COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

THE ELECTRONIC APPLICATION OF BLUEGRASS WATER UTILITY OPERATING COMPANY, LLC FOR AN ADJUSTMENT OF RATES AND APPROVAL OF CONSTRUCTION	))))	Case No. 2020-00290

Deer Run Estates Homeowners Association, Inc.'s
And Longview Homeowners Association, Inc.'s
Reply in Support of Motion for Leave to Intervene

Comes now Deer Run Estates Homeowners Association, Inc. ("Deer Run HOA") and Longview Homeowners Association, Inc. ("Longview HOA") (collectively, the "Movants"), by counsel, pursuant to 807 KAR 5:001, Section 4(11), and other applicable law, and do hereby tender their reply in support of their respective December 18, 2020 and December 23, 2020 motions for leave to intervene in this docket, respectfully stating as follows:

The applicant, Bluegrass Water Utility Operating Company, LLC ("Bluegrass"), tendered its response in opposition to the Movants' motions on January 5, 2021 and essentially raised the same two arguments asserted in its prior opposition to the November 23, 2020 motion for leave to intervene filed by The Homestead Home Owners Association, Inc. ("Homestead HOA"). Bluegrass asserts that: (1) the Attorney General will adequately represent the interests of all Bluegrass's customers; and (2) the Movants lack associational standing because their homeowners would themselves lack standing to intervene in this instance. To this latter argument, Bluegrass now additionally makes the novel argument that merely representing the interest of homeowners is not the same as representing the interests of Bluegrass's real and potential customers *if* these individuals are not one and the same.[1]

[1] *See* Bluegrass's Response, p. 2, n. 3 and accompanying text. Bluegrass offers no evidence to suggest that the Movants' homeowners are not in fact also its existing or intended customers. Such an argument is misplaced in any

Bluegrass also cites one prior case to support its premise that the interests of the Movants and their members are not, in effect, special enough to warrant intervention.[2] However, the facts in Case No. 2013-00199 are very different than the matter *sub judice*. In that case, a labor union sought to intervene on behalf of its members who were employed by the utility that sought to adjust its rates. The Commission correctly denied the union's motion to intervene, holding:

> We find that a claimed interest in the amount of compensation or the provision of working conditions is not a sufficient nexus to Big Rivers' rates or service to constitute a special interest. Further, we do not have expertise nor jurisdiction over these issues raised by Petitioner.[3]

The Movants' motions are not concerned with extracting a pay raise or more time off for Bluegrass's workers as part of their request to intervene. The Movants' interest is squarely within the plenary ratemaking authority of the Commission – whether Bluegrass's proposed rates and service-related construction are fair, just and reasonable. In this regard, Bluegrass confesses to the conflict it has created by proposing – before it even owns all the systems it seeks to charge – a single, unified rate that applies to all residential customers, where it says: "[each one of these customers has an interested [*sic*] in having other customers pay more so that it can pay less."[4] Despite this telling admission that its proposed rate design benefits some at others' expense, Bluegrass suggests that the Attorney General can equally represent all residential interests even when they are in direct opposition to one another.[5]

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event in light of the Commission's precedent (n. 14 *infra*.) that demonstrates the Commission's historical understanding that homeowners associations are intervening on behalf of their "homeowners."

[2] *See* Bluegrass's Response, p. 3 *citing In the Matter of the Application of Big Rivers Electric Corporation for a General Adjustment in Rates Supported by Fully Forecasted Test Period*, Order, Case No. 2013-00199 (Ky. P.S.C. Nov. 12, 2013).

[3] *See* Order, Case No. 2013-00199, p. 3 (Ky. P.S.C. Nov. 12, 2013).

[4] *See* Bluegrass's Response, p. 3

[5] Bluegrass not so subtly suggests that the undersigned may also have a conflict that arises between the various subdivisions that have moved to intervene. *See* Bluegrass Response, p. 4, n. 8. However, each subdivision has asserted its interest in opposing Bluegrass's proposed rate design. This does not amount to a concession by any of the involved neighborhood associations that the proposed revenue requirement is itself warranted or acceptable. Bluegrass's proposed rates are too high across the board.

Bluegrass's argument that the Movants have no special interest in this case assumes that a single, homogenous rate is the best rate design for socializing the widely disparate costs of service across a system that it does not yet even completely own, when in fact that is one of the ultimate issues of the case. Contrary to Bluegrass's assertion, the Movants specifically identified the issues and facts in their motions which give rise to its special interest.[6] While Bluegrass contends that Deer Run HOA's unique concern with regard to the design of the commercial and industrial rate is unfounded,[7] that argument assumes that Bluegrass's position is correct – which is still very much in doubt and must be tested through discovery and cross-examination. There is a legitimate and serious question of whether the proposed rate design is fair, just and reasonable under the particular circumstances of this proceeding. That conflict is especially important now, as this is Bluegrass's initial rate case filing as a consolidated system and it is likely that the neighborhoods served by Bluegrass will be forced to live with this precedent for many years to come. Again, the Attorney General will no doubt do an excellent job in helping to assure that Bluegrass's revenue requirement is as low as permitted under the facts and law, however, he cannot fully weigh in on the proposal to adopt the single, uniform rate without prejudicing some neighborhoods and favoring others. This conflict is tangible, not just theoretical. The Movants clearly have a special interest in this proceeding for all the specific reasons set forth in its motion, which Bluegrass's response generally ignores.

Bluegrass's argument with regard to associational standing is equally inferior. When it tendered its response in opposition to the Homestead HOA's motion for leave to intervene, Bluegrass conceded its associational standing legal theory was on uncertain ground when it stated: "Finally, the HOA *arguably* does not meet the burden or associational standing…."[8] The legal standard for associational standing is set forth in *Bailey v. Preserve Rural Roads of Madison County, Inc*., 394 S.W.3d 350 (Ky. 2010), which provides:

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[6] Both Deer Run HOA and Longview HOA expressly adopted those key portions of the Homestead HOA's Motion for Leave to Intervene, pp. 4-7.

[7] *See* Bluegrass's Response, p. 5, n. 11.

[8] *See id*., p. 5 (emphasis added).

> The United States Supreme Court has identified three requirements that an association must meet to sue on behalf of its members:
>
> > (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.
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> While Kentucky has never officially adopted this entire test, we have held that, at a minimum, to establish associational standing at least one member of the association must individually have standing to sue in his or her own right.[9]

Bluegrass correctly conceded then – as it does here again – that the Kentucky Supreme Court only requires a showing that its members would have standing to sue in their own right.[10] Clearly, the customer of a utility has standing as a matter of law to challenge the rates charged by a utility. This rule of law is expressed in KRS 278.260 which gives the Commission jurisdiction to hear a customer's challenge as to the fairness, justness and reasonableness of a utility's rates. Similarly, KRS 278.270 allows a customer to file a complaint to challenge the adequacy of a utility's service. Apart from these statutory authorities, the Commission's own regulations (807 KAR 5:001, Section 17(2)) require a utility to publish notice of a proposed rate increase to customers. Bluegrass's argument that Homestead HOA lacks standing because its members (who are Bluegrass's customers) somehow also lack standing is plainly inconsistent with these textual authorities. While clearly leveraging its current response to address arguments contained in the reply filed by Homestead HOA, Bluegrass fails to acknowledge these statutory authorities in its current response.

While Bluegrass seeks to diminish the long-standing Commission precedent that firmly establishes a homeowners association's ability to intervene on behalf of its members in a rate proceeding,[11] it fails to

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[9] *Bailey*, p. 356.

[10] *See id.* citing *Com. ex rel. Brown v. Interactive Media Entertainment and Gaming Ass'n, Inc.*, 306 S.W.3d 32, 38 (Ky. 2010).

[11] *See, e.g., In the Matter of the Application of Hayfield Utilities, Inc. for a Rate Adjustment Pursuant to the Alternative Rate Filing Procedure for Small Utilities*, Order, Case No. 97-00457 (Ky. P.S.C Oct. 9, 1998); *In the Matter of the*

cite a single Commission precedent where such a request for intervention by a homeowners association was denied on the merits in a case such as this. In fact, one of the very few times when the Commission denied a homeowners association's effort to intervene in a case occurred a decade ago and involved the Deer Run HOA. The Commission denied the motion not on the theory that the association somehow lacked standing, but rather upon the fact that Deer Run HOA had not retained counsel to represent it and, under Kentucky law, could not represent itself.[12] Homeowners associations are widely recognized to have standing before the state and federal courts of the Commonwealth of Kentucky to represent the interests of their constituent residents.[13] Indeed, the Commission has itself repeatedly allowed a homeowners association to file a complaint to challenge a utility serving its "homeowners" on their behalf.[14]

The Movants also satisfy the second and third elements of the federal associational standing criteria (even though they do not apply). For instance, Bluegrass's speculative assertion that the Movants' corporate purpose is somehow ungermane to its members' interests in this case is a fiction. The Movants clearly have an interest in maintaining their respective neighborhoods, which clearly includes access to adequate and efficient wastewater service at fair, just and reasonable rates. When the neighborhoods were developed, such efforts were undertaken with the fundamental understanding that wastewater would be processed through a centralized facility, not individual septic tanks. Shrubberies and landscaping are nice. Wastewater facilities are essential. Protecting the neighborhood's consistent and unified interest in this

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Application of Springcrest Sewer Company, Inc. for Transfer of the Equestrian Woods Septic System and for the Establishment of Initial Rates, Order, Case No. 95-00289 (Ky. P.S.C Mar. 22, 1996); *In the Matter of the Application of Covered Bridge Utilities, Inc. for an Adjustment of Rates Pursuant to the Alternate Rate Filing Procedure for Small Utilities*, Order, Case No. 97-00455 (Ky. P.S.C. July 13, 1998). The foregoing cases are cited to demonstrate the sheer mountain of precedent supporting the Movants' position, but rather to unequivocally demonstrate that the Movants' position has decades of precedent behind it.

[12] *See In the Matter of the Alternative Rate Filing Adjustment for Delaplain Disposal Company*, Order, Casen No. 2010-00349 (Ky. P.S.C. Oct. 13, 2010).

[13] *See, e.g., Colliver v. Stonewall Equestrian Estates Ass'n, Inc.*, 139 S.W.3d 521, 524 (Ky. Ct. App. 2003); *River Fields, Inc. v. Peters*, No. CIV.A. 3:08-CV-264S, 2009 WL 2222901 (W.D. Ky. July 23, 2009)

[14] The argument that the Movants must represents Bluegrass's "customers" and not the "homeowners" whose residences who are attached to the respective wastewater treatment facilities is a fruitless exercise in sophistry. *See In the Matter of: Forest Hills Residents Association, Inc. and William Bates v. Jessamine South Elkhorn Water District*, Order, Case No. 2011-00138 (Ky. P.S.C. May 3, 2011); *In the Matter of: The Villas of Woodson Bend Condominium Association, Inc., et al. v. South fork Development, Inc. Timothy L. Gross and the Janice Gross Living Revocable Trust, Janice Gross Trustee*, Order, Case No. 2009-00037 (Ky. P.S.C. Feb. 11, 2009).

community infrastructure clearly falls within the general purpose of any homeowners association. The Movants' interest here is germane to their broader purpose as incorporated homeowners associations. It also bears emphasis that, while the interests of the homeowners within the subdivisions have standing under Kentucky law to challenge Bluegrass's rates, the participation of each individual member is not necessary. It is sufficient for the Movants to represent the collective interest of all affected homeowners. Indeed, that is the very purpose of associational standing.

The Movants have a special interest in this proceeding that is not otherwise adequately represented and their participation in the case will assist in fully developing the record without unduly complicating the Commission's proceeding.

WHEREFORE, on the basis of the foregoing, Deer Run HOA and Longview HOA respectfully request the Commission to grant them leave to intervene in this proceeding on behalf of their respective members and award them any and all relief to which they or their members may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that the foregoing document was filed via the Commission's electronic filing system today. The undersigned hereby certifies that the electronic filing is a true and accurate copy of the documents being filed in paper medium; the electronic filing was transmitted to the Commission on January 12, 2012; there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; paper copies of this information will be hand-delivered to the Commission within thirty (30) days of the lifting of the present State of Emergency relating to the COVID-19 pandemic.

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