

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

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

**Joint Intervenors’ Response to
Bluegrass Water Utility Operating Company’s
Motion to Alter the Commission’s February 12, 2021 Order**

Come now The Homestead Home Owners Association, Inc. (“Homestead”), Longview Homeowners Association, Inc. (“Longview”), The Deer Run Estates Homeowners Association, Inc. (“Deer Run”), Arcadia Pines Sewer Association, Inc. (“Arcadia”), Carriage Park Neighborhood Association, Inc. (“Carriage Park”), Marshall Ridge Sewer Association, Inc. (“Marshall Ridge”) and Randview Septic Corporation (“Randview”) (collectively, “Joint Intervenors”), by counsel, pursuant to 807 KAR 5:001, Section 5(2) and other applicable law, and do hereby tender their response in opposition to the Motion to Alter the Commission’s February 12, 2021 Order, filed by Bluegrass Water Utility Operating Company, LLC (“Bluegrass”) on March 4, 2021, respectfully stating as follows:

Bluegrass filed its rate application on September 30, 2020, but due to various deficiencies identified in the application, the filing was not accepted as administratively complete until November 19, 2020. At that point, Bluegrass did not yet own any of the systems that were the subject of Case No. 2020-00297 and had, only that same day, acquired the systems referenced in Case No. 2020-00028. In its February 12, 2021 Order, the Commission quite reasonably held:

For the reasons discussed above, as indicated in the final Order in Case No. 2020-00297 and pursuant to 807 KAR 5:011, Section 11, Bluegrass Water must file adoption notices for the tariffs of each of the utilities at issue in Case No. 2020-00297 before seeking to amend the rates with notice to the Commission pursuant to KRS 278.180 and notice to customers. Further, as indicated in the previous orders in this matter, the Commission considers the application in this matter, which was deemed filed as of November 19, 2020, as a proposal to change the rates systems Bluegrass Water owned when the application was deemed filed, including the systems at issue in Case No. 2020-00028, and a request for construction approval.¹

In its March 4, 2021 Motion, Bluegrass claims:

This decision is contrary to statutes and public policy, and is in substantial violation of Bluegrass’s due-process rights. Excluding the 00297 systems from the rate adjustment request in this rate case would violate Bluegrass’s procedural and substantive due process rights.²

Bluegrass’s argument that its due process rights have been violated should be summarily rejected, for “[i]t is well established that in order to succeed in either a procedural or substantive due process claim, such claimant must demonstrate a legitimate entitlement to vested property interest.” *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 497 (Ky.1998) citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). A “mere subjective expectancy” of a property interest is not constitutionally protected. *See Perry v. Sindermann*, 408 U.S. 593, 603 (1972). If it were, constitutional protections would be based upon little more than dreams and aspirations. Nothing in Bluegrass’s motion actually identifies a specific and legitimate entitlement to a vested property interest. Certainly, there is nothing constitutionally offensive about requiring an applicant to follow the long-established requirements of Kentucky law in acquiring a utility system or pursuing a rate increase.

¹ Order, Case No. 2020-00290, p. 7 (Ky. P.S.C. Feb. 12, 2021).

² Bluegrass Motion, p. 4.

Moreover, Bluegrass’s arguments that the Commission has somehow violated “statutes and public policy” is flat incorrect. The forecasted test year concept is statutorily defined:

Any application utilizing a forward-looking test period shall include a base period to be filed with the application, which begins not more than nine (9) months prior to the date of filing, consisting of not less than six (6) months of actual historical data and not more than six (6) months of estimated data at the time of filing.³

Bluegrass’s motion completely overlooks the requirement that there be “actual historical data” to support its filing. This omission is particularly glaring in light of Bluegrass’s representation to the Commission in Case No. 2020-00028 that it would “file for a general rate adjustment of the rates ... when Bluegrass Water will have a full year of data from owning and operating those systems.”⁴ In point of fact, Bluegrass tendered its rate increase application before it owned any of the systems at issue in Case No. 2020-00028 or Case No. 2020-00297. Ownership of the systems in Case No. 2020-00028 only occurred on November 19, 2020 – the same day the rate application was finally deemed filed. Bluegrass cannot complain that the Commission is somehow violating Kentucky law when it is itself completely unable to provide information required by KRS 278.192 for a significant number of the systems it has recently acquired.⁵ If Bluegrass’s position is taken to its logical conclusion, then the forecasted test year is ingeniously designed to allow a utility to *avoid* having to provide probative evidence to the Commission and intervenors because it is *only* forward looking. Such a construction of the statute is wholly unreasonable.

³ See KRS 278.192(2)(a).

⁴ See *In the Matter of the Electronic Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC of Wastewater System Facilities and Subsequent Tariffed Service to Users Presently Served by those Facilities*, Order, Case No. 2020-00028, pp. 19-20 (Ky. P.S.C. June 19, 2020). Of note, in its Response to the Joint Intervenors DR-01-001, Bluegrass’s witness omits the commitment to waiting until Bluegrass has a full-year of data before filing a rate case.

⁵ In Response to several of Joint Intervenors’ initial data requests, Bluegrass quickly points out that it has no information about the systems prior to its ownership of them.

Finally, it bears emphasis that nothing in the Commission's February 12th Order bars Bluegrass from properly and timely recovering its prudently incurred expenses at the appropriate time. Bluegrass has several options available to it. For instance, it can – as it originally committed to do – withdraw its current filing, without prejudice, and file a new application after it has gained at least one year's worth of actual operational experience with its new systems. Or it can move forward with the present case less the customers and associated expense with the systems it did not own when its application was filed.

WHEREFORE, on the basis of the foregoing, the Joint Intervenors' respectfully request the Commission to deny Bluegrass's Motion to Alter the Commission's February 12, 2021 Order.

This 11th day of March 2021.

Respectfully submitted,



David S. Samford
L. Allyson Honaker
GOSS SAMFORD, PLLC
2365 Harrodsburg Road, Suite B-325
Lexington, KY 40504
(859) 368-7740
david@gosssamfordlaw.com
allyson@gosssamfordlaw.com

Counsel for Joint Intervenors

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 March 11 2021; 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.

A handwritten signature in blue ink, reading "David A. Sepl", is written over a horizontal line.

Counsel for Joint Intervenors