

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

This matter arises from an application for a rate increase and approval of construction filed by Bluegrass Water Utility Operating Company, LLC (Bluegrass Water). On December 23, 2020, the Commission entered a procedural schedule that allowed any person to file a motion to intervene on or before January 6, 2021. Homestead Home Owners Association, Inc. (Homestead HOA); The Deer Run Estates Homeowners Association, Inc. (Deer Run HOA); Longview Homeowners Association, Inc. (Longview HOA); 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, Movants) filed four separate motions to intervene in this matter. Bluegrass Water has responded to each such motion, and Movants each filed a reply, either jointly or separately, in support of each such motion. Movants' motions to intervene are now before the Commission for a decision on the merits.

BACKGROUND

In its November 23, 2020 motion for leave to intervene, Homestead HOA indicated that it represents the interests and enforces the collective obligations of the approximately

250 homeowners who reside in the Homestead subdivision, which is served by one of Bluegrass Water's sewer systems. Homestead HOA argues that it has a special interest in this proceeding that is not otherwise adequately represented and that it is likely to present issues and develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

Specifically, Homestead HOA argues that while the Attorney General will likely seek to keep the revenue requirement as low as possible for all customers, the interests of customers served by different systems will diverge at the point at which the revenue requirement is allocated amongst the various constituents because Bluegrass Water is requesting a unified rate that Homestead HOA asserts will result in the customers of some systems subsidizing those of other systems. Homestead HOA also argues that this matter is likely to be complicated given the unique circumstances surrounding Bluegrass Water's service, including the fact that Bluegrass Water has no employees, but rather, relies entirely upon corporate affiliates; Bluegrass Water is proposing to include approximately \$6.4 million in new investments in rate base that Homestead HOA asserts have not been fully supported by the application; and Bluegrass Water is proposing an overall rate of return on common equity of 11.80 percent on its jurisdictional rate base that Homestead HOA argues exceeds current market conditions. Homestead HOA asserted that it is well suited to address those complex issues to assist the Commission in developing a full record. Thus, Homestead HOA argues that it is entitled to intervene based on a special interest in the case that is not otherwise adequately represented and its ability to present issues and to develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

In its December 18, 2020 motion to intervene, Deer Run HOA indicated that it represents 78 homeowners who reside in the Deer Run Estates neighborhood in Scott County, which is currently served by the Delaplain Disposal Company (Delaplain) that Bluegrass Water is currently seeking to purchase. Deer Run HOA, which is represented by the same attorney as Homestead HOA, Goss Samford, PLLC (Goss Samford), refers to the arguments made by Homestead HOA for intervention and argues that it is entitled to intervene for those same reasons. Deer Run HOA also argued that it has a special interest because Bluegrass Water has proposed to treat the residential customers served by the Delaplain system differently than the commercial and industrial customers served by the same system by proposing a larger percentage increase for residential customers than for industrial and commercial customers.

In its December 23, 2020 motion to intervene, Longview HOA indicates that it is a homeowners association for the Longview neighborhood located in Scott County, and the Longview neighborhood is served by the same system that serves Homestead HOA. Longview HOA, which is also represented by Goss Samford, refers to the arguments made by Homestead HOA for intervention and argues that it is entitled to intervene for the reasons asserted by Homestead HOA.

In their January 6, 2021 joint motion to intervene, Arcadia, Carriage Park, Marshall Ridge, and Randview indicated that Arcadia is a nonprofit corporation that represents the interests of approximately 25 homeowners in the Arcadia neighborhood in McCracken County; Carriage Park is a nonprofit corporation that represents approximately 38 homeowners in the Carriage Park neighborhood in McCracken County; Marshall Ridge is a nonprofit corporation that represents approximately 40 homeowners in the Marshall

Ridge neighborhood in McCracken County; and Randview is a nonprofit corporation that represents approximately 55 homeowners and one church in the Randview neighborhood in Graves County. The Arcadia neighborhood, Carriage Park neighborhood, Marshall Ridge neighborhood, and Randview neighborhood are served by systems Bluegrass Water was approved to purchase in Case No. 2020-00028¹ and on which it closed before this matter was deemed to have been filed. Arcadia, Carriage Park, Marshall Ridge, and Randview previously owned the systems that served their respective neighborhoods, but the systems were not considered to be utilities because the nonprofit corporations that owned each system were controlled by the customers themselves. Arcadia, Carriage Park, Marshall Ridge, and Randview, who are also represented by Goss Samford, argue that they should be permitted to intervene for the reasons asserted by Homestead HOA.

Bluegrass Water filed a response to Homestead HOA's motion for leave to intervene and a joint response to Deer Run HOA and Longview HOA's motion for leave to intervene on December 7, 2020, and January 5, 2021, respectively. Bluegrass Water argues, among other things, that the Movants do not have "standing" to intervene or a special interest in the case that is not otherwise adequately represented because movants failed to establish that their corporate purpose is to protect the interest of the customers they purport to represent or that they have a special interest beyond the generalized interest of residential customers that is already adequately represented by the Attorney General. Bluegrass Water also argues that the Movants failed to demonstrate that they would present issues or develop facts that will assist the

¹ Case No. 2020-00028, *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* (Ky. PSC June 19, 2020).

Commission in fully considering the matter without unduly complicating or disrupting the proceedings because they did not raise any specific issues and do not have the experience or expertise to present information regarding such issues or facts. Bluegrass Water further argues that the Movants will have an adequate opportunity to participate even if they are not granted full intervention because they can review the material in the record and making public comments.

Additionally, in response to Deer Run HOA's argument that it has a special interest justifying intervention based on the proposed increase for residential customers as compared to commercial and industrial customers served by the Delaplain system, Bluegrass Water asserts that if Deer Run HOA's argument in favor of a special interest is accepted, it would require a conclusion that the Attorney General is not able to adequately represent any of the residential customers simply because Bluegrass Water's customer base includes industrial and commercial customers charged different rates. Bluegrass Water also notes that Deer Run HOA's argument regarding the alleged disparity in the percentage increases compares a fixed monthly charge to a volumetric charge and, by referring only to the percentage increase, Deer Run HOA omits the fact that the proposed increase in rates for Delaplain's industrial and commercial customers is larger than the proposed increase for residential customers.

On January 13, 2021, Bluegrass Water responded to the motion for leave to intervene filed by Arcadia, Carriage Park, Marshall Ridge, and Randview and raises the same objections to the motion it raised in its previous responses. It also asserts that the entities seeking to intervene were formed to operate four of the sewer systems at issue as opposed to representing the interest of customers within the neighborhoods in which

those systems were located. Bluegrass Water also claimed that even though those entities owned and operated four of the relevant systems until November 19, 2020, that they would not be able to provide the Commission useful information regarding the costs to operate those systems because they were unable to provide Bluegrass Water information it requested when performing due diligence to determine whether to purchase the systems.

On December 11, 2020, and January 12, 2021, respectively, Homestead HOA, and Dear Run HOA and Longview HOA, jointly, filed their replies in support of their motions for leave to intervene. Among other things, they assert that for an association to establish standing to sue in a Kentucky civil court that it is sufficient to establish that its members would have such standing, and they further argue that the homeowners associations were organized for the purpose of representing the collective interest of residents with respect to amenities offered to those in the neighborhood they serve. They claim that there are legitimate questions regarding whether such a rate design is fair, just and reasonable under the circumstances of this case, and they note that the rate design issue is of particular importance in this matter because this is the first case in which Bluegrass Water is proposing a single unified rate. They argue that the Attorney General will not be able to adequately represent the interests of customers of the different systems on the issue of rate design because those interests will be adverse.

On January 19, 2021, Arcadia, Carriage Park, Marshall Ridge, and Randview filed their joint reply in support of their motion for leave to intervene. They assert that Bluegrass Water did not object to their intervention on the basis of “standing” as it had in response to the other motions to intervene, but rather, Bluegrass Water argues that they

did not have a special interest and would be unable to assist the Commission in developing the record. Arcadia, Carriage Park, Marshall Ridge, and Randview raise arguments similar to those raised by the other prospective interveners. They also took issue with Bluegrass Water's assertion that they would not be able to assist the Commission in developing the record because they had been unable to provide information to Bluegrass Water when Bluegrass Water was performing due diligence on the systems they previously owned and operated. They assert that they are not aware of any information requested by Bluegrass Water prior to closing that they were not able to provide.

DISCUSSION

The Attorney General is the only person with a statutory right to intervene in this matter.² Intervention by all others is permissive and is within the sound discretion of the Commission. However, the Commission's discretion to grant or deny a motion for intervention has limits enumerated by statute and regulation.³ Specifically, pursuant to 807 KAR 5:001, Section 4(11)(a), the Commission:

[S]hall grant a person leave to intervene if . . . he or she has a special interest in the case that is not otherwise adequately represented or that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.⁴

² Case No. 2017-00179, *Electronic Application of Kentucky Power Company for (1) a General Adjustment of its Rates for Electric Service; (2) an Order Approving Its 2017 Environmental Compliance Plan; (3) an Order Approving Its Tariffs and Riders; (4) an Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities; and (5) an Order Granting all Other Required Approvals and Relief* (Ky. PSC Aug. 3, 2017), Order at 1.

³ *EnviroPower, LLC v. Public Service Commission of Kentucky*, No. 2005-CA-001792-MR, 2007 WL 289328 at *3-4 (Ky. App. Feb. 2, 2007) (unpublished).

⁴ 807 KAR 5:001, Section 4(8).

Here, as noted above, Movants argued that they are entitled to intervene based on a special interest in the case that is not otherwise adequately represented and their ability to present issues or to develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. Having reviewed the record and being otherwise sufficiently advised, the Commission finds that Movants have established that they should be permitted to intervene in this matter. Specifically, the Commission finds that Movants' intervention is likely to present issues or to develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

Movants raise a number of issues that the Commission believes will be important to review in this matter and Movants indicate that they intend to develop facts regarding those issues. Among other things, Movants correctly point out that the cost allocation among the various systems and rate design are likely to be significant issues in this matter because Bluegrass Water is seeking to combine a number of rates into a single unified residential rate that are currently distinct. Further, although less time is devoted to those issues, Movants also raise a number of other issues with Bluegrass Water's application—including the extent of necessary upgrades for which Bluegrass Water is requesting Certificates of Public Convenience and Necessity (CPCNs); Bluegrass Water's unique structure and associated affiliate transactions; and a proposed return on equity that Movants allege is excessive.

Further, because Movants are represented by the same counsel, the Commission expects that they will collectively question Bluegrass Water and its witnesses through their shared counsel such that their collective participation will not unduly complicate or

disrupt the proceedings. Finally, while the Attorney General has intervened in this case, it is difficult to imagine how the Attorney General could represent the varied and discrete interests of each HOA and the impact of the proposed unified rate on each Movant. Thus, the Commission expects that Movants, through their counsel, will develop issues and facts in a manner that will assist the Commission without unduly complicating or disrupting this matter, and therefore that they should be permitted to intervene pursuant to 807 KAR 5:001, Section 4(11)(a).

The Commission does not view granting these motions to intervene as a departure from the cases relied on by Bluegrass Water in which subsets of residential customers were denied intervention. Rather, every motion to intervene should be addressed on the facts and circumstances of the case in which it is made. The circumstances of this case are distinct, for the reasons discussed above, and justify allowing Movants to intervene in this matter. However, this Order should not be interpreted as finding that neighborhood associations or other subsets of residential customers must be permitted to intervene in future rate cases, even those filed by Bluegrass Water in which different issues might be presented.

The Commission also does not believe that Bluegrass Water's argument that Movants lack the associational "standing" supports denying the motion to intervene. In support of that argument, Bluegrass Water cites to *Com. ex rel. Brown v. Interactive Media Entertainment and Gaming Ass'n, Inc.*, 306 S.W.3d 32 (Ky. 2010) in which the Court held that an association that purportedly represented the owners of gambling websites did not have standing to obtain a writ of prohibition against the civil forfeiture of those websites because the association failed and refused to actually identify its members

so the court evaluate their interest in the case (presumably because doing so would have implicated them in a crime).⁵ Conversely, Movants are either homeowners associations for neighborhoods served by Bluegrass Water or nonprofit entities through which customers of systems purchased by Bluegrass Water previously operated those systems to provide themselves service. Thus, while they might not have been formed with the specific intent of representing the interest of residents in a rate case, Movants were formed with the intent of acting in the interest of residents they purport to represent in this matter.

Moreover, the cases relied on by Bluegrass Water to argue that Movants lack associational “standing” dealt with requests to participate as a party in a civil action in Kentucky circuit court.⁶ While such cases are useful as persuasive authority, it is the language of the relevant statutes and regulations governing intervention before the Commission that control.⁷ As discussed above, the Commission finds that Movants are likely to present issues or to develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings and therefore they should be permitted to intervene pursuant to 807 KAR 5:001, Section 4(11)(a).

The Commission also observes that due to the number of requests for intervention and the briefing of the requests that this Order was not entered before the first requests

⁵ *Com. ex rel. Brown v. Interactive Media Entertainment and Gaming Ass’n, Inc.*, 306 S.W.3d 32 (Ky. 2010) at 37-40.

⁶ *Id.* at 38; see also *City of Ashland v. Ashland F.O.P. No. 3, Inc.*, 888 S.W.2d 667 668 (Ky. 1994) (the association had a judicially recognizable interest in the subject matter of the suit).

⁷ See, e.g. *Shockey Tours, Inc. v. Miller Transp., Inc.*, 984 S.W.2d 95, 99 (Ky. 1998) (finding that the language of the relevant statute “conferr[ed] standing” on carriers attempting to participate in administrative matter).

for information were to be served on Bluegrass Water. Given the novel issues that are likely to be presented in this matter and to ensure that Movants are able to fully participate in this matter, the Commission, on its own motion, finds that the procedural schedule in this matter should be modified to allow for another set of request for information to Bluegrass Water. Thus, the procedural schedule established in the December 23, 2020 Order is amended as set forth herein.

IT IS THEREFORE ORDERED that:

1. Homestead HOA's motion for leave to intervene is hereby granted.
2. Deer Run HOA's motion for leave to intervene is hereby granted.
3. Longview HOA's motion for leave to intervene is hereby granted.
4. Arcadia, Carriage Park, Marshall Ridge, and Randview's joint motion for leave to intervene is hereby granted.
5. Homestead HOA, Deer Run HOA, Longview HOA, Arcadia, Carriage Park, Marshall Ridge, and Randview shall be entitled to the full rights of a party and shall be served with the Commission's Orders and with filed testimony, exhibits, pleadings, correspondence, and all other documents submitted by parties after the date of this Order.
6. Homestead HOA, Deer Run HOA, Longview HOA, Arcadia, Carriage Park, Marshall Ridge, and Randview shall comply with all provisions of the Commission's regulations, 807 KAR 5:001, Section 8, related to the service and electronic filing of documents.
7. Pursuant to 807 KAR 5:001, Section 8(9), within seven days of entry of this Order, Homestead HOA, Deer Run HOA, Longview HOA, Arcadia, Carriage Park, Marshall Ridge, and Randview shall file a written statement with the Commission that:

a. Certifies that it, or its agent, possesses the facilities to receive electronic transmissions; and

b. Sets forth the electronic mail address to which all electronic notices and messages related to this proceeding should be served.

8. The procedural schedule in the December 23, 2020 Order is amended as set forth in the Appendix to this Order.

9. The December 23, 2020 Order shall remain in effect except as amended herein.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

By the Commission

ENTERED
FEB 08 2021 rca
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Executive Director

Case No. 2020-00290

APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2020-00290 DATED FEB 08 2021

Last day for intervention requests to be accepted.....01/06/2021

All initial requests for information to Bluegrass Water shall
be filed no later than..... 01/15/2021

Bluegrass Water shall file responses to initial requests for
information no later than..... 01/29/2021

All supplemental requests for information to Bluegrass Water
shall be filed no later than 02/12/2021

Bluegrass Water shall file responses to supplemental requests
for information no later than 02/26/2021

All second supplemental requests for information to Bluegrass Water
shall be filed no later than 03/08/2021

Bluegrass Water shall file responses to second supplemental requests
for information no later than 03/22/2021

Intervenor testimony, if any, in verified prepared
form shall be filed no later than 04/01/2021

All requests for information to Intervenors shall
be filed no later than..... 04/15/2021

Intervenors shall file responses to requests for
information no later than..... 04/29/2021

Bluegrass Water shall file, in verified form, its rebuttal
testimony no later than 05/10/2021

Last day for Bluegrass Water to publish notice of hearing To be scheduled

Public Hearing to be held in the Richard Raff Hearing Room
at the offices of the Public Service Commission at 211 Sower Boulevard,
Frankfort, Kentucky, for the purpose of cross-examination
of witnesses of Bluegrass Water and Intervenors To be scheduled

Post-Hearing Briefs, if any..... To be scheduled

*L Allyson Honaker
Goss Samford, PLLC
2365 Harrodsburg Road, Suite B325
Lexington, KENTUCKY 40504

*Bluegrass Water Utility Operating Company, LLC
1650 Des Peres Road, Suite 300
St. Louis, MO 63131

*Angela M Goad
Assistant Attorney General
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204

*J. Michael West
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204

*David S Samford
Goss Samford, PLLC
2365 Harrodsburg Road, Suite B325
Lexington, KENTUCKY 40504

*John G Horne, II
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204

*Kathryn A Eckert
McBrayer PLLC
201 East Main Street
Suite 900
Lexington, KENTUCKY 40507

*Katherine Yunker
McBrayer PLLC
201 East Main Street
Suite 900
Lexington, KENTUCKY 40507

*Larry Cook
Assistant Attorney General
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204