COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of

Electronic Application of Bluegrass Water Utility Operating Company, LLC for an Adjustment of Rates and Approval of Construction	))))	Case No. 2020-00290

Applicant's Response in Opposition to
Deer Run and Longview HOAs' Motions for Leave to Intervene

Comes now Bluegrass Water Utility Operating Company, LLC (hereinafter "Bluegrass") and for its response in opposition to the Motions for Leave to Intervene of Deer Run Estates Homeowners Association, Inc. ("Deer Run") and Longview Homeowners Association, Inc. ("Longview," collectively, "the HOAs"), states as follows:

1. Bluegrass submitted its Application to the Commission in the instant matter on September 30, 2020, for an adjustment of rates and approval of construction; the Application has been deemed filed as of November 19, 2020. The fully-forecasted test year and sewer rates proposed are based on service to systems for which Bluegrass's acquisition was approved in Case Nos. 2019-00104, 2019-00360, and 2020-00028, and those for which acquisition/transfer approval has been sought in Case No. 2020-00297.

2. Deer Run alleges in its Motion (p.1, ¶2) that it "represents the interests" of "approximately" 78 homeowners residing in the Deer Run neighborhood, an area presently served by Delaplain Disposal Company, which has proposed to transfer its system to Bluegrass in Case No. 2020-00297.[1] Longview alleges in its Motion (p.1, ¶2) that it "represents the interests" of

[1] Deer Run does not provide any support for its claim that it "represents the interests" of the homeowners. Its 2006 Articles of Incorporation simply charge it with "carrying on the business of a homeowners association," and do not mention voting rights for or representation of homeowners.

"approximately" 79 homeowners residing in the Longview neighborhood, an area formerly served by LH Treatment and transferred to Bluegrass in September 2019 pursuant to Commission approval in Case No. 2019-00104.[2] Neither HOA claims to be a sewer service customer or to otherwise itself have an interest in the rates or service of a utility. Their assertions that they should be granted intervention rest on the Deer Run and Longview household customers' interests in those rates and service[3] and incorporates by reference the arguments made in the earlier-filed motion to intervene and reply by the Homestead HOA; Longview claims that its interests in this proceeding are identical to those of the Homestead HOA (Motion, p.2, ¶3).

3. The Attorney General of the Commonwealth of Kentucky, by and through the Office of Rate Intervention, has a statutory right to intervene, pursuant to KRS 367.150(8)(b). That statute gives the Attorney General the right and obligation to appear before the Commission, *inter alia*, to represent consumers' interests. Although the Attorney General represents the interests of all customers of a utility, KRS ch. 367 as a whole and KRS 367.150 in particular are focused on protecting consumers who are purchasing or receiving goods or services for personal, family, or household use (*see, e.g.,* KRS 367.170(1)) — in this case, the residential customers of a utility. The Attorney General's motion for intervention in this case was granted on September 28, 2020.

4. Intervention for all others is permissive and is within the sound discretion of the Commission. Section 4(11)(b) of 807 KAR 5:001 states that the Commission shall grant a

[2] Longview also does not provide any support for its claim that it "represents the interests" of the homeowners.

[3] By its name, each HOA is an association of homeowners, who are not necessarily the household customers consuming utility services or the persons contracting with the utility for services. In their Motions (p.1 ¶2), the HOAs refer to the approximately 78 or 79 "homeowners who reside in the subdivision." It is unclear whether these are all the homeowners for the subdivision, or whether either HOA claims to represent any non-homeowner utility consumers residing in the subdivision.

timely motion for intervention if it finds that the movant has a special interest in the case that is not otherwise adequately represented or that the movant is likely to present issues or to develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. Movants for intervention must be specific in their showing of a special interest or about issues/facts that they can present or develop.[4]

5. The HOAs have failed to demonstrate any cognizable special interest not adequately represented or to identify any issues or facts they can present that would assist the Commission in fully considering the matter.[5] In reviewing requests for intervention on behalf of "subsets" of residential customers in other rate cases, the Commission has consistently recognized that customer status is not a special interest meriting full intervention. A generalized representation that the HOAs' current members would be impacted by Bluegrass's application is not a special interest;[6] Bluegrass provides service to more than 2000 customers, and each one of these customers has an interested in having other customers pay more so that it can pay less. The

[4] See, *e.g.*, *In the Matter of Electronic Application of Kentucky-American Water Company for an Adjustment of Rates*, Ky. PSC Case No. 2018-00358, 12/5/18 Order, p. 2: "[A]ny person requesting to intervene in a Commission proceeding must state with specificity the person's special interest that is not adequately presented, or the issues and facts the person will present that will assist the Commission in fully considering the matter. A mere recitation of the quantity of water consumed by the movant or a general statement regarding a potential impact of a possible modification of rates will not be deemed sufficient to establish a special interest."

[5] For example, the Commission denied the Sierra Club's motion to intervene in *In the Matter of Electronic Application of Kentucky Utilities Company for an Adjustment of its Rates,* Ky. PSC Case No. 2018-00294. In its 11/9/18 Order, the Commission found that the interests expressed by the members of the Sierra Club, as residential customers of the utility, are similar to the interests of other residential customers served by the same utility. Furthermore, the Commission found that those interests are adequately represented by the Attorney General, who is a party to this proceeding, and that the Attorney General has extensive experience in similar rate cases; therefore, intervention by Sierra Club would not assist the Commission in fully considering the matter without unduly complicating the proceedings, and intervention was denied. *Id.*, pp. 2-3.

[6] See, e.g., *In the Matter of the Application of Big Rivers Electric Corporation for a General Adjustment in Rates Supported by Fully Forecasted Test Period*, Ky. PSC Case No. 2013-00199, 11/12/13 Order, denying the motion of a labor union (IBEW) to intervene in the matter.

Attorney General has extensive experience representing the interests of a broad range of consumers in rate adjustment cases, making intervention by Deer Run or Longview unnecessary for any cognizable interests of the homeowners to be adequately represented.[7]

6. The HOAs assert there may be a conflict between residents in "their" neighborhoods versus the rest of Bluegrass's customers spread across its various systems (who presently are charged different legacy rates), that would prevent the Attorney General from providing adequate representation to all of Bluegrass's customers in the pending matter.[8] To imply that the Attorney General cannot adequately represent different subsets of Bluegrass customers as to the proposed increases to a universal rate[9] ignores the statutory role of the Attorney General to represent consumers in rate cases. Such "conflict" among consumers would always be present, and would make the statutory grant of a right to intervene on behalf of these consumers a hollow nullity.

7. Deer Run's Motion also attempts to manufacture an inadequately-represented "special" interest by arguing that because Delaplain Disposal Company's sewer system also provides service to commercial/industrial customers, the Attorney General cannot adequately represent the homeowner's interests. (*See* Deer Run Motion p.4, ¶8). If accepted, this line of reasoning would also require a conclusion that the Attorney General cannot adequately represent any of the residential customers because the Bluegrass customer base includes industrial and commercial customers charged different rates — now and as proposed. Furthermore, it relies on an

[7] See, e.g., *id.*; *In the Matter of Electronic Application of Kentucky Utilities Company for an Adjustment of its Rates*, Ky. PSC Case No. 2018-00294, 11/9/18 Orders denying intervention by the Sierra Club and Community Action Council.

[8] Of note, this assertion that such a conflict exists would arguably disqualify the same counsel from representation of all three of the movant HOAs (Homestead, Deer Run, and Longview).

[9] *See* Homestead HOA's Reply in Support of its Motion to Intervene, p. 2, filed December 11, 2020.

apples-to-oranges comparison of the increases to the fixed monthly charge and the volumetric charge, respectively, to residential and industrial/commercial customers served by the Delaplain system facilities[10] and omits any consideration of the greater increase in revenues proposed to be charged to the Delaplain industrial/commercial customers than to the residential customers.[11]

8. The interests of residential consumers who will be affected by proposed rate changes do not give rise to the "conflict" or a special interest "subset" suggested in the Deer Run and Longview Motions.[12] The only examples of HOAs being allowed intervention cited to support an assertion that "Commission precedent firmly establishes that a homeowners' association may intervene on behalf of its members in a rate proceeding" (Homestead HOA Reply p.3 & fn.3), are three cases in 1995-98 in which the Attorney General did not intervene. Thus, a few Commission findings decades ago that there was support for granting intervention on behalf of residential customers who were not being represented by the Attorney General[13] is not precedent for allowing HOAs to intervene in this case.

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[10] Deer Run's Motion (p. 2, fn. 3) incorrectly suggests that Bluegrass omitted the Delaplain-served subdivisions from its customer notice. The notices filed with the Commission on November 19, 2020, as a Supplement to the Application identifies the current, proposed, and increases to the residential rate for the Delaplain-served subdivisions, using Delaplain's description of its service territory in its filed tariff ("I-75 & Delaplain Road interchange area (Scott County)").

[11] The percentage increase in revenues from single-residential customers and metered commercial/ industrial customers is forecasted to be the same — 188.49%. *See* Application revised Exh. 21, Sch. M-1, line 5 (filed 11-19-21). The forecasted increase to annual revenue from the Delaplain system's commercial/ industrial customers ($580,883 = $889,058 – 308,175) far exceeds the forecasted increase in annual revenue from the 79 residential customers that Deer Run claims to represent ($79,291 = 79 x $83.64/month increase x 12 months). *See* Application revised Exh. 21, Schs. M-1 and N (filed 11-19-21).

[12] *See, In the Matter of Electronic Application of Kentucky Utilities Company for an Adjustment of its Rates,* Ky. PSC Case No. 2018-00294, 11/9/18 Order denying the Community Action Council's Motion to Intervene on behalf of the subset low-income residential customers.

[13] Cases Nos. 97-457 and 97-455 were ARF proceedings in which a homeowner's association was granted intervention. The other cited case, No. 97-289, involved an application to acquire and set initial tariffed rates for a system served by a non-utility sewer association; the Commission granted intervention to a large number of individual customers and to the sewer association from which the system was being acquired. *See* Orders issued August 17 and 25, respectively.

9. The HOAs have also each failed to make a showing of how it will likely present issues or develop facts to assist the Commission in fully considering the matter. They have not articulated any specifics about what issues or what facts; the only mention is of the "issue" of rate design, which along with revenue requirement is typical for rate cases and is already presented in this case. They do not claim to have any information or facts relevant to the case and are unlikely to have any to contribute since the HOAs are not themselves utility customers.[14]

10. The Motions also do not show that the HOAs meet the tests for associational standing (in civil cases) identified in *Com. ex rel. Brown v. Interactive Media Entertainment and Gaming Ass'n, Inc*., 306 S.W.3d 32, 38 (Ky.2010) (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977)). The Supreme Court of the United States has articulated the following requirements for associational standing:

> (a) its members would otherwise have standing to sue in their own right;
> (b) the interests it seeks to protect are germane to the organization's purpose; and
> (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit.

Hunt, 432 U.S. at 343.While Kentucky has only officially recognized criterion (a) in addressing associational standing, the (b) criterion is also helpful in elucidating the 807 KAR 5:001 Section 4(11) prerequisites for permissive intervention. The residential homeowners would not have standing to intervene separately from the Attorney General in this matter, failing subpart (a). Additionally, the interests the HOAs seek to protect have not been shown to be germane to their purpose, *e.g.*, through Articles or By-Laws, failing subpart (b).

[14] Compare with 10/25/18 Order, *In the Matter of Electronic Application of Kentucky Utilities Company for an Adjustment of its Rates,* Ky. PSC Case No. 2018-00294, by which the PSC granted intervention to Kentucky Industrial Utility Customers (KIUC). KIUC's Motion to Intervene explained that the Attorney General would not provide adequate representation because its focus was residential consumers; and also showed that through the group's extensive experience intervening in multiple other rate cases, it could assist the Commission with developing the issues.

11. The HOAs, like the individual customers in the neighborhoods,[15] have plenty of opportunity to participate in the case without being granted intervenor status. They can review all documents filed in the case and monitor the proceedings as the case progresses. Each HOA may also file comments as frequently as it chooses, which will be entered in the record of the case. In addition, representatives of the HOAs may attend and present public comment at any evidentiary hearing held in this matter.

12. In conclusion, the HOAs have failed to show any special interest that would be above and beyond that of the generalized interest of residential customers, which is already adequately represented by the Attorney General. The HOAs have also failed to demonstrate any special training, knowledge or experience that would provide any assistance to the Commission in the pending case, as well as has failed to present issues or to develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. Therefore, the HOAs should not be allowed to intervene in this matter.

WHEREFORE, Bluegrass respectfully requests that the Commission DENY the HOAs' Motions for Leave to Intervene.

Respectfully submitted,

/s/ Kathryn A. Eckert

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[15] The HOAs do not address the likelihood that some of "their" homeowners are among the customers who have requested individual intervention in this case.