

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

This matter is before the Commission on a motion by Bluegrass Water Utility Operating Company, LLC (Bluegrass Water) to alter or amend the Commission's February 12, 2021 Order denying Bluegrass Water's motion for a deviation. The Homestead Home Owners Association, Inc.; Longview Homeowners Association, Inc.; The Deer Run Estates Homeowners Association, Inc.; Arcadia Pines Sewer Association, Inc.; Carriage Park Neighborhood Association, Inc.; Marshall Ridge Sewer Association, Inc.; and Randview Septic Corporation (collectively, Joint Intervenors) filed a response arguing that the February 12, 2021 Order should not be altered or amended. Bluegrass Water filed a reply in support of the motion. Bluegrass Water's motion is now before the Commission for a decision on the merits.

Bluegrass Water tendered its application for approval of construction and an adjustment of rates based on a forecasted test year pursuant to 807 KAR 5:001, Section 16, on October 1, 2020. In an October 30, 2020 letter, Commission Staff notified Bluegrass Water that its application was rejected because it contained several filing deficiencies Commission Staff identified therein. On October 30, 2020, the Commission

also issued an Order indicating that the application could not be accepted for filing until those filing deficiencies were corrected by Bluegrass Water.

The Commission also noted in the October 30, 2020 Order that Bluegrass Water indicated that it did not provide customer notice to customers of the systems it was approved to purchase in Case No. 2020-00028¹ on which it had not closed or the utilities for which it was requesting approval to purchase in Case No. 2020-00297.² The Commission noted that the failure to provide such notice alone would not render the application deficient because 807 KAR 5:001, Section 17, did not appear to require that potential future customers receive notice of a proposed change in a utility's existing rates. However, the Commission noted that it has established additional requirements to protect those customers, including the requirements in 807 KAR 5:011, Section 11, that a person purchasing an existing utility must first adopt the existing utilities's tariffs before seeking to amend the existing utilities rates pursuant to KRS 278.190.³

In the October 30, 2020 Order, the Commission indicated that the requirements of 807 KAR 5:011, Section 11, would apply to the utilities that Bluegrass Water is seeking approval to purchase in Case No. 2020-00297 but that those requirements did not explicitly apply to the systems Bluegrass Water was approved to purchase in Case No.

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).

² Case No. 2020-00297, *Electronic Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC and the Transfer of Ownership and Control of Assets by: Delaplain Disposal Company; Herrington Haven Wastewater Company, Inc.; Springcrest Sewer Company, Inc; and Woodland Acres Utilities, LLC.* (Ky. PSC Jan. 14, 2021).

³ Order at 3 (Ky. PSC Oct. 30, 2020).

2020-00028⁴ on which it had not closed because they were not utilities. However, the Commission noted that it imposed a similar requirement in the final Order in Case No. 2020-00028 by requiring Bluegrass Water to file a tariff adopting the existing rates of those systems before seeking to amend those rates pursuant to KRS Chapter 278 and 807 KAR Chapter 5. The Commission then noted that if Bluegrass Water intended for the application filed in this matter to serve as a request to adjust the rates of the systems at issue in Case No. 2020-00028 that it must complete the purchase of those systems, file a tariff with the initial rates approved in Case No. 2020-00028, and provide those customers with proper notice of the rate adjustment proposed herein before this application is filed (or deemed filed upon correction of the deficiencies identified by Commission Staff).⁵

In its motion for a deviation, Bluegrass Water did not specify the requirements from which it sought a deviation. Rather, Bluegrass Water requested “an Order granting a deviation from any conflicting regulatory requirements such that notice by Bluegrass Water to the potential future customers in Case No. 2020-00297 that meets the content, manner, and timing requirements of 807 KAR 5:001 Section 17 is sufficient to allow an adjustment of their rates on an Application deemed filed no earlier than when notice to those customers was given.”⁶ Given the context, the Commission interpreted Bluegrass Water’s motion as a request for a deviation from 807 KAR 5:011, Section 11, among other regulations, such that the rates of the systems at issue in Case No. 2020-00297 could be

⁴ 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).

⁵ Order at 4–7 (Ky. PSC Oct. 30, 2020).

⁶ Bluegrass Water’s Motion for Deviation from Requirements Relating to Customer Notice at 5.

amended pursuant to the application filed in this matter despite the fact that it had not yet purchased the systems or adopted the current tariffs of the existing utilities.

Bluegrass Water now argues that the February 12, 2020 Order denying its request for a deviation should be altered and amended and that the application in this matter should be permitted to proceed to a decision about the proposed rate adjustment for all the systems, including the utilities Bluegrass Water was approved to purchase in Case No. 2020-00297. In summary, Bluegrass Water argued that the Commission's concerns regarding the potential confusion and expense that could arise by permitting Bluegrass Water to propose a rate adjustment for a system owned by another utility were not justified; Bluegrass Water's application, as amended and supplemented, unambiguously sought to increase rates for the systems at issue in Case No. 2020-00297; excluding the systems at issue in Case No. 2020-00297 from the rate adjustment requested in this case would violate Bluegrass's procedural and substantive due process rights; and the Order is inconsistent with KRS 278.192, which allows utilities to use "a forward-looking test period corresponding to the first twelve (12) consecutive calendar months the proposed increase would be in effect after the maximum suspension provided in KRS 278.190."⁷

Joint Intervenors argue that the Commission should reject Bluegrass Water's procedural and substantive due process arguments, because nothing in Bluegrass Water's motion actually identifies a protected property interest and because "there is nothing constitutionally offensive about requiring an applicant to follow the long-

⁷ Bluegrass Water's Motion to Alter the Commission's February 12, 2021 Order at 5.

established requirements of Kentucky law in acquiring a utility system.”⁸ They argue that the Commission did not violate KRS 278.192, because that statute actually anticipates a base period based on actual historical information, and they note that in Bluegrass Water’s application to acquire the systems in Case No. 2020-00028 that it even indicated that it intended to wait to seek to adjust the rates of those systems for a year so it would have a full year of data from owning and operating those systems. They also note that nothing in the Commission’s February 12, 2021 Order prevents Bluegrass Water from seeking to recover its prudently incurred expenses at the appropriate time.⁹

In its reply, Bluegrass Water noted that as of March 9, 2021, it had closed on all systems at issue in Case No. 2020-00297 and argued that it maintained a vested property interest from the time it initially tendered the application in this matter due to the executed purchase agreements for those systems. Bluegrass Water asserts that the application in Case No. 2020-00297 included notice of Bluegrass Water’s intention that those systems would be part of the rate application. Bluegrass Water disputes Joint Intervenors’ interpretation of KRS 278.192 and argues that statements made in Case No. 2020-00028 are irrelevant to whether the systems at issue in Case No. 2020-00297 should be included as part of the application in this case. Bluegrass Water asserts that Joint Intervenors do not allege that the notice received by the systems at issue in Case No. 2020-00297 was deficient, which they claim supports their assertion that notice was “appropriate and effective.”¹⁰

⁸ Joint Intervenors’ Response to Bluegrass Water Utility Operating Company’s Motion to Alter Commission’s February 12, 2021 Order at 2.

⁹ *Id.* at 2–3.

¹⁰ Bluegrass Water’s Reply in Support of Motion to Alter the Commission’s February 12, 2021 Order at 3.

Having reviewed the filings and being otherwise sufficiently advised, the Commission finds that Bluegrass Water's motion to alter or amend should be denied. Among other things, contrary to Bluegrass Water's assertion, the application in this matter did not unambiguously indicate that Bluegrass Water was proposing new rates for customers of the utilities at issue in Case No. 2020-00297. As previously noted, the tariff filed with the application, which Bluegrass Water referenced as providing notice pursuant to KRS 278.180, does not list the territories served by the systems at issue in Case No. 2020-00297 in the "General Index of Territory Served" despite listing the territories served by every other system, including those at issue in Case No. 2020-00028, which it had been approved to purchase but did not own when it tendered the application.¹¹ Further, Bluegrass Water indicated that it intended to follow the requirements set forth in 807 KAR 5:011, Section 11 (as it was required by law to do), for adopting the tariff of an existing utility before then amending the rates and tariff with a subsequent filing.¹² Bluegrass Water even included form tariff sheets as an exhibit to its application in Case No. 2020-00297 for each system at issue in that case that it indicated it would file after first adopting

¹¹ See Application at 7, Exh. 1-B. The only potential reference to any customers of the systems at issue in Case No. 2020-00297 is a reference to industrial and commercial customers at the interchange of I-75 and Delaplain Road in Scott County, Kentucky, but it is not clear from the tariff itself that is referring to systems in Case No. 2020-00297 given that the systems are not included in the index of territories served. Further, the tariff section itself indicates it is not currently serving such customers.

¹² See Application at 5; see also Case No. 2020-00297, *Electronic Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC and the Transfer of Ownership and Control of Assets by: Delaplain Disposal Company; Herrington Haven Wastewater Company, Inc.; Springcrest Sewer Company, Inc.; and Woodland Acres Utilities, LLC*, Application (filed Sept. 16, 2020) at 11 ("Following the Closing on these assets, Bluegrass Water will provide service in accordance with each transferring utilities' current sewer tariff on file with the Commission. In all cases, there will be continuity of service to the existing customers. Bluegrass Water will file an adoption notice for the existing tariffs after closing on the respective sewer systems, and then shortly thereafter will file revisions to the current Bluegrass Water sewer tariff related to the acquisitions.").

the current tariffs of those utilities to bring those systems within Bluegrass Water's tariff at the rates charged by the current service providers,¹³ and Bluegrass Water did not then include those tariffs with its application in this matter among that tariff's it was proposing to amend. Thus, while the application was occasionally unclear and it was anticipated that Bluegrass Water would make subsequent tariff filings to amend the rates of the utilities it would adopt to bring the systems at issue in Case No. 2020-00297 within its unified rate, Bluegrass Water's application could not be interpreted as such a filing.

Rather, the first time that Bluegrass Water explicitly indicated that it intended for its application in this matter to be a request to amend the rates of the systems at issue in Case No. 2020-00297 was in its motion for deviation. In fact, the application could not have been accepted as a request to amend the rates of the systems at issue in Case No. 2020-00297 unless Bluegrass Water obtained a deviation from 807 KAR 5:011, Section 11, which explicitly requires persons purchasing existing utilities to first adopt the rates and tariffs of those systems before proposing to amend the rates with customer notice and 30 days notice to the Commission. The Commission never granted such a deviation and, therefore, the application could not be accepted as a request to amend the rates of the systems at issue in Case No. 2020-00297.

Requiring Bluegrass Water to comply with 807 KAR 5:011, Section 11, by first adopting the tariffs of the utilities it purchased before proposing to amend the rates pursuant to KRS Chapter 278 would also not violate any of Bluegrass Water's due process rights. Among other things, Bluegrass Water had notice of the requirement

¹³ Case No. 2020-00297, *Electronic Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC and the Transfer of Ownership and Control of Assets by: Delaplain Disposal Company; Herrington Haven Wastewater Company, Inc.; Springcrest Sewer Company, Inc.; and Woodland Acres Utilities, LLC*, Application (filed Sept. 16, 2020) at 11, Exhibit L.

before it entered into any agreement to purchase the systems at issue in Case No. 2020-00297, since it is in the Commission's regulations, and the Commission's Orders in this matter explicitly indicated the applicability of 807 KAR 5:011, Section 11, before Bluegrass Water closed on any systems at issue in Case No. 2020-00297. Bluegrass Water also committed to and was ordered to follow the process set forth in 807 KAR 5:011, Section 11, in previous acquisition cases and in the final Order Case No. 2020-00297,¹⁴ which was never appealed or otherwise challenged. Further, as noted by Joint Intervenors, nothing in the February 12, 2021 Order prevented Bluegrass Water from proposing to increase the rates of the systems at issue in Case No. 2020-00297, immediately upon acquiring them and adopting the current tariffs, with 30 days notice to Commission in the exact same way every other utility in the Commonwealth proposes to increase rates when they contend that they are insufficient. Bluegrass Water's motion for a deviation also was not denied significantly into the case,¹⁵ and Bluegrass Water, which is proposing to combine the separate rates of multiple systems into a single rate, had notice that the Commission would be looking at the costs attributable to each system

¹⁴ Case No. 2020-00297, *Electronic Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC and the Transfer of Ownership and Control of Assets by: Delaplain Disposal Company; Herrington Haven Wastewater Company, Inc.; Springcrest Sewer Company, Inc.; and Woodland Acres Utilities, LLC*, Order at 14-15 (PSC Ky. Jan. 14, 2020) ("When Bluegrass Water closes on the systems at issue, it should file an adoption notice pursuant to 807 KAR 5:011, Section 11, as it proposed in its application, before seeking to incorporate the current customers of Delaplain, Herrington Haven, Springcrest, and Woodland Acres into Bluegrass Water's existing tariff.").

¹⁵ The February 12, 2021 Order denying Bluegrass Water's request for a deviation was entered just a few days after the Commission granted Joint Intervenors request to intervene and before Bluegrass Water even owned the systems at issue in Case No. 2020-00297. Further, the fact that Bluegrass Water responded to the first requests for information in this matter before the Commission addressed the motion for a deviation is not unusual as Commission Staff often serve the first request for information before an application is even filed and requests for deviations, if any, are addressed.

separately, even if it ultimately adopts a unified rate for the systems at issue in this case, when reviewing whether the proposed rates were reasonable.¹⁶

The application of 807 KAR 5:011, Section 11, also does not violate KRS 278.192 because nothing in that statute indicates that the Commission must permit a purchasing utility to file a tariff proposing new rates for the customers of a selling utility that the purchaser does not yet own. In fact, as previously noted, there is a strong argument that KRS Chapter 278 would prohibit a person from filing a tariff proposing to amend the filed rates of utilities it does not own.¹⁷ Further, KRS 278.160(1) grants the Commission explicit authority to prescribe rules establishing the form in which utilities must file tariffs with their rates with the Commission and the time in which they can make such filings. The Commission exercised that authority in a manner that is consistent with KRS Chapter 278 by establishing 807 KAR 5:011, Section 11. Absent such a requirement, two utilities could have separate effective tariffs on file with the Commission that purport to be the filed rates for the same customers, which would be inconsistent with the statutory scheme

¹⁶ See e.g. Case No. 2018-00358, *Electronic Application of Kentucky-American Water Company for an Adjustment of Rates*, (Ky. PSC June 27, 2019), Order at 44–45 (addressing a unified rate when the utility filed its next rate case after purchasing another system but noting that a unified rate should not be presumed); see also Case No. 2020-00297, *Electronic Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC and the Transfer of Ownership and Control of Assets by: Delaplain Disposal Company; Herrington Haven Wastewater Company, Inc.; Springcrest Sewer Company, Inc.; and Woodland Acres Utilities, LLC* (Ky. PSC Jan. 14, 2020) Order at 14–15 (“[W]hile Bluegrass Water stated that it initially intended to adopt the rates of the current utilities, as required by 807 KAR 5:011, Section 11, Bluegrass Water indicated in its application that it ultimately intended to propose a unified rate for all of its systems. . . . However, the Commission’s approval of the transfers at issue in this case should not be construed as an approval of Bluegrass Water’s plan to adopt a unified rate.”).

¹⁷ See, e.g., *Bullitt Utilities, Inc. v. Kentucky Public Service Commission*, No. 2018-CA-000559-MR, 2019 WL 2157926 (Ky. App. 2018) (unpublished) (indicating that a receiver operating a utility as opposed to the owner of a utility that abandoned it is the entity entitled to request a rate increase pursuant to KRS Chapter 278 and stating that “it would be absurd to allow two different entities . . . to file and collect surcharges from the same customers based on the same utility services”).

intended by KRS Chapter 278. Thus, the application of 807 KAR 5:011, Section 11, is authorized by KRS Chapter 278 and is consistent with the statutory requirements therein.

IT IS THEREFORE ORDERED that:

1. Bluegrass Water's motion to alter or amend the Commission's February 12, 2021 Order is denied.

2. Pursuant to 807 KAR 5:011, Section 11, Bluegrass Water must first adopt the existing tariffs of the utilities at issue in Case No. 2020-00297 before filing a tariff proposing to increase rates for those systems, pursuant the 807 KAR Chapter 5 and KRS Chapter 278, with 30 days notice to the Commission.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

By the Commission



ATTEST:


Executive Director

Case No. 2020-00290

*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