

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION BY WATER SERVICE)
CORPORATION OF KENTUCKY,)
ALONG WITH CORIX)
INFRASTRUCTURE (US) INC. AND)
SW MERGER ACQUISITION CORP.,)
FOR APPROVAL OF TRANSFER OF)
CONTROL)

Case No. 2022-00396

PETITION FOR MODIFICATION OF REQUIRED COMMITMENTS

Water Service Corporation of Kentucky (“WSCK”), Corix Infrastructure (US) Inc. (“Corix US”), and SW Merger Acquisition Corp. (“SWMAC”) (collectively, “Joint Applicants”), by counsel, hereby petition the Commission (“Petition”) to modify certain commitments required by the Commission in its Order dated March 23, 2023 (“Order”). Specifically, the Joint Applicants seek modification to certain commitments to provide clarity on future expectations and avoid unintended consequences while still maintaining the Commission’s objectives of its Order. In addition, the Joint Applicants respectfully request an extension to the April 18, 2023 deadline by which to file a written acknowledgment accepting and agreeing to be bound by regulatory commitments required by the Commission.

I. Procedural Background

On November 23, 2022, the Joint Applicants filed a verified Application, in which they sought approval for a proposed transaction whereby Corix US and SWMAC would merge to create a larger and stronger water and wastewater company (“Proposed Transaction”). The Application was supported by the written testimony of Steven M. Lubertozi, Brian D. Bahr, Justin Kersey,

and Ellen Lapson. No person has sought intervention, nor have there been any public comments submitted in the docket of this case. On December 22, 2022, the Commission Staff issued a Request for Information, to which the Joint Applicants timely responded on January 12, 2023. No supplemental requests for information have been issued. On February 14, 2023, the Joint Applicants submitted a request for the Commission to issue a decision on the written record of the case. The Commission did not hold a hearing in this matter.

On March 23, 2023, the Commission issued its Order approving the Proposed Transaction, subject to the Chief Executive Officers of the Joint Applicants filing written acknowledgments accepting and agreeing to be bound by the party-specific commitments contained in the Appendix to the Order. Although the Commission found the Proposed Transaction to be in the public interest and generally indicated that it believed the commitments are necessary to ensure there are no adverse effects to WSCK or its customers, the Commission did not specifically explain why any particular commitment or the specific language of that commitment serves those objectives. In reviewing the commitments, the Joint Applicants have identified a few commitments that they believe should be modified to provide better clarity of expectations and properly tailored to WSCK's stature and context in the combined company, while still maintaining the Commission's intent of ensuring that the transaction will be in the public interest and will not create adverse impacts.

On March 28, 2023, the Joint Applicants filed a motion to extend the deadline by which to file a written acknowledgment accepting and agreeing to be bound by the regulatory commitments identified in the Commission's Order. Although the Commission denied the specific relief requested, it granted an extension through April 18, 2023, to file the written acknowledgment.

Because the Joint Applicants cannot agree to the commitments at this time for the reasons set forth in this Petition, and because this Petition seeks modifications to the regulatory commitments, the Joint Applicants respectfully request an extension of the deadline by which to file a written acknowledgment accepting and agreeing to be bound by regulatory commitments. The Joint Applicants suggest a deadline of either (1) five business days after the Commission's ruling on this Petition to file such an acknowledgment or (2) five business days after this Petition is denied as a matter of law under KRS 278.400 if the Commission does not enter an order.

II. KRS 278.400

KRS 278.400 authorizes “any party to the proceedings” to apply for reconsideration of a Commission order within 23 days after issuance of the order. “KRS 278.400 expressly authorizes the Commission to rehear ‘any of the matters’ determined” in any case.¹ In other words, the Commission enjoys the broad discretion to grant rehearing to consider new arguments,² particularly when the argument could not reasonably have been raised before. In addition, rehearing will be granted when required to address any errors or omissions in a Commission order.³ Each of these bases supports reconsideration of this matter.

Within this Petition, the Joint Applicants frequently refer to two prior cases in which the Commission mandated certain conditions that are similar to the commitments required in the present matter. These two cases, involving Kentucky Power Company's acquisition by Liberty Utilities Co.⁴ (“*Kentucky Power Company*”) and Delta Natural Gas's acquisition by Aqua

¹ *Adjustment Of The Rates Of Kentucky-American Water Co.*, Case No. 2000-00120 (Ky. P.S.C. Feb. 26, 2001).

² *America's Tele-Network Corp.'s Alleged Violation of KRS 278.535*, Case No. 2000-00421 at 2 (Ky. P.S.C. March 23, 2001) (limiting scope of rehearing to new arguments raised in petition).

³ *Application of Jessamine-South Elkhorn Water District For A Certificate Of Public Convenience And Necessity To Construct And Finance A Waterworks Improvement Project Pursuant To KRS 278.020 And 278.300*, Case No. 2012-00470 at 11 (Ky. P.S.C. January 3, 2014).

⁴ *Electronic Joint Application Of American Electric Power Company, Inc., Kentucky Power Company And Liberty Utilities Co. For Approval Of The Transfer Of Ownership And Control Of Kentucky Power Company*, Case No. 2021-00481 (Ky. P.S.C. May 4, 2022).

America, Inc.⁵ (“*Delta Natural Gas*”), have noteworthy differences from the procedural posture of the present matter as they relate to the conditions discussed herein. The conditions mentioned in this Petition that were included in *Kentucky Power Company* were commitments made through witness testimony and responses to requests for information in that case prior to the Commission’s final order.⁶ Similarly, the conditions mentioned in this Petition that were included in *Delta Natural Gas* were also presented to the parties in that case through a request for information prior to the Commission’s final order.⁷ Accordingly, it is appropriate for the Commission to consider the Joint Applicants’ request for modifications to the commitments, as they have not had prior opportunity to address them.

III. Discussion

The Joint Applicants respectfully request modification to the following commitments.

A. Commitment No. 2

Commitment No. 2 in Appendix A of the Commission’s Order states, “Corix US commits to having an independent director residing in Kentucky on WSCK’s post-closing board of directors.”

This commitment is similar to conditions found in the *Kentucky Power Company* and *Delta Natural Gas* transfer cases. Liberty Utilities committed in its application to having at least one Kentucky Power Company board seat reserved for a business and/or community leader from

⁵ *Electronic Joint Application Of Aqua America, Inc., Steelriver Infrastructure Fund North America LP, Steelriver LDC Investments LP, LDC Parent LLC, LDC Funding LLC LDC Holdings LLC, PNG Companies LLC, Peoples Gas Ky LLC, And Delta Natural Gas Company, Inc. For Approval Of An Acquisition Of Ownership And Control Of PNG Companies LLC And Delta Natural Gas Company, Inc.*, Case No. 2018-00369 (Ky. P.S.C. Mar. 13, 2019 and Mar. 20, 2019).

⁶ See Appendix A to the order in *Kentucky Power Co.*, Case No. 2021-00481 (Ky. P.S.C. May 4, 2022). The Joint Applicants acknowledge that they made certain commitments in their Application. They are not seeking modification of those commitments.

⁷ See Commission Staff’s Post-Hearing Data Request in *Delta Natural Gas Co.*, Case No. 2018-00369 (Ky. P.S.C. Feb. 14, 2019).

Kentucky Power's service territory.⁸ Aqua America also committed to maintaining an independent director on the board of directors of Delta Natural Gas Company, Inc., but there was no requirement that the director reside in Kentucky.⁹ Both Kentucky Power Company and Delta Natural Gas Company, Inc. are significantly larger than WSCK.

WSCK has two concerns about the condition as drafted. First, WSCK cannot guarantee that a Kentucky resident will always sit on the board of directors. While WSCK can commit to use commercially reasonable efforts to retain an independent director who resides in Kentucky, it cannot guarantee that a resident of the Commonwealth is willing to serve on its Board of Directors on such terms.

Second, having an independent director on WSCK's post-closing board of directors will increase costs to WSCK. Searching for and retaining an independent director who resides in Kentucky would likely increase the cost of operating WSCK. Generally, independent directors receive fees, the payment of which would increase WSCK's operating expenses. Given the significant difference in scale between Kentucky Power, Delta Gas and WSCK – Kentucky Power's 2021 operating revenue exceeded \$629 million, Delta Natural Gas's 2021 operating revenue exceeded \$50 million, and WSCK's 2021 annual revenue was approximately \$3.4 million – the additional costs associated with an outside director have an outsized impact on WSCK's customers.¹⁰

The Joint Applicants' concerns about the condition can be relieved by allowing WSCK to have an employee director residing in Kentucky on the post-closing board of directors. Such an individual would have a fiduciary duty to WSCK but the additional duties for the employee would

⁸ *Kentucky Power Co.*, Case No. 2021-00481 at 17 (Ky. P.S.C. May 4, 2021).

⁹ *Delta Natural Gas Co.*, Case No. 2018-00369 (Ky. P.S.C. Mar. 13, 2019).

¹⁰ See 2021 Annual Reports on file with the Commission and available at <https://psc.ky.gov/WebNet/ListLibrary/ANN>.

not result in increased costs to WSCK customers. Moreover, because WSCK uses local operators and other employees, WSCK's shareholder can ensure that a Kentucky resident is appointed to WSCK's board. Alternatively, if the Commission believes that an independent director residing in Kentucky is necessary, the Joint Applicants request confirmation that WSCK will be eligible for rate recovery of those additional costs and that Corix US must use commercially reasonable efforts to obtain such a director.

Accordingly, the Joint Applicants respectfully request the Commission modify Commitment No. 2 to one of the two following alternatives:

A. Corix US commits to having a director residing in Kentucky on WSCK's post-closing board of directors.

or

B. Corix US commits to having an independent director residing in Kentucky on WSCK's post-closing board of directors with the understanding that any additional costs incurred would be eligible for rate recovery, notwithstanding any other commitments made in connection with Case No. 2022-00396. WSCK will use commercially reasonable efforts to have an independent director residing in Kentucky on WSCK's post-closing board of directors.

B. Commitment No. 3

Commitment No. 3 in Appendix A of the Commission's Order states, "Corix US commits that it will not utilize push-down accounting in any manner arising from the transaction contemplated in this case."

The Joint Applicants seek a modification to this broad commitment that provides additional flexibility but maintains the Commission's intent to ensure that any premium paid related to the Proposed Transaction not be recovered from WSCK customers. At this time, Corix US and SWMAC are unsure of the format and nature of the acquisition journal entries, and therefore the

parties do not want to preclude this option in the future. Corix US, however, can commit that any premium paid will not be recovered from WSCK customers.

The Joint Applicants note that their proposal is consistent with the Commission's 2012 order approving the acquisition of WSCK, which required that "[n]either Corix Utilities nor Utilities, Inc. shall 'push down' to Water Service Corporation any transaction-related costs or any premium that Corix Utilities may pay for Hydro Star stock," as well as the following commitment:

Any premium that Corix Utilities pays for Hydro Star, LLC stock, as well as all transaction-related costs, will not be "pushed down" to Water Service Corporation and will not be recovered from Water Service Corporation's ratepayers to the extent that this does not include obligations that would not otherwise be required by the Commission but for the conditions placed on the transfer.

Accordingly, the Joint Applicants respectfully request the Commission modify Commitment No. 3 to the following:

3. Any premium paid related to the Proposed Transaction will not be "pushed down" to Water Service Corporation of Kentucky and will not be recovered from Water Service Corporation Kentucky's ratepayers.

C. Commitment No. 6

Commitment No. 6 in Appendix A of the Commission's Order states, "Corix US commits that WSCK will not be exposed to any increased insurance premiums in the event the Commission approves the transaction."

The Joint Applicants respectfully submit that this commitment is unintentionally broad. A strict reading of the commitment could suggest that any increase of insurance premiums, regardless of cause, would violate the commitment and potentially not be permitted to be recovered in rates. The Commission seemingly considered this issue in *Delta Natural Gas*, in which it required the

parties to that case to adhere to commitments they made in that case.¹¹ This included a modification to the proposed condition that “Aqua America, PNG, and Delta commit that Delta will not be exposed to any increased insurance premiums if the transaction is approved,” such that it became the following: “Given that market conditions influence insurance premiums, Aqua America, PNG, and Delta commit that Delta will not be exposed to any increased insurance premiums if the transaction is approved *that it otherwise would not have faced but for the approval.*”¹² (Emphasis added.)

Consistent with the modification in *Delta Natural Gas*, and given that insurance premiums may be affected by numerous factors other than the approval of this transaction (including market conditions, natural disasters and other acts of God, etc.), the Joint Applicants respectfully request the Commission modify Commitment No. 6 to the following:

6. Given that market conditions influence insurance premiums, Corix US commits that WSCK will not be exposed to any increased insurance premiums if the transaction is approved that it otherwise would not have faced but for the approval.

D. Commitment No. 7

Commitment No. 7 in Appendix A of the Commission’s Order states, “Corix US commits that WSCK will not be exposed to any additional contributions to any pension or medical plans, etc., for employees than it otherwise would not have faced but for the approval.”

The Joint Applicants submit that this requirement is vague and may have unintended consequences. The Commission’s regulatory authority provides sufficient protections to ensure that unreasonable costs are not borne by a utility’s customers. The parties in *Delta Natural Gas*

¹¹ *Delta Natural Gas Co.*, Case No. 2018-00369 at 13 (Ky. P.S.C. Mar. 13, 2019).

¹² See Response to Commission Staff’s Post-Hearing Data Request in *Delta Natural Gas Co.*, Case No. 2018-00369 (Ky. P.S.C. Feb. 25, 2019).

proposed a modification similar to the following proposed modification,¹³ which was accepted by the Commission.¹⁴

Accordingly, the Joint Applicants respectfully request the Commission modify Commitment No. 7 to the following:

7. Corix US commits that any future service company charges to WSCK, which may include pension or medical plan costs, will be included in appropriate affiliated interest agreements and will be submitted for review and approval to the Commission.

E. Commitment No. 8

Commitment No. 8 in Appendix A of the Commission's Order states, "Corix US commits to ring-fencing of WSCK such that WSCK would be insulated from Corix US's or any of its affiliates' non-utility lines of business."

The Joint Applicants submit that this commitment is vague because the term "ring-fencing" is not defined. The Joint Applicants propose to modify this commitment to be consistent with the condition in *Kentucky Power Company* that provided a definition of "ring-fencing."¹⁵

Accordingly, the Joint Applicants respectfully request the Commission modify Commitment No. 8 to the following:

8. Corix US commits to ring-fencing WSCK such that WSCK would be insulated from Corix US's non-utility lines of business by ensuring that WSCK: (i) will not assume liability for the debts issued by other subsidiaries or affiliates; (ii) will maintain corporate officers who have a fiduciary duty to WSCK, and; (iii) will maintain separate books and records of WSCK.

F. Commitment No. 12

¹³ *Id.*

¹⁴ *Delta Natural Gas Co.*, Case No. 2018-00369 at 13 (Ky. P.S.C. Mar. 13, 2019).

¹⁵ See Appendix A at 3 to the order in *Kentucky Power Co.*, Case No. 2021-00481 (Ky. P.S.C. May 4, 2022).

Commitment No. 12 in Appendix A of the Commission’s Order states, “Corix US commits that the proposed transaction will not result in any writeups, write-offs, or restatements of financial results.”

The Joint Applicants interpret this commitment to relate to the closing of the transaction, which will not result in the writeup or write-off of any Kentucky jurisdictional assets. However, this commitment as written is broader than intended. At a minimum, the Joint Applicants will be required to record any non-regulated assets for the acquiree at fair value, which will likely result in an increase in some assets. The Joint Applicants can commit that any writeups, write-offs, or restatements on WSCK’s books and records would be excluded for ratemaking purposes, which is similar to the requested modification to Commitment No. 3 above.

Accordingly, the Joint Applicants respectfully request the Commission modify Commitment No. 12 to the following:

12. Corix US commits that the proposed transaction should not result in any writeups, write-offs, or restatements of financial results on WSCK’s books and records. However, if any such writeups, write-offs, or restatements of financial results do occur, and are required to be recorded on WSCK’s books and records pursuant to GAAP, then Corix US and WSCK agree that any writeups, write-offs, or restatements on WSCK’s books and records would be excluded for rate making purposes.

G. Commitment No. 22

Commitment No. 22 in Appendix A of the Commission’s Order states, “Corix US and WSCK commit that, in the event an employee is terminated as a result of the proposed transaction any severance paid to such an employee would be considered a transaction cost and would not be recovered through WSCK’s rates.”

The Joint Applicants do not consider severance costs as transaction costs. There may be longer-term cost savings resulting from consolidation of employees. Moreover, future rate cases provide appropriate regulatory controls to ensure that unreasonable costs are not borne by WSCK ratepayers.

Accordingly, the Joint Applicants respectfully request the Commission modify Commitment No. 22 to the following:

22. Corix US and WSCK commit that, in the event an employee is terminated as a result of the proposed transaction, any severance paid to such an employee would be considered an integration cost and, as such, would not be recovered through WSCK's rates unless integration benefits meet or exceed integration costs.

H. Commitment No. 24

Commitment No. 24 in Appendix A of the Commission's Order states, "Corix US and WSCK commit that they will maintain WSCK's corporate office, and its books and records, within WSCK's service territory."

The Joint Applicants are committed to maintaining WSCK's corporate office in its service territory, as well as WSCK's books and records in a way that is reasonably accessible in Kentucky, which appears to be the Commission's intent for this commitment. A similar condition was discussed in the 2012 WSCK transfer-of-control case, wherein the applicants and the Attorney General agreed to,¹⁶ and the Commission accepted,¹⁷ a condition that recognized the practice of maintaining electronic records. The Joint Applicants believe that the agreed-upon condition

¹⁶ See Joint Motion to Submit Case for Consideration Without Hearing at 3, Case No. 2012-00133 (Ky. P.S.C. July 26, 2012).

¹⁷ See *Joint Application Of Corix Utilities (Illinois) LLC; Hydro Star, LLC; Utilities, Inc.; And Water Service Corporation Of Kentucky For The Transfer And Acquisition Of Control Pursuant To KRS 278.020*, Case No. 2012-00133 at 10 (Ky. P.S.C. Aug. 13, 2012).

imposed in the 2012 case meets the intent of the Commission and provides reasonable flexibility to accommodate modern utility practices.

Accordingly, the Joint Applicants respectfully request the Commission modify Commitment No. 24 to the following:

24. Corix US and WSCK commit that WSCK's principal office will remain within WSCK's service territory, and WSCK's books and records will be maintained and housed in Kentucky or will otherwise be maintained in a manner to be easily accessible to the Commission for inspection at reasonable times upon reasonable notice.

I. Commitment No. 27

Commitment No. 27 in Appendix A of the Commission's Order states, "Corix US and WSCK will track any synergies that results from the integration of Corix US's water, wastewater, and related businesses with SWMAC's water and wastewater business. The tracked synergies will be addressed in WSCK's future rate case proceedings."

The Joint Applicants agree that it is appropriate to track synergies that result from the integration of the two companies. Synergies associated with corporate mergers diminish over time as companies fully integrate. Tracking synergies outside a relevant time period will result in costs that do not provide correlative benefits, but, as written, Commitment No. 27 would require tracking over an indefinite period. The Joint Applicants thus propose a modification to the commitment, to require tracking of synergies over a five-year period following closing.

Accordingly, the Joint Applicants respectfully request the Commission modify Commitment No. 27 to the following:

27. Corix US and WSCK will track any synergies for five years after closing the Proposed Transaction that result from the integration of Corix US's water, wastewater, and related businesses with

SWMAC's water and wastewater business. The tracked synergies will be addressed in WSCK's future rate case proceedings.

IV. Conclusion

The Joint Applicants believe their proposed modifications to certain commitments provide additional clarity to set future expectations and avoid unintended consequences, while still maintaining the perceived intent of the Commission. Accordingly, the Joint Applicants respectfully request approval of the modifications to the commitments discussed herein.

In addition, because the Joint Applicants cannot agree to the commitments at this time and because this Petition seeks modification to the regulatory commitments, the Joint Applicants respectfully request an extension through which to file a written acknowledgment accepting and agreeing to be bound by regulatory commitments. The Joint Applicants suggest a deadline to file such an acknowledgment of either (1) five business days after the Commission's ruling on this Petition or (2) five business days after the Petition is denied as a matter of law under KRS 278.400 if the Commission does not enter an order.

Respectfully Submitted,

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