

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 SEWAGE RATES )

CASE NO.  
2022-000432

**REPLY BRIEF**

Respectfully submitted,

/s/ David E. Spenard

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November 10, 2023

### **Notice And Certification For Filing**

Undersigned counsel provides notice that the electronic version of the paper has been submitted to the Commission by uploading it using the Commission's E-Filing System on this 10<sup>th</sup> day of November, 2023, in conformity with the Commission's April 14, 2023 Order of procedure in the instant case. Pursuant to the Commission's Orders in Case No. 2020-00085, *Electronic Emergency Docket Related to Novel Coronavirus Covid-19*, the paper, in paper medium, is not required to be filed.

/s/ David E. Spenard

### **Notice And Certification Concerning Service**

No party has been excused from the electronic filing procedures in the instant proceeding.

/s/ David E. Spenard

## **SECTION 1. INTRODUCTION**

On October 27, 2023, Bluegrass Water Utility Operating Company, LLC (“Bluegrass Water” or “Company”) and the Kentucky Office of the Attorney General (“KY OAG” or “OAG”) each filed a comprehensive Post-Hearing Brief. Pursuant to authority through the Commission’s Order entered on September 22, 2023,<sup>1</sup> Scott County, Kentucky respectfully submits its Reply Brief.

## **Section 2. Reply to Bluegrass Water**

### **Section 2.1 Bluegrass Water may not establish an acquisition adjustment through a valuation or revaluation of any land or land rights of Delaplain Disposal Company through the appraisal offered.**

Prior to the application in the instant case by Bluegrass Water, the most recent rate adjustment application for the Delaplain service area was Case No. 2010-00349, an application filed by Delaplain Disposal Company’s prior owner.<sup>2</sup> The application in Case No. 2020-00349 states that it is based upon the utility’s Annual Report to the Commission for the twelve (12) months ending December 31, 2009.<sup>3</sup> Per the 2009 Annual Report, Account 310, Land and Land Rights, had no balance.<sup>4</sup> Rates were (without objection or notice of correction by Delaplain) requested, investigated, and set upon this information.<sup>5</sup>

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<sup>1</sup> Order (Ky. P.S.C. Sept. 22, 2023).

<sup>2</sup> *Alternative Rate Filing Adjustment for Delaplain Disposal Company*, (Application filed Aug. 31, 2010) (“Case No. 2010-00349”).

<sup>3</sup> Case No. 2010-00349, Application (filed Aug. 31. 2010), page 2.

<sup>4</sup> Delaplain Disposal Company Annual Report to the Commission for Jan. 1, 2009 through Dec. 31, 2009, page 18 of 44 – Sewer Utility Plant in Service, Reference Page 5 (“Delaplain 2009 Annual Report”).

<sup>5</sup> Case No. 2010-00349, Order (Ky. P.S.C. June 29, 2011).

The Delaplain Disposal Company's Annual Report to the Commission for the twelve (12) months ending December 31, 2019 likewise has no balance listed for Account 310, Land and Land Rights.<sup>6</sup> Therefore, at the execution of the Purchase and Sale Agreement between Bluegrass Water and Delaplain Disposal Company, Bluegrass Water knew or should have known that (1) Delaplain Disposal Company did not have any balance recorded in Account 310, Land and Land Rights, and (2) the rates of Delaplain Disposal Company were established in Case No. 2010-00349 based upon Delaplain Disposal's request to use and rely upon this information.

There is no Order of the Commission pursuant to KRS 278.290 valuing or revaluing any of the assets of the Delaplain Disposal Company, and the instant case does not include an application for relief through KRS 278.290.<sup>7</sup> If there was a problem with the prior owner's failure to account for land values or easements on the predecessor utility's books and records,<sup>8</sup> it was an issue that should have been addressed prior to the

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<sup>6</sup> Delaplain Disposal Company Annual Report to the Commission for Jan. 1, 2019 through Dec. 31, 2019, page 17 of 44 – Sewer Utility Plant in Service, Reference Page 5 (“Delaplain 2019 Annual Report”).

<sup>7</sup> Under the assumption that the Company could now apply for relief that Delaplain Disposal Company defaulted or failed to seek in 2010, Bluegrass Water's failure to formally apply for relief under KRS 278.290 is not a so-called “technicality.” There are procedural and substantive requirements for a valuation or revaluation of utility property under the statute, and they have not been met. Further, KRS 278.295 has an effective date of June 29, 2021. The final Order approving the acquisition of the assets of the Delaplain Disposal Company was entered on January 14, 2021, prior to the effective date of the statute. KRS 278.295 is not retroactive and valuation or revaluation cannot be pursued under this latter statute for the assets acquired from the Delaplain Disposal Company. See KRS 446.080(3); see, *additionally*, *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 500 (Ky. 1998) (KRS 446.080(3) prohibits retroactive application of KRS 278.183).

<sup>8</sup> Bluegrass Water Brief, page 20.

execution of the Purchase and Sale Agreement. Bluegrass Water is not entitled to relief under the record presented to the Commission, which includes the appraisal.

**Section 2.2 Bluegrass Water’s discussion of its metered rates and proposed cost allocation merits expansion to provide context.**

In support of its proposal to shift the allocation percentages for metered and unmetered service, Bluegrass Water states that its metered customers did not have an increase in its last rate case.<sup>9</sup> As a preliminary matter, the Delaplain service area is the only Bluegrass Water service area with metered customers. It is factually accurate that the metered customers within the Delaplain service area did not have their rates adjusted through the Commission’s final Order in Case No. 2020-00297, Bluegrass Water’s most recent application for a rate adjustment.<sup>10</sup> From that proceeding:

However, as of November 19, 2020, Bluegrass Water had not been approved to purchase and did not own the systems for which it sought approval to purchase in Case No. 2020-00297; the Delaplain, Herrington Haven, Springcrest, and Woodland Acres sewer systems (the 00297 systems). The Commission denied Bluegrass Water’s request for a deviation from 807 KAR 5:011, Section 11, and determined that, pursuant to 807 KAR 5:011, Section 11, and KRS Chapter 278, Bluegrass Water could not file a tariff proposing to increase the rates of the 00297 systems until it completed the purchase of those systems and adopted the existing tariffs of those systems. Thus, the Commission held that Bluegrass Water’s application in this matter, which was filed before Bluegrass Water was even approved to purchase those systems, would not be considered as a request to increase the rates of the 00297 systems pursuant to KRS Chapter 278.<sup>11</sup>

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<sup>9</sup> Bluegrass Water Brief, page 48.

<sup>10</sup> See, Case No. 2020-00290, *Electronic Application of Bluegrass Water Utility Operating Company, LLC for An Adjustment of Rates and Approval of Construction*, Order (Ky. P.S.C. Aug. 2, 2021).

<sup>11</sup> *Id.*, page 4.

Rates for metered service were not revised in Case No. 2020-00290 because those rates were not investigated by the Commission in that proceeding. Further, the rates for unmetered service in the Delaplain service area were likewise not investigated (or revised) in Case No. 2020-00290. Pointing out the lack of change in rates that Bluegrass Water could not change through the last rate application does not offer material support for the proposed reallocation.<sup>12</sup>

**Section 2.3 Scott County’s proposed phase-in rates result in fair, just, and reasonable rates.**

Scott County’s proposal for phase-in rates is otherwise adequately addressed in its *Memorandum Brief*; nonetheless, Scott County expressly responds to Bluegrass Water’s allegations that Scott County’s proposed rates fail to provide financial integrity and pose concerns regarding confiscation of property.<sup>13</sup> Bluegrass Water did not take the position that a phase-in approach in all circumstances raises concerns regarding financial integrity. Scott County, for the reasons stated in its *Memorandum Brief* and in Section 3 (below), asserts that it proposes non-confiscatory rates, and there are no related concerns regarding the Company’s financial integrity.

**Section 3. Reply to the Office of the Attorney General**

The OAG post-hearing brief raises an excellent point concerning late payment revenue. If the Commission approves the Company’s request to implement late fees, the impact of the revenue generated by these fees should be recognized in the current case.<sup>14</sup>

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<sup>12</sup> Additionally, the statement that Delaplain service area customers have not seen an increase in over 30 years (Bluegrass Water Brief, page 48) is in error. Case No. 2010-00349, Order (Ky. P.S.C. June 29, 2011).

<sup>13</sup> Bluegrass Water Brief, page 52.

<sup>14</sup> OAG Post-Hearing Brief (filed Oct. 27, 2023), page 12 (“OAG Brief”).

The Company does not seek to recognize the approximate \$355,000 of additional revenue associated with these fees. Bluegrass Water seeks to defer consideration of the additional revenue to future rate cases even though the approval for these fees is sought in the instant case and the collection of the revenue will occur while the rates are in effect pending the next rate case.<sup>15</sup> It is a designed over-collection of revenue.

Rate design concerns the overall consequence of the rates during the period that they will be effective. The focus is not upon the rates individually (any rate of itself).<sup>16</sup> The focus, therefore, is not upon a phase-in rate versus a hypothetical rate. The focus is upon the overall revenue requirement and the effectiveness of the overall rate design.<sup>17</sup>

The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect.<sup>18</sup>

If there is, as Bluegrass Water suggests, growth in service in the Delaplain service area in combination with a significant shift of responsibility for revenue collection from unmetered service to metered service (as Bluegrass Water proposes), it does not follow

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<sup>15</sup> Bluegrass Water Brief, page 33.

<sup>16</sup> OAG Brief, page 5.

<sup>17</sup> OAG Brief, page 12 (discussing new late fees).

<sup>18</sup> *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989) see also *Kentucky Industrial Utility Customers, Inc. v. Kentucky Public Service Commission*, 504 S.W.3<sup>rd</sup> 695, 705 (Ky. App. 2016).

that there are any concerns with a “straight” phase-in approach (a phase-in of rates without a regulatory asset or express carrying cost). Bluegrass Water would collect different rates under a phase-in; however, Bluegrass Water would not necessarily fail to collect its overall revenue requirement if there is a phase-in by reference to the Company’s own evidence concerning growth and revenue requirement apportionment.

Given Bluegrass Water’s position concerning late payment fee revenue (that the resulting revenue collection through authorization of the fee in the instant case is a matter for a future case), there is no demonstration that the phase-in rates impair Bluegrass Water’s opportunity for a reasonable return. Confiscation of property is not implicated if the net effect of a straight phase-in is offset by countervailing factors in other aspects of the Company’s request, such as an increase in revenues through a late payment penalty (or growth in revenues through the anticipated expansion of service and/or the increase in revenue from metered customers).

There is no need to create a regulatory asset or build-in a carrying cost for a phase-in proposal in the absence of a demonstration that the net effect of the rate order will be confiscatory “but for” such a recovery mechanism. In the instant case, there is no demonstration. The estimated \$261,678 in unrecovered revenue (phase-in versus hypothetical rates) is clearly more than offset by the approximate \$355,000 in additional revenue associated with late fees for the same twelve (12) month period.<sup>19</sup>

WHEREFORE, Scott County respectfully tenders its *Reply Brief*.

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<sup>19</sup> Unlike the phase-in rates which would terminate after twelve (12) months, the late fee revenue would continue to be collected after twelve (12) months.