Service Corporation and will not be recovered from Water Service Corporation’s ratepayers to the extent that this does not include obligations that would not otherwise be required by the Commission but for the conditions placed on the transfer.⁶

The Commission concludes that the modification, as requested here, should be denied. In order to maintain the intent of this commitment, yet acknowledge Corix US’s assurance that no recovery of the premium will be paid from WSCK customers, the Commission instead shall modify this commitment to read, “Corix US commits that it will not utilize push-down accounting in any manner *related to WSCK* arising from the transaction contemplated in this case.”

Commitment No. 6: “Corix US commits that WSCK will not be exposed to any increased insurance premiums in the event the Commission approves the transaction.”

Joint Applicants stated this commitment is unintentionally broad and a strict reading of the commitment could suggest that any increase of insurance premiums, regardless of cause, would violate the commitment and potentially not be permitted to be recovered in rates. Joint Applicants requested a modification to Commitment No. 6 to state:

Given that market conditions influence insurance premiums, Corix US commits that WSCK will not be exposed to any increased insurance premiums if the transaction is approved that it otherwise would not have faced but for the approval.

⁶ Case No. 2012-00133, *Joint Application of Corix Utilities (Illinois) LLC; Hydro Star, LLC; Utilities, Inc.; and Water Service Corporation of Kentucky for the Transfer and Acquisition of Control Pursuant to KRS 278.020* (Ky. PSC Aug. 13, 2012), Order at 15.

Joint Applicants argued their proposed modification is consistent with one granted by the Commission in a case involving Delta Natural Gas (Delta), in which it required the parties to adhere to regulatory commitments.⁷ Delta included a modification to the proposed condition that “Aqua America, PNG, and Delta commit that Delta will not be exposed to any increased insurance premiums if the transaction is approved,” such that it became the following: “Given that market conditions influence insurance premiums, Aqua America, PNG, and Delta commit that Delta will not be exposed to any increased insurance premiums if the transaction is approved that it otherwise would not have faced but for the approval.”⁸

The Commission concludes that the requested modification meets the intent of the original commitment, to ensure no immediate increase in insurance premiums for WSCK solely as a result of the merger transaction, and therefore finds that this modification should be approved.

Commitment No. 7: “Corix US commits that WSCK will not be exposed to any additional contributions to any pension or medical plans, etc., for employees than it otherwise would not have faced but for the approval.”

Joint Applicants stated this requirement is vague and may have unintended consequences and the Commission’s regulatory authority provides sufficient protections to ensure that unreasonable costs are not borne by a utility’s customers. Joint Applicants

⁷ Case No. 2018-00369, *Electronic Joint Application of Aqua America, Inc., Steelriver Infrastructure Fund North America LP, Steelriver LDC Investments LP, LDC Parent LLC, LDC Funding LLC LDC Holdings LLC, PNG Companies LLC, Peoples Gas Ky LLC, And Delta Natural Gas Company, Inc. For Approval of an Acquisition of Ownership and Control of PNG Companies LLC and Delta Natural Gas Company, Inc.*, Ky. PSC Mar. 13, 2019) at 13.

⁸ Case No. 2018-00369, Delta Natural Gas’s Response to Commission Staff’s Post-Hearing Data Request (filed Feb. 25, 2019).

argued their proposed modification is consistent with a similar one granted in Case No. 2018-00369.⁹ Joint Applicants requested a modification to Commitment No. 7 to state,

Corix US commits that any future service company charges to WSCK, which may include pension or medical plan costs, will be included in appropriate affiliated interest agreements and will be submitted for review and approval to the Commission.

The Commission concludes that the requested modification should be denied. The Commission would emphasize Joint Applicants' assertion that the Commission has the ability to review the costs for recovery, and point to the fact that affiliate costs have to be included in cost allocation or affiliate agreements. The Commission accordingly finds that the requested modification of Commitment No. 7 is denied.

Commitment No. 8: "Corix US commits to ring-fencing of WSCK such that WSCK would be insulated from Corix US's or any of its affiliates' non-utility lines of business."

Joint Applicants proposed to modify this commitment to be consistent with a modified condition in a Kentucky Power Company case that provided a definition to clarify the meaning of "ring-fencing."¹⁰ Joint Applicants requested a modification to Commitment No. 8 to state,

Corix US commits to ring-fencing WSCK such that WSCK would be insulated from Corix US's non-utility lines of business by ensuring that WSCK: (i) will not assume liability for the debts issued by other subsidiaries or affiliates; (ii) will maintain corporate officers who have a fiduciary duty to WSCK, and; (iii) will maintain separate books and records of WSCK.

⁹ Case No. 2018-00369, March 13, 2019 Order at 13.

¹⁰ Case No. 2021-00481, *Electronic Joint Application of American Electric Power Company, Inc., Kentucky Power Company and Liberty Utilities Co. For Approval of the Transfer of Ownership and Control of Kentucky Power Company* (Ky. PSC May 4, 2022), Order, Appendix A at 3.

The Commission concludes that the requested modification does not change the initial intent of the commitment, rather provides more clarity to its meaning, and therefore finds the requested modification to Commitment No. 8 should be approved.

Commitment No. 12: “Corix US commits that the proposed transaction will not result in any writeups, write-offs, or restatements of financial results.”

Joint Applicants argued this commitment is broader than intended and would require them to record any non-regulated assets for the acquiree at fair value, which will likely result in an increase in some assets. The Joint Applicants stated they can commit that any writeups, write-offs, or restatements on WSCK’s books and records would be excluded for ratemaking purposes. Joint Applicants requested a modification to Commitment No. 12 to state,

Corix US commits that the proposed transaction should not result in any writeups, write-offs, or restatements of financial results on WSCK’s books and records. However, if any such writeups, write-offs, or restatements of financial results do occur, and are required to be recorded on WSCK’s books and records pursuant to GAAP, then Corix US and WSCK agree that any writeups, writeoffs, or restatements on WSCK’s books and records would be excluded for rate making purposes.

The Commission concludes that, while the requested modification partially meets the intent for the original commitment, to ensure that costs are not incurred by WSCK customers as a result of the transaction, the following language should be added to fully ensure that protection: “WSCK shall track, and clearly and explicitly provide, all costs related to this condition in all subsequent base rate proceedings.” The Commission finds that the requested modification to Commitment No. 12 should be approved with the addition of this language.

Commitment No. 22: “Corix US and WSCK commit that, in the event an employee is terminated as a result of the proposed transaction any severance paid to such an employee would be considered a transaction cost and would not be recovered through WSCK’s rates.”

Joint Applicants stated they do not consider severance costs as transaction costs and asserted that there may be longer-term cost savings resulting from consolidation of employees. Joint Applicants also argued future rate cases provide appropriate regulatory controls to ensure that unreasonable costs are not borne by WSCK ratepayers. Joint Applicants requested a modification to Commitment No. 22 to state,

Corix US and WSCK commit that, in the event an employee is terminated as a result of the proposed transaction, any severance paid to such an employee would be considered an integration cost and, as such, would not be recovered through WSCK’s rates unless integration benefits meet or exceed integration costs.

The Commission concludes that Commitment No. 22, as originally stated, best maintains the intended protection for WSCK. The Commission believes that the requested modification by Joint Applicants does not provide the same assurance or protection originally required of the Joint Applicants, and therefore finds the requested modification to Commitment No. 22 should be denied.

Commitment No. 24: “Corix US and WSCK commit that they will maintain WSCK’s corporate office, and its books and records, within WSCK’s service territory.”

Joint Applicants stated they are committed to maintaining WSCK’s corporate office in its service territory, as well as WSCK’s books and records in a way that is reasonably accessible in Kentucky, which appears to be the Commission’s intent for this commitment. Joint Applicants further stated they believe that a previously agreed-upon condition in

WSCK's 2012 transfer-of-control case, that recognized the practice of maintaining electronic records as a means of reasonable access to its books and records in Kentucky,¹¹ should be acceptable here. Joint Applicants requested a modification to Commitment No. 24 to state:

Corix US and WSCK commit that WSCK's principal office will remain within WSCK's service territory, and WSCK's books and records will be maintained and housed in Kentucky or will otherwise be maintained in a manner to be easily accessible to the Commission for inspection at reasonable times upon reasonable notice.

The Commission concludes that the requested modification remains consistent with the intent of the initial commitment, and is consistent with the condition regarding records that the Commission previously established for WSCK, and therefore finds the requested modification to Commitment No. 24 should be approved.

Commitment No. 27: "Corix US and WSCK will track any synergies that results from the integration of Corix US's water, wastewater, and related businesses with SWMAC's water and wastewater business. The tracked synergies will be addressed in WSCK's future rate case proceedings."

Joint Applicants agreed that it is appropriate to track synergies that result from the integration of the two companies, but stated that this would require tracking over an indefinite period. The Joint Applicants thus proposed the following modification to Commitment No. 27, to require tracking of synergies over a five-year period following closing, to state:

Corix US and WSCK will track any synergies for five years after closing the Proposed Transaction that result from the integration of Corix US's water, wastewater, and related

¹¹ Case No. 2012-00133, Aug. 13, 2012 Order at 10.

businesses with SWMAC's water and wastewater business. The tracked synergies will be addressed in WSCK's future rate case proceedings.

While the Commission acknowledges Joint Applicants' concern regarding the potentially open-ended time requirement for this commitment, the Commission concludes that the modification, as requested, should be denied. The Commission instead finds that Commitment No. 27 should be modified to include a specification that Corix US and WSCK shall track synergies for a period of ten years, in order to provide proper time to track and report any such synergies.

CONCLUSION

Based upon the petition, the March 23, 2023 Order, and being otherwise sufficiently advised, the Commission finds that Joint Applicants' motion for rehearing should be granted in part and denied in part, as provided above. The Commission further finds that Joint Applicants' request for an extension should be granted, to file a written acknowledgment accepting and agreeing to be bound by the regulatory commitments required by the Commission within five business days after service of this Order.

IT IS THEREFORE ORDERED that:

1. Joint Applicants' motion for rehearing is granted in part and denied in part.
2. The requested modification to Commitment No. 2 is denied.
3. The requested modification to Commitment No. 3 is denied. Commitment No. 3 shall instead be modified to state,

Corix US commits that it will not utilize push-down accounting in any manner related to WSCK arising from the transaction contemplated in this case.

4. The requested modification to Commitment No. 6 is granted.

5. The requested modification to Commitment No. 7 is denied.
6. The requested modification to Commitment No. 8 is granted.
7. The requested modification to Commitment No. 12 is granted, with

language added by the Commission to read:

Corix US commits that the proposed transaction should not result in any writeups, write-offs, or restatements of financial results on WSCK's books and records. However, if any such writeups, write-offs, or restatements of financial results do occur, and are required to be recorded on WSCK's books and records pursuant to GAAP, then Corix US and WSCK agree that any writeups, writeoffs, or restatements on WSCK's books and records would be excluded for rate making purposes. WSCK shall track, and clearly and explicitly provide, all costs related to this condition in all subsequent base rate proceedings.

8. The requested modification to Commitment No. 22 is denied.
9. The requested modification to Commitment No. 24 is granted.
10. The requested modification to Commitment No. 27 is denied. Commitment

No. 27 shall instead be modified to state:

Corix US and WSCK will track any synergies that results from the integration of Corix US's water, wastewater, and related businesses with SWMAC's water and wastewater business over a period of ten years. The tracked synergies will be addressed in WSCK's future rate case proceedings.

11. Joint Applicants' request for an extension is granted. Joint Applicants shall file a written acknowledgment accepting and agreeing to be bound by the regulatory commitments required by the Commission, pursuant to the March 23, 2023 Order and the modifications granted and provided here, within five business days after service of this Order.

12. All provisions of the March 23, 2023 Order not in conflict with those modified by this Order shall remain in effect.

13. This case is closed and removed from the Commission's docket.

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PUBLIC SERVICE COMMISSION



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Vice Chairman



Commissioner



ATTEST:



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