

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of

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

Applicant’s Motion to Alter the Commission’s 2/12/21 Order

Applicant, Bluegrass Water Utility Operating Company, LLC (hereinafter “Bluegrass”), hereby respectfully requests that the Commission alter its 2/12/21 Order denying Bluegrass a “deviation that the application ... be considered an application for a general rate adjustment for the systems at issue in Case No. 2020-00297” (p.8), to acknowledge or confirm that the rate adjustment requested includes those systems. In support of its Motion, Bluegrass states as follows:

1. Bluegrass filed an Application in Case No. 2020-00297 for acquisition of four wastewater utilities on September 16, 2020. These systems are Delaplain Disposal Company, Herrington Haven Wastewater Company, Inc., Springcrest Sewer Company, Inc., and Woodland Acres Utilities, LLC (collectively, “the 00297 systems”). Acquisition of these four systems was approved by Order of the Commission entered on January 14, 2021, in Case No. 2020-00297.

2. 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 (May 1, 2021 – April 30, 2022) and sewer rates proposed in the Application are based on service to systems for which Bluegrass’s acquisition has been approved in Case Nos. 2019-00104, 2019-00360, 2020-00028, and 2020-00297. Bluegrass filed this rate application for these systems (including the 00297 systems) to maximize efficiency on behalf of both the Commission as well as Bluegrass and the

system customers by engaging in a single rate case. As Bluegrass had always planned to file its initial rate case for a unified rate across all systems,¹ Bluegrass believed (and had discussed with Commission Staff) that the most efficient and cost-effective approach for doing so would be to include all systems which it had acquired or was in the process of acquiring in Kentucky. A single rate adjustment application would prevent duplicative proceedings.

3. By Order entered October 30, 2020 (pp. 7-8), the Commission concluded that the Application was deficient as to four enumerated requirements in 807 KAR 5:001 Section 16(7) & (8) and had not yet been accepted as filed due to those deficiencies, and that it was necessary to suspend the rates proposed. The 10/30/20 Order also addressed the issue of notice to potential customers by stating that, standing alone, a lack of notice to them pursuant to 807 KAR 5:001 Section 17 would not render the application deficient, because this regulation “does not appear to require that potential future customers receive notice of a proposed rate change.” (10/30/20 Order p. 3). The 10/30/20 Order required that the proposed adjustment to the rates charged on the 2020-00028 systems (“00028 systems”) be preceded by steps complying with the 6/19/20 final Order in that case (which established initial tariffed rates for those customers) and giving the 00028 systems’ customers notice of the rate adjustment application.

4. With respect to the 00297 systems’ customers, Bluegrass filed its Motion to Deviate on November 18, 2020. The Motion sought a deviation from any conflicting, applicable regulatory requirements regarding notice. Bluegrass was also seeking confirmation that its Application would be deemed filed upon the correction of other identified deficiencies and the

¹ See Case No. 2020-00297, Application filed 9/16/20, p.14 ¶ 38; *see also* Case No. 2020-00028, Application filed 2/24/20, p.18 ¶ 51; Case No. 2019-00360, Application filed 10/21/19, p.14 ¶ 37; and Case No. 2019-00104, Application filed 4/16/19, p.19 ¶ 61.

mailing of a written notice complying with 807 KAR 5:001 § 17 to each customer of the 00028 and 00297 systems.

5. On the following day (11/19/20), Bluegrass filed its Notice of Filing to Cure Deficiencies and its Supplements to the Application regarding notice to the 00028 and 00297 system customers. The Supplements provided an update to the Application showing that Bluegrass complied with notice requirements for customers who had not been sent individual notice on September 30, 2020.

6. As amended and supplemented, the Application unambiguously sought to increase rates from current tariffed levels for, *inter alia*, the 00297 system customers. The Application seeks approval for the increased rates to be uniform, and for the same rate to be in effect across all systems that would be owned and operated as of the start of the forecasted test year (5/1/21). In addition to the Application, this intent was clear in light of: the pre-filing informal meeting with Commission Staff and attended by representatives of the Attorney General on June 24, 2020; the informal conference held with Commission Staff and the Attorney General on October 30, 2020; the Motion for Deviation filed November 18, 2020; and the Supplements and Notice of Filing to Cure Deficiencies filed November 19, 2020.

7. The notice reported in the Supplements filed November 19, 2020, unleashed a storm of objections and requests for intervention by customers of the 00028 and 00297 systems, similar in number and intensity to the previous response by customers to the notice given on September 30, 2020. In addition, by motion filed on December 18, 2020, Deer Run Estates Homeowners Association, Inc. (whose area is provided sewer service by Delaplain, one of the 00297 systems) requested intervention in this case. The Commission granted this request for intervention on February 8, 2021.

8. The Commission entered an Order on December 23, 2020, noting the acceptance of the supplemented Application as filed as of November 19, 2020, and suspended the proposed rates through June 19, 2021. The Applicant has already responded to the first and second round of data requests with information about all its systems, including the 00297 systems.

9. The Commission entered the subject Order on February 12, 2021, denying Bluegrass's Motion to Deviate, characterizing it as requesting a "deviation that the application to be considered [sic] an application for a general rate adjustment for the systems at issue in Case No. 2020-00297" (p.9). The Order (p.6) interprets the Commission's regulations to require that Bluegrass file adoption notices for the 00297 systems before seeking to amend the rates with respect to those systems. This decision is contrary to statutes and public policy, and is in substantial violation of Bluegrass's due-process rights.

10. Excluding the 00297 systems from the rate adjustment request in this rate case would violate Bluegrass's procedural and substantive due process rights. Rate regulation interferes with a business's right to set its own prices and so effects an unconstitutional taking unless it provides substantive and procedural due process to the utility. Thus, rate regulation statutes are to be strictly construed,² and resort to extra-statutory or *ad hoc* reasons to deny or "exclude" portions of a requested rate adjustment is the kind of arbitrary exercise of governmental power proscribed by both the U.S. and Kentucky Constitutions. It is particularly egregious that the Commission would exclude a rate adjustment for the 00297 systems at this late date and because it "considers the application in this matter ... as a proposal to change the rates systems [sic] Bluegrass Water owned when the application was deemed filed," 2/12/21 Order p.7. What the

² So. *Central Bell Tel. Co. v. Utility Regulatory Comm'n*, 637 S.W.2d 649, 653 (Ky. 1982) ("[I]t is clear that the legislative grant of power to regulate rates will be strictly construed and will neither be interpreted by implication nor inference.").

Commission “considers” or “interpreted” an application to be is, at best, arbitrary and subjective, and it is procedurally unfair for the Commission to wait to rule as it did on the Motion for a Deviation until 4.5 months after the Application was submitted, 3.0 months after the Motion was filed and the Application deemed filed, and nearly 2.0 months after the rates were suspended. Since the suspension and before issuing the 2/12/21 Order, the Commission has granted intervention to a homeowner association whose only interest or relevance is related to a 00297 system (*see* 2/8/21 Order pp. 3, 11), its Staff has propounded two sets of data requests, and Bluegrass has proceeded with this case in good faith and in reliance on the proposed adjustment establishing uniform rates applying in the 00297 systems as well as all Bluegrass’s other systems.

11. The Commission’s decision violates the plain meaning of the statute requiring it to allow a utility to use “a forward-looking test period corresponding to the first twelve (12) consecutive calendar months the proposed increase would be in effect after the maximum suspension provided in KRS 278.190(2).” The statute does not provide for any matters in that forward-looking period to be excluded from the test period, and the Commission’s regulations emphasize that by referring to this option as a “fully forecasted test period.” 807 KAR 5:001 § 16(1)(a)1 (emphasis added); *see also id.* §§ 16(2)(a), (6) & (7). By regulation, the Commission requires a rate-adjustment application supported by a fully-forecasted test year to include an attestation statement that “the forecast contains the same assumptions and methodologies as used in the forecast prepared for use by management,” 807 KAR 5:001 § 16(7)(e)2. That attestation was given in the Application (Exh. 14, stmt. 2) submitted September 30, 2020. At the time of the Application’s submission, at the time the Application was deemed filed, and today, management’s forecasts and the Application supported by the fully-forecasted test year both anticipate

and assume that throughout the forward-looking test period Bluegrass will own and operate each of the 00297 systems. The Commission’s decision to “consider” or “interpret” the Application as if it did not include some forecasted and assumed facts that were expressly included is inconsistent with the statutory allowance of a forward-looking test period and creates an impermissible hybrid of forecasted and historical test years.

12. Furthermore, the Commission took full advantage of the additional month of suspension period allowed by KRS 278.190(2) for a rate-adjustment request when a forward-looking test period is used. In its Order entered December 18, 2020, the Commission cited the KRS 278.020(1) requirement of 30 days’ notice to the Commission and that the Application (as supplemented) had been accepted for filing as of November 19, 2020, and concluded:

Therefore, because the application was not accepted for filing until November 19, 2020, the earliest date that Bluegrass Water’s proposed rates can be effective is December 19, 2020.

12/18/20 Order p.1. The Commission then suspended the effective date of the proposed adjustment to rates for six (6) months counted from the date 30 days after November 19, 2020, that is, to June 19, 2020. Nonetheless, in its 2/12/21 Order (pp. 6-7), the Commission suggests that KRS 278.180(1) “likely would prohibit” changing the rates on the 00297 systems because “there is a strong argument” that Bluegrass could not file “a tariff proposing to amend the filed rates of utilities it does not own.” Yet KRS 278.180(1) does not restrict how notice is given and does not mention anything about a tariff.

13. As anticipated in its 2020-00297 Application filed on September 16, 2020 (p.14 ¶38), and in accordance with 807 KAR 5:011, Bluegrass will adopt the existing tariffs for those systems shortly after acquisition and soon thereafter incorporate the rates into its own sewer tariff. Those rates will be subject to increase only at the end of the suspension period on June 19, 2021 — seven full months after Bluegrass sent individualized, §17-compliant notice to 00297

system customers.³ In contrast with the 00297 systems, the 00028 systems were non-jurisdictional before their acquisition by Bluegrass. As a result, there were no tariffs to adopt or existing rates to be adjusted at the moment Bluegrass acquired the 00028 systems. Immediately upon acquisition of these systems, Bluegrass filed its notice of closing for the 00028 systems, followed by revisions to Bluegrass's existing tariff with the initial rates approved in the 00028 final Order. Bluegrass also provided notice to the 00028 customers of the proposed adjustment in this case in compliance with the requirements in 807 KAR 5:001, Section 17. (*See* 11/19/20 Supplement to the Application re 00028 systems).

14. Appeals to public policy considerations cannot amend legislative statutes or mend a due-process violation, and the Commission's policy concerns expressed in the 2/12/21 are not borne out in this particular case. The 2/12/21 Order (p.6) speculates that notice to the customers of the 00297 systems "from a utility that is not serving [them] would not likely have the same effect as notice from a utility that is serving them and could cause confusion." However, the record reflects that the 00297 systems' customers did not respond any differently than did customers from any other system; these individuals filed comments and requests to intervene with the Commission during the open period for doing so and none evinced any confusion (or doubt) that the proposed acquirer of their respective system (Bluegrass) had asked to increase the rates they presently pay. As did non-profit associations related to the 00028 systems and other systems owned and operated by Bluegrass, the Deer Run Estates Homeowners Association, Inc. ("Deer Run") moved to intervene on allegations that its homeowner members were served by Delaplain Disposal Company (one of the 00297 systems). The extensive response and effort to intervene

³ Had the Commission not suspended the proposed rates in its 10/30/20 Order or its 12/18/20 Order, then the new, increased rates would have applied only to the systems Bluegrass owned at that time. But that is a hypothetical that was not realized in this case.

by Deer Run and the individual customers from the affected service area belies the Commission's concern about effective notice for the proposed rate increase.

15. The Commission also expressed a conditional concern that “customers could be put in a position of having to expend funds to oppose a rate increase that might never apply to them,” 2/12/21 Order p.6 — presumably, if acquisition approval had not been granted. This seems incompatible with the Commission's grant of intervention to Deer Run if Delaplain is not going to be considered as part of this rate application and somewhat moot in this case since the 2/12/21 Order was too late to save the expenditure of funds (*e.g.*, for a stamp for mailing a comment or intervention request). Furthermore, the Commission did approve the acquisition and Bluegrass has proceeded to close on all four 00297 systems.⁴ Significant inefficient expenditures (that must ultimately be borne by ratepayers) can be avoided in Bluegrass's situation only if this case proceeds to a determination of whether and how much of a rate adjustment applies to all the systems, including the 00297 systems.

WHEREFORE, Bluegrass respectfully requests that the Commission alter its 2/12/21 Order denying Bluegrass's Motion to Deviate from any applicable regulations regarding notice to the 00297 systems and allow the Application to proceed to a decision about the proposed rate adjustment for all the systems. Bluegrass also requests a timely decision on this Motion.

Respectfully submitted,

/s/ Katherine K. Yunker

Katherine K. Yunker
Kathryn A. Eckert
MCBRAYER PLLC

⁴ Transfer of three of the 00297 systems closed on February 23, 2021; the fourth is ready to close when allowed by the health of that system's principal.

201 East Main St., Suite 900
Lexington, KY 40507
(859) 231-8780

kyunker@mcbayerfirm.com

keckert@mcbayerfirm.com

*Attorneys for Applicant, Bluegrass Water Utility
Operating Company, LLC*