

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC PROPOSED ACQUISITION BY)	
BLUEGRASS WATER UTILITY OPERATING)	
COMPANY, LLC OF WASTEWATER SYSTEM)	CASE NO.
FACILITIES AND SUBSEQUENT TARIFFED)	2020-00028
SERVICE TO USERS PRESENTLY SERVED)	
BY THOSE FACILITIES)	

ORDER

On February 24, 2020, Bluegrass Water Utility Operating Company, LLC (Bluegrass Water) filed an application for any approvals necessary for the transfer of certain wastewater systems which are not subject to the Commission’s jurisdiction and provide service to those systems’ present users. The wastewater systems proposed to be acquired are Arcadia Pines Sewer Association, Inc. (Arcadia Pines), Carriage Park Neighborhood Association, Inc. (Carriage Park), Marshall Ridge Sewer Association, Inc. (Marshall Ridge), and Randview Septic Corporation (Randview). The wastewater systems proposed for acquisition provide wastewater services to approximately 160 users in areas of Graves and McCracken counties, Kentucky.¹

BACKGROUND

Bluegrass Water is a limited liability company with its principal place of business at 500 Northwest Plaza Drive, Suite 500, Saint Ann, Missouri 63074.² Bluegrass Water

¹ Verified Application at

² *Id.*

Utility Holding Company, LLC (Holding Company) is the member owner of Bluegrass Water.³ Kentucky Central States Water Resources, LLC (CSWR) is the member owner of Holding Company.⁴ First Round CSWR, LLC (First Round) and Central States Water Resources, Inc. (CSWR, Inc.) are affiliates of each other and sit atop the corporate structure (CSWR Group).⁵

By the Commission's August 14, 2019 Order in Case No. 2019-00104, Bluegrass Water was approved to own, control, operate, and manage eight wastewater systems.⁶ By October 1, 2019, Bluegrass Water had closed on all the approved transactions in Case No. 2019-00104, and has been operating all wastewater facilities acquired and providing service to customers since that time. By October 14, 2019, Bluegrass Water issued Adoption Notices for the filed tariffs of each of the transferring utilities in Case No. 2019-000104. With the acquisition of the eight wastewater systems, Bluegrass Water now serves approximately 1,300 wastewater customers in Bullitt, Franklin, Hardin, Madison, Marshall, McCracken, Scott, and Shelby counties. By the Commission's February 17, 2020 Order in Case No. 2019-000360, Bluegrass Water approved acquisition of the

³ Case No. 2019-00104, *The Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC and the Transfer of Ownership and Control of Assets by: P.R. Wastewater Management, Inc.; Marshall County Environmental Services LLC; LH Treatment Company, LLC; Kingswood Development, Inc.; Airview Utilities, LLC; Brocklyn Utilities, LLC; Fox Run Utilities, LLC; and Lake Columbia Utilities, Inc.* (filed Apr. 16, 2019) at 3.

⁴ *Id.*

⁵ *Id.* at 3–4.

⁶ Case No. 2019-00104, *The Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC and the Transfer of Ownership and Control of Assets by: P.R. Wastewater Management, Inc.; Marshall County Environmental Services LLC; LH Treatment Company, LLC; Kingswood Development, Inc.; Airview Utilities, LLC; Brocklyn Utilities, LLC; Fox Run Utilities, LLC; and Lake Columbia Utilities, Inc.* (Ky. PSC August 14, 2019).

assets of two sewer utilities and one water utility.⁷ With the acquisition of the two sewer utilities and the water utility, Bluegrass Water will serve another 700 customers in Calloway, McCracken, and Oldham counties.⁸

The Nonjurisdictional Wastewater Systems Proposed to be Acquired

Arcadia Pines is a nonstock, nonprofit corporation. Arcadia Pines was formed to use, operate, and maintain a wastewater disposal system to serve lots in the Arcadia Pines Subdivision in McCracken County.⁹ Arcadia Pines currently provides wastewater service to 25 lots.¹⁰ Title to the wastewater system facilities that Arcadia Pines operates and maintains is held by Heartland Manufactured Homes, LLC (Heartland).¹¹ Heartland is a member-managed company with its sole member, Tina L. Martin. Heartland was the developer of the Arcadia Pines Subdivision and owns the wastewater system facilities.¹² Heartland does not charge Arcadia Pines or the property owners/residents for use of or access to the system facilities.¹³ The Purchase District Health Department has oversight of the system's operation. Arcadia Pines operates the system, as well as bills and collects for the wastewater service provided.¹⁴ Charges and other terms for service by Arcadia

⁷ Case No. 2019-00360, *Electronic Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC and the Transfer of Ownership and Control of Assets by Center Ridge Water District, Inc.; Joann Estates Utilities, Inc.; and River Bluffs, Inc.* (Ky. PSC Feb. 17, 2020).

⁸ *Id.*

⁹ Verified Application at 4.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 5.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 6.

Pines are provided in its Bylaws. The service fee is a monthly assessment of \$25.00, the amount originally specified.¹⁵ Arcadia Pines bills and collects the monthly charges, and third-party contractors provide maintenance, repair, and other services for the system.¹⁶ Although the Bylaws provide for a \$500 tap-on fee, that fee has been waived to induce subdivision unit owners to tap into the system rather than construct septic drain fields.¹⁷ Interest is charged on delinquent accounts from the due date at 10 percent per annum.¹⁸

Carriage Park is a nonstock, nonprofit corporation, formed to use, operate, and maintain a wastewater disposal system to serve lots in the Carriage Park Subdivision in McCracken County.¹⁹ Carriage Park has also approved taps outside of the Carriage Park Subdivision to two lots immediately south of the Carriage Park Subdivision, and the owners of the lots are members of the Neighborhood Association.²⁰ The local Purchase District Health Department has oversight of the system's operation.²¹ Charges and other terms for Service by Carriage Park are provided in its Bylaws. The service fee is a monthly assessment of \$16.00, the amount originally specified. Interest is charged on delinquent accounts from the due date at 10 percent per annum. There is no charge specified in the Bylaws for being hooked up to the system.²² In February 2019, Carriage Park had 38

¹⁵ Verified Application at 5.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 7.

²⁰ *Id.*

²¹ *Id.* at 8.

²² *Id.* at 7.

billed residential accounts.²³ For a fee, the West McCracken County Water District, which provides water service to the Carriage Park Subdivision, bills and collects the monthly charges for Carriage Park. Maintenance, repair, and other services for the system are provided by third-party contractors.²⁴

Marshall Ridge is a nonstock, nonprofit corporation. Marshall Ridge was formed to use, operate, and maintain a wastewater disposal system to serve lots in the Marshall Ridge Subdivision in McCracken County. Charges and terms of service by Marshall Ridge are provided in its Bylaws. The service fee is a monthly assessment of \$15.00, the amount originally specified. The Bylaws provide for a \$500 tap-on fee and for interest to be charged on delinquent accounts from the due date at 10 percent per annum.²⁵ In February 2019, there were 40 billed residential accounts using the Marshall Ridge system.²⁶ The local Purchase District Health Department has oversight of the system's operation. For a fee, Paducah Water Works, which provides water service to the Marshall Ridge Subdivision, bills and collects the monthly charge for Marshall Ridge. Maintenance, repair, and other services for the system are provided by third-party contractors.²⁷

Randview is a nonprofit corporation, formed to own and operate a wastewater system for owners of lots in the Randview Subdivision in Graves County. Membership in Randview is limited to owners of lots in the Randview Subdivision that are tapped into the

²³ Verified Application at 8.

²⁴ *Id.*

²⁵ *Id.* at 9.

²⁶ *Id.* at 10.

²⁷ *Id.*

system.²⁸ Charges and other terms of service by Randview are provided in a Septic Effluent Agreement between Randview and the owner of each served lot. Although service by Randview is available only to properties within the Randview Subdivision, not every lot in the Randview Subdivision is connected to or served by the system. Some lots in the Randview Subdivision have individual septic systems (tank and drainfield) and others are served by the city of Mayfield. The system serves most of the platted lots in the Randview Subdivision. Each of the lots served must have its own septic tank and discharge only tank effluent into the Randview system.²⁹ In February 2020, there are 55 customer properties on the system: one commercial property (a church), 52 one-tap residential properties, and two two-tap residential properties. The baseline charge is a fixed fee of \$25.00 per month per tap, and the corporate by-laws permit interest at 10 percent per annum to be charged from the due date on delinquent accounts for past service. The connection fee is \$950 for all properties except a duplex, for which the fee is \$1,500.³⁰ Administration of the system is provided by the Randview Subdivision developer, Greenwood Acres, which arranges for third-party billing and collection, maintenance, repair, and other services for the system. The Graves County Health Department has oversight of the system's operation.³¹

²⁸ Verified Application at 10.

²⁹ *Id.* at 11.

³⁰ *Id.*

³¹ *Id.* at 11–12.

The Transaction

Bluegrass Water has executed a sales agreement (Agreement) with each system's facilities owner designating the buyer as CSWR, Inc., or its affiliate. CSWR, Inc. has designated Bluegrass Water, its affiliate, as the buyer for each Agreement. Each Agreement provides for the sale of all of the assets pertaining to operation of the respective wastewater system.³² The sale includes all assets used or useful to operate the system, including real property interests, service machinery and equipment, other tangible fixtures or personality, franchises, contract rights, accounts receivable, and other intangibles.³³ Assets expressly excluded from the transfer are cash and banking deposits prior to the Closing.³⁴ This exclusion applies to any escrow or other depository accounts that are maintained for each system. Finally, upon the closing of the transactions, the Agreements provide for Bluegrass Water to become responsible at the closing of the transactions for all assets from that point forward.³⁵

Bluegrass Water's acquisition of each system's assets will be funded with equity capital from its affiliate CSWR, LLC. Bluegrass Water plans to fund the work to repair and improve the acquired systems with debt financing, including long-term loans which Bluegrass Water has access to through CSWR, LLC. Over time, this borrowed funding will balance the equity funding to achieve the planned 50-50 capital structure that has been developed for Bluegrass Water.³⁶

³² Verified Application at 14.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 15.

From and after the closing of the transactions of each system, Bluegrass Water will provide service in accordance with its current sewer tariff on file with the Commission with a sheet specific to each system providing for the monthly recurring monthly rates now charged to its users.³⁷ Over time, Bluegrass Water will integrate the four systems proposed to be acquired in the instant case with others operated by Bluegrass Water in Kentucky so that regulatory and technical standards are met on a uniform basis, and customers will be served under a unified tariff.

The day-to-day operations, billing, and customer service functions are to be provided by third-party contractors for Bluegrass Water's systems.

The systems will be operated by a third-party operations and maintenance firm engaged by Bluegrass Water. In Bluegrass Water's other Kentucky systems, that firm is Midwest Water Operations, LLC (Midwest Water). It is anticipated that Midwest Water will be the entity to provide operations and maintenance service for the systems proposed to be acquired in the instant case. Midwest Water has knowledgeable and experienced personnel who carry the necessary state licenses and has insurance coverage necessary to manage the daily wastewater operations of the systems. In addition to the service obligations during normal business hours, Midwest Water will be required to have a 24-hour emergency service line on which customers may report any service disruption with notice of service disruption calls to be forwarded to Josiah Cox, the president of Central States, Inc.

A third-party firm engaged by Bluegrass Water will send out bills and handle service-related billing questions for the acquired systems. In Bluegrass Water's other

³⁷ Verified Application at 15.

Kentucky systems, that firm is Nitor Billing Services, LLC (Nitor Billing Services). It is anticipated that Nitor Billing Services will have this role for the systems proposed to be acquired in the instant case. Nitor Billing Services has in place an online billing system to receive credit cards and e-checks from customers and a Bluegrass Water specific customer service email account to handle customer inquiries and other interactions. The customer service representatives are to be available during normal business hours and to take messages 24 hours a day.³⁸

Bluegrass Water will maintain a toll-free number and a website that contains a summary of customers' rights, tariffs, or links to the tariffs for each system; contact information for emergencies during regular and after-hours to report service issues; links to any tariffs filed in the future with the Commission; and links to Bluegrass Water's systems' maps on the Kentucky Infrastructure Authority Wastewater Mapping website. Bluegrass Water's arrangements will ensure continuity of service to current customers of the four systems and that future customers are provided with a quality of service equal to or better than that currently being provided. These arrangements include implementation of computerized maintenance management system for utility facilities, online bill-pay options, up-to-date website bulletins about current service status, and service initiation/discontinuance procedures.³⁹

CSWR, Inc. will be responsible for all management, financial reporting, underground facility safety and locations services, Commission and environmental regulatory reporting and management, record keeping, and final customer dispute

³⁸ Verified Application at 16.

³⁹ *Id.*

management. Proportional costs for those services will be allocated to Bluegrass Water, which will be considered as one utility, using the Massachusetts Formula.⁴⁰

DISCUSSION

Bluegrass Water argues that Commission approval is not necessary for the proposed asset acquisitions of the wastewater systems and its service to the systems' customers, with the exception of accommodating revisions to Bluegrass Water's tariff for the initial rates to be charged on the systems. Bluegrass Water goes on to state that, even if other Commission approvals or authorizations were necessary, the proposed acquisitions and continued service by Bluegrass Water meets relevant standards.

Argument that Commission Approval is Not Required Pursuant to Chapter 278

Bluegrass Water asserts that the "transfer" and "certificate" requirements of KRS 278.020(6) – (8) are inapplicable to the proposed transactions because the transactions do not involve "utility" facilities or entities within the meaning of KRS 278.010(3). Bluegrass Water states that KRS 278.020(6) – (8) require prior Commission approval for transfer or acquisition of ownership or control of utility assets or of a utility itself. Bluegrass Water states that the word "utility" is defined for purposes of Chapter 278 in KRS 278.010(3). Bluegrass Water asserts that, regardless of the type of service provided, a "utility" provides the service "for the public, for compensation." Therefore, the systems to be acquired in the instant case are not utilities within the meaning of KRS 278.010(3).⁴¹

Bluegrass Water also notes that the Commission has previously found that the transfer and acquisition provisions of KRS 278.020 do not apply when a jurisdictional

⁴⁰ Verified Application at 16-17.

⁴¹ *Id.* at 18

utility acquires facilities from a non-jurisdictional service provider, and the jurisdictional utility continues the service provided by the non-jurisdictional service providers. Therefore, with “no statutory requirement or authority for Commission approval of the transfer of ownership of [non-utilities’] wastewater assets”⁴² to a utility, the standards of KRS 278.020(6) – (8) do not apply in the instant case.

Bluegrass Water asserts that a certificate of public convenience or necessity pursuant to KRS 278.020(1) is not required in the instant case because KRS 278.020(1) does not apply to a utility that has already “commence[d] providing utility service” in Kentucky and is not seeking to construct anything.⁴³ Bluegrass Water states that the provision currently codified as KRS 278.020(6) has long governed transfers of existing utility-service assets and that the more recent provisions of KRS 278.020(7) and (8) were added to give the Commission jurisdiction over transactions in which ownership or control of the utility itself was changing hands. Bluegrass Water states that the approval of a transfer by the Commission under KRS 278.020 (7) and (8) has not also included grant of a KRS 278.020(1)(a) certificate of public convenience or necessity.⁴⁴ Bluegrass Water asserts that this is due to the acquirer adding to its assets or expanding its service territory. Bluegrass Water also asserts that in the case of existing assets and service, the requirements of KRS 278.020(1)(a) are also superfluous because the public convenience and necessity are demonstrated by the continued use of a service already provided.

⁴² Verified Application at 23, quoting, Case No. 2005-00206, *The Verified Joint Application of the City of Owenton and Kentucky-American Water Company for Approval of the Transfer of the Ownership of Water- and Wastewater-Related Assets of the City of Owenton to Kentucky-American Water Company* (Ky. PSC July 22, 2005) at 3.

⁴³ *Id.* at 22.

⁴⁴ *Id.* at 24.

Finally, Bluegrass Water asserts that no other requirement pursuant to KRS 278.020 is applicable in the instant case.⁴⁵

Bluegrass Water states that KRS 278.020(3) and (10) requirements apply only if a construction certification or approval is needed for a transfer or acquisition. Neither approval of a transfer or acquisition nor a certificate of public convenience and necessity is required in this case and, thus, the standards in KRS 278.020(3) and (10) are inapplicable.

Bluegrass Water states that the requirement pursuant to KRS 278.020(5) of a certificate of convenience and necessity from the Commission in order to apply for or obtain “any franchise, license, or permit from any city or other governmental agency” is also inapplicable. Bluegrass Water states that no municipal franchise is involved for the systems acquired, and that the permit for each system was obtained from the respective local health agency or authority at the time each system was constructed. In addition, the required showing regarding demand and need is “for the service sought to be rendered.” Here, the service is already being rendered and the continued demand and need for the service is shown by the past and continuing use of the systems.

KRS 278.020(6) and 278.020(7) require prior Commission approval of the transfer or control of any “utility.” None of the wastewater systems to be transferred in this case are “utilities” subject to the Commission’s jurisdiction as that term is defined in KRS 278.010(3). The systems to be acquired are not, and have not been, registered with the Commission as wastewater utilities. Furthermore, based on the evidence of record, the systems to be acquired do not meet the definition of a utility because they do not provide

⁴⁵ Verified Application at 24-25.

“the collection, transmission, or treatment of sewage for the public”⁴⁶ All of the systems to be acquired provide service to a specific subdivision and receipt of service is predicated upon living within that specific subdivision. The Commission has held that such systems are not public utilities subject to the Commission’s jurisdiction.⁴⁷ The Commission finds, therefore, that neither KRS 278.020(6) nor KRS 278.020(7) are applicable to the proposed transaction.

The Commission acknowledges that it had previously determined that a jurisdictional utility’s acquisition of a non-jurisdictional utility does not require Commission approval. For example, in Case No. 2005-00206⁴⁸, the Commission found that Kentucky-American Water Company’s (Kentucky-American) acquisition of a municipal water utility did not require Commission approval because the municipal’s facilities were not a utility as defined under KRS 278.010. We, however, part ways with this precedent as discussed below.

KRS 278.010(1)(a) provides, in part, that, “[n]o person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public . . . until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction.” The

⁴⁶ KRS 278.010(3)(f).

⁴⁷ See, Case No. 2020-00013, *Removal of Bush Gardens Enterprises, LLC from Public Service Commission Jurisdiction* (Ky. PSC Jan. 24, 2020); Case No. 1999-00515, *Application of Huntington Woods Neighborhood Association, Inc., for Transfer of Ownership of the Sewage Treatment Plant Owned by John and Marlene Fehsal Located in Huntington Woods Subdivision* (Ky. PSC June 14, 2000); and Case No. 2003-00360, *Petition of Doe Valley Utilities, Inc. for Determination as to Jurisdictional Status of Doe Valley Utilities, Inc. and Additional or Alternative Determinations* (Ky. PSC May 19, 2004).

⁴⁸ Case No. 2005-00206, *The Verified Joint Application of the City of Owenton and Kentucky-American Water Company for Approval of the Transfer of the Ownership of Water- and Wastewater-Related Assets of the City of Owenton to Kentucky-American Water Company* (Ky. PSC July 22, 2005).

systems that Bluegrass Water proposes to acquire are not utilities, and thus do not provide utility service as defined in KRS 278.010, but upon approval of this transaction, those non-utilities will be providing utility service “to or for the public.” Even though the acquired systems will technically be part of Bluegrass Water, upon closing of the proposed transaction, those entities will commence providing utility service, to or for the public, at their original rates, with the rates that they were charging before being acquired by Bluegrass Water. Eventually Bluegrass Water will likely seek a unified rate, however, upon acquisition, Arcadia Pines, Carriage Park, Marshall Ridge, and Randview will have separate rates and separate systems, and will be providing service to or for the public for compensation. As such, Commission approval in the form of a certificate of public convenience and necessity is required prior to their acquisition by Bluegrass Water.

Requiring approval under KRS 278.020(1)(a) ensures that the Commission discharges its statutory duty to ensure that the acquiring utility’s ability to provide adequate service at fair, just, and reasonable rates is not impaired. The Commission “is charged with responsibility, and vested with the power, to see that the service of public utilities is adequate. . . .”⁴⁹ Insofar as the acquisition of a non-utility’s system may impact a jurisdictional utility’s ability to provide adequate and reasonable service, either to customers of the system to be acquired or the customers of the acquiring utility, it follows that the Commission has such authority to prevent such an acquisition and its approval for such an acquisition is required. The Commission finds that the plain reading of KRS 278.020 supports and requires such a determination.

⁴⁹ *Pub. Serv. Comm’n v. Southgate*, 268 S.W. 19, 21 (Ky. 1954).

This interpretation of KRS 278.020 finds additional support in case law. In *Southgate* the Kentucky Supreme Court concluded that the Commission had the implied authority to review a utility's acquisition of a municipal utility. The Kentucky Supreme Court subsequently described its decision in *Southgate* as such:

In Public Service Commission v. Cities of Southgate and Highland Heights, 268 S.W.2d 19 (Ky.1954), this Court concluded that the PSC's power included not only powers expressly provided by statute but could also encompass powers necessarily implied to take action to meet its statutory duties. Specifically, in that case this Court concluded that the PSC had the implied power to approve or disapprove a utility systems sale, despite the lack of express statutory authority to do so, because of the PSC's general statutory authority under KRS 278.040 to regulate utility service.⁵⁰

The Commission's reading of KRS 278.020(1)(a) to require Commission approval of a utility's acquisition of a nonjurisdictional utility's system is consistent with the Commission's implied powers.

The Commission acknowledges that this decision is a departure from previous decisions of the Commission in which the Commission concluded that KRS 278.020 does not apply to a utility's acquisition of a municipal utility system, and neither was Commission approval necessary. However, those decisions rested upon a flawed reading of KRS 278.020 and an incorrect rejection of the Commission's plenary powers in general to ensure that utilities provide adequate and reasonable service at fair, just, and reasonable rates. The Commission's previous decision to not enforce KRS 278.020(1)(a) to certain acquisitions is not a bar to the Commission altering its

⁵⁰ *Kentucky Public Service Com'n v. Commonwealth ex rel. Conway*, 324 S.W.3d 373, 380 (Ky. 2010).

interpretation of KRS 278.020 and the Commission will hereafter require its approval before a utility may acquire the system of a nonjurisdictional utility.⁵¹

We find, however, that Bluegrass Water's acquisition of Arcadia Pines, Carriage Park, Marshall Ridge, and Randview should be approved. Bluegrass Water has provided sufficient information regarding the state of each of the systems it seeks to acquire, including the known problems with the system, the actions necessary to repair the systems, and adequate financial information. The evidence of record supports the Commission's decision that the acquisition of Arcadia Pines, Carriage Park, Marshall Ridge, and Randview will not impair Bluegrass Water's ability to provide reasonable and adequate service, to either those customers no Bluegrass' current customers.⁵²

We further find that KRS 278.300(1) is not applicable to the transactions proposed in the Application. Bluegrass Water is not issuing any new evidences of indebtedness to

⁵¹ The Commission is not required to continue with a flawed interpretation of its statutes or powers. See, *N.L.R.B. v. Baltimore Transit Co.*, 140 F.2d 51, 54-55 (4th Cir. 1944) (stating: "Whatever may be the effect of quasi-judicial determinations of administrative agencies (*Cf. Arizona Grocery Co. v. Atchison, etc., R. Co.*, 284 U.S. 370, 389, 52 S.Ct. 183, 76 L.Ed. 348), it is well settled that the principle of res adjudicata has no application to their exercise of other powers. 30 Am.Jur. p. 930; *Pearson v. Williams*, 202 U.S. 281, 26 S.Ct. 608, 50 L.Ed. 1029; *Tagg Bros. & Moorehead v. United States*, 280 U.S. 420, 445, 50 S.Ct. 220, 74 L.Ed. 524; *State Corp. Comm. v. Wichita Gas Co.*, 290 U.S. 561, 569, 54 S.Ct. 321, 78 L.Ed. 500; *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 64, 56 S.Ct. 720, 80 L.Ed. 1033. An administrative agency, charged with the protection of the public interest, is certainly not precluded from taking appropriate action to that end because of mistaken action on its part in the past. *Cf. Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145, 60 S.Ct. 437, 84 L.Ed. 656; *Houghton v. Payne*, 194 U.S. 88, 100, 24 S.Ct. 590, 48 L.Ed. 888. Nor can the principles of equitable estoppel be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials. *United States v. San Francisco*, 310 U.S. 16, 32, 60 S.Ct. 749, 84 L.Ed. 1050; *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409, 37 S.Ct. 387, 61 L.Ed. 791; *United States v. City of Greenville*, 4 Cir., 118 F.2d 963, 966."

⁵² A utility cannot change an established practice or precedent without explanation. See *GTE v. Revenue Cabinet*, 889 S.W.2d 788, 792 (Ky. 1994) ("This Court has held that interpretation of a statute made by an administrative agency, once made and applied over a long period of time, cannot be unilaterally revoked by the agency."); *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991). The Commission has adequately explained in this Order its reasons for deviating from past practices. Furthermore, to the extent that this new interpretation is applied to the instant proceeding, the Commission notes that the Applicants suffer no prejudice because the Commission is granting the relief requested in the Application.

acquire Arcadia Pines, Carriage Park, Marshall Ridge, or Randview, nor is Bluegrass Water assuming any obligations associated with any of the systems. As the Agreements make no provision for the purchase amount to be paid over an extended period of time, it does not constitute an evidence of indebtedness. KRS 278.300(1) does not require prior Commission review or approval of the proposed transaction. As no statutory requirement or authority for Commission approval of the transfer of ownership of the wastewater assets of Arcadia Pines, Carriage Park, Marshall Ridge, or Randview exists, we find that the portion of the Application requesting Commission approval is moot.

Approval for Tariff Revisions to Bluegrass Water's Tariff

Due to the transferors not having tariffs on file with the Commission which could be adopted by Bluegrass Water, Bluegrass Water proposes revisions to its existing tariff to establish rates for the systems proposed to be acquired when the transactions have closed. The proposed new sheets for Bluegrass Water's tariff will set initial rates for customers in the acquired systems' service areas at the existing levels established for each acquired system.⁵³ Bluegrass Water asserts that the proposed rates and other terms of service meet the criteria of KRS 278.030. The general terms and conditions in Bluegrass Water's tariff are uniform for all its systems, and were subject to Commission review before becoming effective November 20, 2019. The Bluegrass Water wastewater tariff does not have unified rates for the monthly flat service fee and instead charges customers on the respective systems at the applicable pre-acquisition rate per month.

Bluegrass Water is proposing the same for the service fees to customers on the systems in the instant case. Bluegrass Water argues that in comparing the rate schedules

⁵³ Verified Application at 19.

in Bluegrass Water’s filed tariff, the proposed recurring rates for the four systems are “fair, just, and reasonable” in accordance with KRS 278.030(1) because (a) the filed tariff rates are set at the level in the tariff of the respective transferor utility as of the date of the acquisition, (b) those rates had been subject to Commission review, and (c) the lowest flat fee currently tariffed for Bluegrass Water’s existing systems is \$28.84 per month, which is higher than the existing \$15 to \$25 charge per month for the four systems proposed to be acquired.⁵⁴ Bluegrass Water goes on to assert the following as indicative that the recurring per month flat fees proposed for the acquired systems are fair, just, and reasonable: (1) the existing rate was established by a non-profit corporation and has been paid by users who are also members of the non-profit; (2) the proposed flat fee for each system is substantially lower than the initial rate approved in a recent case in which the Commission established initial rates for a small wastewater utility⁵⁵ and the tariffed rates for other systems with a small number of users; (3) standing alone, the fixed charge by Bluegrass Water’s third-party contractor for operations and maintenance service of \$4,133 per plant site per month would yield a range of per-user monthly charges from \$165.32 for the 25 customers in the Arcadia Pines system to \$75.15 for the 55 customers of the Randview system.

The Bluegrass Water wastewater tariff is also not unified regarding late payment fee, connection fees, or tap-on charges. Instead, Bluegrass Water charges customers on those systems it has acquired any applicable pre-acquisition rate, which Bluegrass

⁵⁴ Verified Application at 19–20.

⁵⁵ Bluegrass Water references Case No. 2015-00306, *Application of Bush Gardens Enterprises, LLC for Approval of Initial Sewer Rates Pursuant to the Alternative Rate Filing Procedures for Small Utilities and Tariff* (Ky. PSC Mar. 24, 2016) in which the Commission established an initial monthly flat rate of \$123.65.

Water proposes to do in the instant case. The nonrecurring rate for a late payment charge (10 percent per annum) on the four systems is equivalent to the late payment charge in Bluegrass Water tariffed rates for its existing systems.⁵⁶ In addition, the existing and proposed nonrecurring rates for tap-on charges are similar to the charges for new taps, reconnections, and terminations for Bluegrass Water’s existing systems.⁵⁷ The rates proposed are also uniform throughout the respective area and are available to all users or provide “suitable and reasonable classifications of its service, patrons and rates” in accordance with KRS 278.030(3). There is no data source for preparing a full rate application or alternate rate filing to establish initial tariffed rates for customers on these systems. The current owners and operators of the systems are not among the KRS 278.010(3) “utilities” regulated by the Commission and neither report operations, expense, or revenue data to the Commission on a regular basis nor keep their books in accordance with the Uniform System of Accounts applicable to public utilities. As a result, Bluegrass Water does not have years of data from its own operation of the system in requesting to set initial rates. The proposed tariff revisions would go into effect simultaneously with the closing on the wastewater service facilities, so there is no gap in service or tariff coverage for the affected users.

The proposed changes in Bluegrass Water’s tariff do not affect its existing customers’ rates or other terms of service. As a part of its plan to integrate its Kentucky systems, Bluegrass Water anticipates that by mid-2021 it will be filing proposed revisions and adjustments to establish a unified tariff with uniform rates through its service area.

⁵⁶ Verified Application at 20.

⁵⁷ *Id.*

Bluegrass Water advises that it will file for a general rate adjustment of the rates for the four subject systems – individually, as a group, or as part of a wider adjustment – within 15 months of the last acquisition closing on the Arcadia Pines, Carriage Park, Marshall Ridge, and Randview facilities, when Bluegrass Water will have a full year of data from owning and operating those systems.

The Commission finds that the proposed initial rates for the acquired systems will be fair, just, and reasonable and should be approved. We base this finding on a variety of factors, notably that the rates are currently being charged to the systems' customers and that the rates are lower than any existing rates for Bluegrass Water's current customers. We also accept these rates based upon Bluegrass Water's assertion that it will file in mid-2021 for a unified rate for its various systems.

In Case No. 2019-00104 and Case No. 2019-00360, the Commission imposed certain conditions on Bluegrass Water regarding its acquisition of jurisdictional utilities. Many of those conditions are not applicable to the current proposed transactions because the systems to be acquired are not currently under the Commission's jurisdiction. However, upon closing of the transactions, the systems will be jurisdictional to the Commission due to their ownership by Bluegrass Water. The Commission finds that it should impose the post-closing requirements as discussed below.

Several of the engineering reports noted that significant improvements were necessary to the plants to be acquired. Accordingly, the Commission will require that, one month after the closing of the transactions, Bluegrass Water file a report listing discharge quality, number of service interruptions, employee or contractor response times, and Division of Water (DOW) or other applicable regulatory agencies violations or

citations for the preceding month. This will serve as a baseline against which to judge improvements to the systems. Bluegrass Water shall also file, at six months and one year after the closing of the transaction, a report listing discharge quality, number of service interruptions, employee or contractor response times, and DOW or other violations or citations for the preceding year. This will allow the Commission to review the anticipated progress that Bluegrass Water has made in improving quality in the systems.

In addition to the reports above, we will also require Bluegrass Water to maintain its records in such a way as to be able to readily distinguish between violations, repairs, investments, etc., for each system. This will allow review of Bluegrass Water's practices and will assist the Commission in determining how Bluegrass Water has used its resources in the operation and management of various systems as well as the reasonableness of the expenses and practices in any future ratemaking proceeding.

We also find that the imposition of the following post-closing conditions is necessary to ensure that the proposed transaction is in the public interest. Pursuant to KRS 278.020, Bluegrass Water shall not begin the construction of any plant, equipment, property, or facility for furnishing water or wastewater services to the public, except ordinary extensions of existing systems in the usual course of business, until Bluegrass Water has obtained a Certificate of Public Convenience and Necessity from the Commission.

Pursuant to KRS 278.300, Bluegrass Water shall not issue any securities or evidences of indebtedness, or assume any obligation or liability in respect to the securities

or evidences of indebtedness of any other person, until Bluegrass Water has been authorized to do so by an Order of the Commission.

IT IS THEREFORE ORDERED that:

1. Pursuant to KRS 278.020(1)(a), Arcadia Pines, Carriage Park, Marshall Ridge, and Randview are granted a Certificate of Public Convenience and Necessity to provide utility service to and for the public.

2. Bluegrass Water's Application of Commission approval of acquisition of certain wastewater systems is granted.

3. The initial rates proposed by Bluegrass Water are approved.

4. Within ten days of completion of the transfer of Arcadia Pines, Carriage Park, Marshall Ridge, and Randview to Bluegrass Water, Bluegrass Water shall notify the Commission in writing of the date that each transfer occurred.

5. One month after the closing of the transaction, Bluegrass Water shall file for each of the acquired systems a report listing discharge quality, number of service interruptions, employee or contractor response times, and any violations or citations for the preceding month.

6. Six months after the closing of the transaction, Bluegrass Water shall file for each of the acquired systems a report listing discharge quality, number of service interruptions, employee or contractor response times, and any violations or citations for the preceding month.

7. One year after the closing of the transaction, Bluegrass Water shall file for each of the acquired systems a report listing discharge quality, number of service

interruptions, employee or contractor response times, and DOW violations or citations for the preceding month.

8. Bluegrass Water shall maintain its records in such a way to be able to readily distinguish between violations, repairs, investments, etc., for each system.

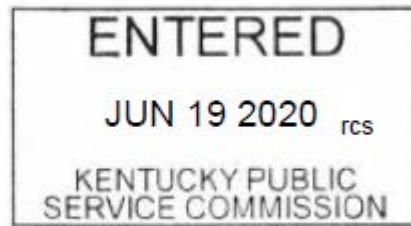
9. Bluegrass Water shall not begin the construction of any plant, equipment, property, or facility for furnishing wastewater or water services to the public, except ordinary extensions of existing systems in the usual course of business, until Bluegrass Water has obtained a Certificate of Public Convenience and Necessity from the Commission.

10. Pursuant to KRS 278.300, Bluegrass Water shall not issue any securities or evidences of indebtedness or assume any obligation or liability in respect to the securities or evidences of indebtedness of any other person until Bluegrass Water has been authorized to do so by an Order of the Commission.

11. Within 20 days of the close of the acquisition of each system, Bluegrass Water shall file revised tariff sheets with the Commission, using the Commission's electronic Tariff Filing System, containing the rates approved in this Order.

12. This case is closed and removed from the Commission's docket.

By the Commission



ATTEST:

A handwritten signature in blue ink, consisting of stylized initials and a surname, positioned above a horizontal line.

Executive Director

Case No. 2020-00028

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