

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION OF NI-COLE CONSTRUCTION, )	
INC. AND GENEVIEVE STEWART )	
_____ )	CASE NO. 91-007
ALLEGED VIOLATION OF KRS CHAPTER 278 )	

O R D E R

On January 14, 1991, Ni-Cole Construction, Inc. ("Ni-Cole") and Genevieve Stewart were directed by the Commission to show cause why they should not be penalized pursuant to KRS 278.990 for failing to maintain and operate their sewer treatment facility in accordance with accepted good engineering practices as required by 807 KAR 5:071, Section 7. The hearing to show cause was held on March 7, 1991.

FINDINGS OF FACT

Ni-Cole was a Kentucky corporation formed in 1972 by Herbert Stewart, its sole shareholder. Herbert Stewart died in 1984 and all of the stock in the corporation was bequeathed to his wife, Genevieve Stewart. In 1985, the corporate charter was revoked and all of the assets became the property of Genevieve Stewart.<sup>1</sup>

In 1972, Ni-Cole purchased and installed a sewage treatment plant to serve a small subdivision in Perry County. Currently,

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<sup>1</sup> Although the corporation Ni-Cole Construction, Inc. ceased to exist in 1985, for the purposes of this Order, the Commission will refer to the utility throughout as Ni-Cole.

the sewage treatment plant serves 13 homes in the subdivision for which they are charged a fee in accordance with Ni-Cole's published tariff on file with this Commission.

On March 15, 1990, the sewage treatment plant was inspected by a utility investigator for the Commission. The investigator issued his report on March 20, 1990 in which he cited Ni-Cole with 16 violations of the Commission's regulations. The report was sent to Ni-Cole and in the report, the Commission requested that Ni-Cole respond by April 20, 1990 by outlining what it intended to do to correct the violations. Of the 16 violations, 14 were repeat violations noted in earlier reports issued on April 21, 1988 and April 25, 1989. On May 5, 1990, Ni-Cole asked for an extension of time in which to respond.

On October 24, 1990, the utility investigator reinspected the sewage treatment plant. Of the 16 violations noted earlier, only four were corrected.

Although the plant is owned by Genevieve Stewart, the person responsible for its daily operations is Bill Stewart, her son. For approximately one year prior to the inspection report Bill Stewart had employed Albert Moore, a certified operator, to maintain the plant in compliance with the law. As a result, Bill Stewart was unaware that the plant was not in compliance with Commission regulations until he received a copy of the March 20, 1990 inspection report. After receiving the report, Bill Stewart terminated Albert Moore, and, at the same time, insisted that Albert Moore assist him in bringing the plant into compliance.

Since the reinspection on October 24, 1990, Bill Stewart claims that all but six of the violative conditions have been corrected.

#### CONCLUSIONS OF LAW

807 KAR 5:071, Section 7, requires that sewage treatment facilities be "operated in accordance with accepted good engineering practices." There is no dispute that all but one of the conditions cited in the March 20, 1990 investigative report violated this requirement. The only condition that might not have been correctly cited was the reported failure to employ a certified plant operator to operate the plant. The evidence establishes that when the initial inspection was made, Ni-Cole had employed the services of a certified plant operator, although his services were subsequently terminated. The evidence also establishes that a second certified plant operator is now employed to oversee the daily operations of the plant. Therefore, the only issue before the Commission is whether Genevieve Stewart, as the owner of the utility, should be penalized pursuant to KRS 278.990 for failing to ensure that the plant was operated in accordance with accepted good engineering practices as required by the Commission's regulation.

KRS 278.990(1) provides in pertinent part as follows:

Any officer, agent or employee of a utility, as defined by KRS 278.010, and any other person who willfully violates any of the provisions of this chapter or any regulation promulgated pursuant to this chapter, . . . shall be subject to either a civil penalty to be assessed by the commission not to exceed two thousand five hundred dollars (\$2,500) for each offense or a criminal penalty of imprisonment for not less than six (6) months, or both. If any utility willfully violates any of the provisions of this chapter or any regulation promulgated pursuant to this

chapter, . . . the utility shall be subject to a civil penalty to be assessed by the commission for each offense not less than twenty-five (\$25), nor more than two thousand five hundred dollars (\$2,500). Each act, omission, or failure by an officer, agent, or other person acting for or employed by a utility and acting within the scope of his employment shall be deemed to be the act, omission, or failure of the utility.

The term "willfully" was defined in Turner v. Commonwealth, Ky., 328 S.W.2d 536, 539 (1959) to mean "intentionally, not accidentally or voluntarily" and done according to a purpose. In other words, a willful violation is one that is committed knowingly and intentionally. Based on this standard, it is clear that the violations cited on March 20, 1990 were committed willfully by the utility. As noted above, 14 were repeat violations cited in earlier reports issued in 1988 and 1989, and the failure of Genevieve Stewart, in her capacity as owner of the utility, to see that the violations were corrected is deemed to be a failure of the utility under KRS 278.990. Therefore, a penalty of not less than \$25, nor more than \$2,500 is required to be assessed against Genevieve Stewart.

Under the circumstances, the Commission finds that a penalty of \$500 is appropriate. The Commission further finds that the penalty should be suspended if the violations are abated within 60 days from the date of this Order.

This Commission being otherwise sufficiently advised,

IT IS HEREBY ORDERED that:

1. Genevieve Stewart, in her capacity as owner of the sewage treatment plant referred to herein as Ni-Cole, is hereby assessed a penalty of \$500 for the willful failure to operate the

sewage treatment plant in accordance with accepted good engineering practices as required by 807 KAR 5:071, Section 7.

2. Genevieve Stewart shall cause to be corrected, within 60 days from the date of this Order, any unabated deficiency cited in the March 20, 1990 investigative report and shall notify the Commission, in writing, once all deficiencies are corrected.

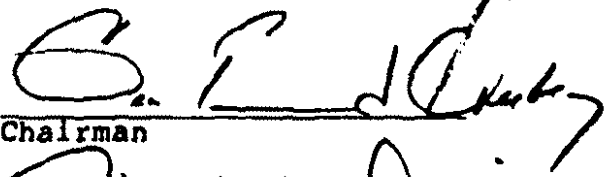
3. If all such deficiencies are abated within the 60-day period prescribed by this Order, the penalty assessed herein shall be suspended.

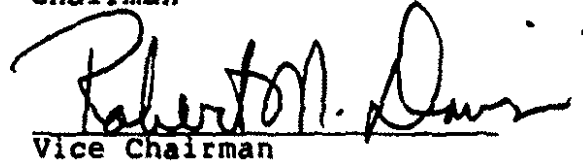
4. If Genevieve Stewart fails to abate the violations cited in the March 20, 1990 investigative report within the 60-day period, she shall remit payment of the penalty assessed to the Commission within 65 days of the date of this Order. Payment shall be made by certified check or money order made payable to Treasurer, Commonwealth of Kentucky and mailed to the Office of General Counsel, Public Service Commission, 730 Schenkel Lane, P. O. Box 615, Frankfort, Kentucky 40602.

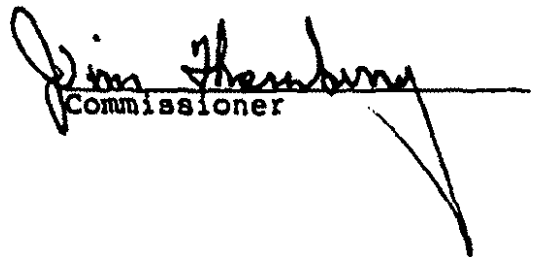
5. Failure to comply with the provisions of this Order may result in further penalties assessed in accordance with KRS 278.990.

Done at Frankfort, Kentucky, this 22nd day of May, 1991.

PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:



Executive Director