

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of

*Electronic* Proposed Acquisition by Bluegrass )  
Water Utility Operating Company, LLC and the )  
Transfer of Ownership and Control of Assets by: )  
P.R. Wastewater Management, Inc.; Marshall )  
County Environmental Services LLC; LH ) No. 2019-00104  
Treatment Company, LLC; Kingswood )  
Development, Inc.; Airview Utilities, LLC; )  
Brocklyn Utilities, LLC; Fox Run Utilities, )  
LLC; and, Lake Columbia Utilities, Inc. )

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**Bluegrass Water Utility Operating Company, LLC**  
**Notice-Motion re Condition #5**

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Please take notice that Bluegrass Water Utility Operating Company, LLC (“Bluegrass Water”) submits as Exhibit A hereto a proposed Letter of Credit to fulfill Condition #5 in the Appendix to the Order entered August 14, 2019 (“the 8/14/19 Order”), which specifies: “Within 60 days of the closing of the transaction, Bluegrass Water shall post a guaranteed financial instrument that is the equivalent of two-months of the cost of its third-party contractors.” Bluegrass Water submits the attached “guaranteed financial instrument” to allow consideration of Condition #5 in the concrete context of a specific proposal, and moves that the Commission establish additional guidelines with respect to the instrument, grant any necessary approvals, or simply order that Bluegrass Water take the necessary steps for the proposed Letter of Credit to be issued. In support of this Notice-Motion, Bluegrass Water states as follows:

1. The 8/14/19 Order conditionally approved proposed acquisitions of utility assets by Bluegrass, subject to acceptance of conditions set forth in the Appendix. In an 8/30/19 filing, the conditions were accepted in writing.

2. Condition #5, which requires posting a guaranteed financial instrument, addresses the KRS 278.020(10) requirement regarding financial integrity to ensure continuity of service, 8/14/19 Order p.15; the condition will be “terminated by further order of the Commission, upon ... confirmation that Bluegrass Water’s condition is sufficiently strong to ensure the continued operation of sewer service.” *Id.* p.16.

3. Guidelines for the “guaranteed financial instrument” were a subject of discussion at the informal conference held September 4, 2019, at which members of the Commission Staff, representatives for Bluegrass, and Kent Chandler for the Attorney General’s Office were present and participated. Letters of credit, advance payments, and escrow arrangements were mentioned as possibilities during the 9/4/19 informal conference.

4. By a Request for Extension re Condition #5, filed November 26, 2019, Bluegrass Water asked for an extension — to December 11, 2019 — of the deadline with respect to Condition #5 in order to file details of the financial instrument it proposes to satisfy this condition and request Commission approval thereof.

5. Attached hereto is text for an irrevocable standby Letter of Credit in the amount of \$ 86,000.00 for a renewable, one-year term. Bluegrass Water proposes to have a Letter of Credit in the form and substance of the attached instrument issued by a bank as its compliance with Condition #5. Paragraphs 6 through 10 below discuss or comment on some of the terms and practical aspects of the proposed Letter of Credit.

6. The \$ 86,000 amount for the Letter of Credit was obtained by summing the two-month costs for Bluegrass Water’s contractors and rounding up to the nearest \$1000.

a. At this date, there are two separate third-party contractors to which Condition #5 relates: (1) Midwest Water Operation, LLC (“Midwest”), which provides operation and maintenance service on the systems that Bluegrass acquired; and (2) Nitor Billing Services, LLC (“Nitor”), which provides billing and other customer services. See attached Letter p.2. The per-month costs and amount equivalent to two months of costs for these contractors are as follows:

<b>Contractor</b>	<b>Per-month cost</b>	<b>Condition #5 amount (2 months)</b>
Midwest	\$ 41,330	\$ 82,660
Nitor	\$ 1,386	\$ 2,772
TOTAL		\$ 85,432

b. The Midwest per-month cost is a fixed amount (\$4133) per plant site served; the number of sites (10) now served was reached with the last closings on approved acquisitions, on September 30, 2019.<sup>1</sup>

c. The Nitor per-month cost is a fixed amount (\$1) per customer, and the number of such customers has held steady at 1316 since the end of September 2019.

7. The Commission is the listed beneficiary of the Letter of Credit, instead of any individual or group of third-party contractors.

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<sup>1</sup> There are two plant sites each for transferring utility MCES (Great Oaks and Golden Acres) and LH Treatment (Longview and Homestead); there is one plant site each for the remaining transferring utilities.

a. Kentucky agencies have been the sole beneficiaries of issued standby letters of credit related to projects or matters over which they have authority.<sup>2</sup>

b. A public agency as the beneficiary aligns better with the public-interest purpose of the instrument, which is to ensure continuity of service to Kentucky customers rather than to provide a fund from which private entities may secure payment for themselves.

c. Third parties other than those listed in ¶ 6.a may be contractors for Bluegrass Water and potential recipients of funds drawn on the Letter of Credit. Designating the Commission as the beneficiary and permitting it to “designate in a draft that payment is to be made to a third party,” Letter p.2, efficiently accommodates possible changes in the identity of third-party contractors.

8. Similarly, the documentation required for the Commission to draw on the credit (see Letter p.2) provides an appropriate role for a third-party contractor while allowing a rapid response to a situation in which continuity of service is threatened.

a. No action or documentation by Bluegrass Water is required for a draft to be honored by the issuing bank. Therefore, if Bluegrass Water “disappeared” or a dysfunction affecting its ability to fund continued operation of sewer service also impeded its taking authorized corporate action, drafts could still be made on the Letter of Credit to ensure continuity of service.

b. The statement under oath or affirmation from a third-party contractor (item #1) provides the Commission with an attestation that there is a current or expected payment problem that threatens continued operation of sewer service because it affects a third party which is

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<sup>2</sup> In preparing the attached Letter of Credit, counsel for Bluegrass Water consulted (*inter alia*) standby letters of credit issued to the Kentucky Economic Development Finance Authority for a construction project and to the Kentucky Energy and Environment Cabinet for mining reclamation.

performing its obligations (as opposed to, *e.g.*, a former contractor or an entity that is declining to provide service until it is paid).

c. The required elements of the Commission's order (item #2) are few in number, clearly listed, and germane to the purpose and requirements of Condition #5. An order is among the ways the Commission takes action, and the item #2 elements of entry and a writing/document are consistent with KRS 278.370.

d. The draft is to be signed on behalf of the Commission, as would be authorized in the entered order (item #2). The requirement of an entered order provides additional protection against an unauthorized or fraudulent draft being presented in the Commission's name.

9. The issuing bank expressly agrees that "every and all drafts drawn under and in compliance with this Letter of Credit [including accompaniment by items #1 and #2] will be honored on presentation to us as specified in this letter." Letter p.2. This agreement is essential to a letter of credit, and is between the issuer and the Commission (as beneficiary) alone. It makes the Commission the gatekeeper for draws, since the issuer by this agreement commits to rely on the documentation alone and is not obligated or entitled to make the draw dependent on its investigation into or confirmation of the facts and circumstances stated in the documents.

10. The Letter of Credit is irrevocable by Bluegrass Water once issued, and is "ever-green" for six (6) successive one-year terms.

a. The Letter of Credit may be modified or revoked only with the written consent of both the issuer and the Commission. Any proposed modification in terms that increased the issuer's obligations would probably require additional consideration from Bluegrass Water.

b. The initial and renewal terms of the credit agreement are for one year. Renewal is automatic unless the issuer gives 60 days' advance written notice to the Commission that the

Letter of Credit will not be renewed. Letter p.1. Such advance notice would give the Commission time (1) to confirm or take steps that compliance with Condition #5 will not lapse or (2) to seek alternative means to ensure continuity of service.

c. The one-year term allows periodic reassessment of the terms of the Letter and facilitates replacement of the Letter at the end of the year if different terms or another issuer would be more appropriate or cost-effective.

d. The limitation of the Letter of Credit to a total of six (6) one-year terms meets a requirement of KRS 278.300(8). See ¶ 13 below. It is also probable that before six years have passed, Condition #5 will have been “terminated by further order of the Commission, upon ... confirmation that Bluegrass Water’s condition is sufficiently strong to ensure the continued operation of sewer service.” 8/14/19 Order p. 16.

11. During the 9/4/19 informal conference, the representative of the Office of the Attorney General expressed concern that a guaranteed financial instrument might be considered to be an asset or executory contract of Bluegrass Water and so subject to the automatic stay or to possible injunction or avoidance if Bluegrass Water were to petition for or be put involuntarily into bankruptcy. There is caselaw holding that (a) a letter of credit is not an executory contract of the applicant, *see Westinghouse Credit Corp. v. Page*, 18 Bankr. 713, 717 (D.D.C. 1982) (reversing a bankruptcy court enjoining payment on a standby letter of credit), and (b) neither a letter of credit nor the proceeds upon payment are property of the applicant’s bankruptcy estate, and so the stay does not prevent the issuer from honoring the letter of credit, *see id. at 716*.

12. As the applicant for a letter of credit, Bluegrass Water anticipates that its contract with the issuer may take the form of a loan agreement and promissory note. If the loan agreement is as “evergreen” as the Letter of Credit — with a one-year term, automatically renewed for

up to five more one-year terms, *see* ¶ 10 above — Bluegrass Water respectfully submits that its transaction with the issuer would not require KRS 278.300 approval. Such a loan agreement and corresponding note meet the criteria for the KRS 278.300(8) exception from the need for approval, being (a) for proper purposes and not in violation of the law; and (b) payable at periods of not more than two years from the date of issuance or, with renewals, not exceeding six (6) years from the date of the initial issue.

WHEREFORE, Bluegrass Water respectfully requests that the Commission consider the guaranteed financial instrument proposed as a fulfillment of Condition #5 and issue an appropriate order to establish additional guidelines with respect to the instrument, grant any necessary approvals, or simply direct that the Bluegrass Water have the proposed Letter of Credit issued.

Respectfully submitted,

*/s/ Katherine K. Yunker*

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IRREVOCABLE STANDBY LETTER OF CREDIT NO. \_\_\_\_

ISSUER: **Enterprise Bank & Trust**  
150 North Meramec Avenue  
Clayton, MO 63105

BENEFICIARY: **Kentucky Public Service Commission**  
300 Sower Boulevard  
Frankfort, KY 40602  
Attn: Gwen R. Pinson, Executive Director

AMOUNT: **USD \$86,000.00**

ISSUE DATE: \_\_\_\_\_, **2020**

At the request of Bluegrass Water Utility Operating Company, LLC (“Bluegrass Water”), we hereby establish our Irrevocable Letter of Credit in favor of the Kentucky Public Service Commission (“the Kentucky PSC” or “you”) up to an aggregate amount of Eighty-Six Thousand U.S. Dollars (USD \$86,000.00). This Letter of Credit is effective \_\_\_\_\_, 2020 *{Issue Date}*, and initially expires at our counters on \_\_\_\_\_, 2021 *{1st Anniversary of Issue Date}* at 12:01 A.M. prevailing local time; provided, however, that this Letter of Credit shall automatically renew for up to five (5) successive one-year periods, unless sixty (60) days prior to the scheduled expiration date for the initial term or any renewal term we notify you in writing that this Letter of Credit shall not be renewed. This Letter of Credit is nontransferable, and is given in support of Bluegrass Water’s agreement to a condition in an Order entered by the Kentucky PSC that Bluegrass Water post a guaranteed financial instrument that is the equivalent of two-months of the cost of its third-party contractors.

This Letter of Credit is available for payment against your draft(s) at sight drawn on Enterprise Bank & Trust, accompanied by the following documents:



1. A statement under oath or affirmation from a third party that it is performing its obligations under a contract with Bluegrass Water for service to or for one or more specified system(s) providing sewer service to customers located in the Commonwealth of Kentucky, and that Bluegrass Water is in default of its payment obligations to the third party under that contract or has notified the third party that it will be unable to make timely payment under that contract in the future.
2. An entered Order of the Kentucky PSC (a) referring to this Letter of Credit, including the number and date of the credit and the name of our bank, (b) describing the circumstances presented to the Kentucky PSC, (c) finding or concluding that drawing on this Letter of Credit is necessary to ensure the continuity of sewer service to customers of Bluegrass Water, and (d) authorizing or directing draft(s) on this Letter of Credit.

The number and the date of this credit and the name of our bank must be quoted on all drafts required. Partial drawings are allowed, and the Kentucky PSC may designate in a draft that payment is to be made to a third party.

Our bank has been informed by Bluegrass Water that, at the date of issuance of this Letter of Credit, there are two (2) third parties which are obligated under a contract with Bluegrass Water to perform service or services to or for one or more specified system(s) providing sewer service to customers located in the Commonwealth of Kentucky, as follows:

Midwest Water Operations, LLC 1351 Jefferson Street, Suite 301 Washington, MO 63090	Nitor Billing Services, LLC 100 Chesterfield Business Pkwy, Ste. 256 Chesterfield, MO 63005
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Other or additional third parties may meet the criteria for providing the document listed in item 1 above and it is not required that our bank be notified or know of such third parties in advance of our receipt of your draft.

We agree with you that every and all drafts drawn under and in compliance with this Letter of Credit will be honored on presentation to us as specified in this letter.

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision), International Chamber of Commerce Publication No. 600. It cannot be modified or revoked by without the written consent of both the Kentucky PSC (as the beneficiary) and us (as the issuer).

Please examine this instrument carefully. If you are unable to comply with the terms or conditions, please communicate with the applicant, Bluegrass Water, to arrange for an amendment. This procedure will facilitate prompt handling when documents are presented.

Yours very truly,

Enterprise Bank & Trust

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*Authorized signature(s) for Bank*