

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENTUCKY TURNPIKE WATER)
DISTRICT AND GERALD P. BURKE,)
SUPERINTENDENT, INDIVIDUALLY)
AND IN HIS OFFICIAL CAPACITY)
_____)
)
ALLEGED VIOLATION OF)
COMMISSION'S ORDER)

CASE NO. 97-168

O R D E R

Kentucky Turnpike Water District ("Kentucky Turnpike") is a water district created pursuant to Chapter 74 of the Kentucky Revised Statutes which owns, controls, and operates facilities used for the distribution of water to the public for compensation in Bullitt County, Kentucky. As such, it is a utility subject to the jurisdiction of the Public Service Commission pursuant to KRS 278.010(3)(d). Gerald P. Burke was, until recently, Kentucky Turnpike's superintendent.

On November 15, 1996, a complaint was filed against Kentucky Turnpike by Jesse and Barbara Ashbaugh. The Commission docketed this complaint as Case No. 96-557.¹ The Commission by Order of November 25, 1996, directed Kentucky Turnpike to satisfy or answer the complaint within 10 days. The Commission received no reply to its Order. On January 24, 1997, the Commission's Executive Director sent a letter, with the

¹ Case No. 96-557, Jesse and Barbara Ashbaugh vs. Kentucky Turnpike Water District.

Commission's November 25, 1996 Order attached, by certified mail to Mr. Burke in his capacity as Kentucky Turnpike's superintendent. This letter requested that a response to the Commission's Order be filed within seven days. Still no response to the Commission's Order of November 25, 1996 was filed.

A prima facie showing having been made that Kentucky Turnpike was in violation of the Commission's Order of November 25, 1996, in Case No. 96-557 and that its superintendent, Mr. Burke, had procured, aided, or abetted Kentucky Turnpike's violation of that Order, the Commission on April 8, 1997 directed Kentucky Turnpike and Mr. Burke to appear before the Commission for the purpose of presenting evidence concerning Kentucky Turnpike's alleged violation and Mr. Burke's role in Kentucky Turnpike's alleged violation. The Commission's April 8, 1997 Order also directed Kentucky Turnpike and Mr. Burke to submit to the Commission written responses to the allegations against them within 20 days.

A response to the Commission's Order was filed on May 13, 1997. A hearing in the matter was held on May 15, 1997 at which Kentucky Turnpike and Mr. Burke were represented by counsel.² Mr. Burke himself did not appear, nor did any one other than counsel appear on behalf of Kentucky Turnpike. At the hearing, counsel for Kentucky Turnpike and Mr. Burke attributed Kentucky Turnpike's failure to file a timely response

² When Kentucky Turnpike's counsel was asked whether he also represented Mr. Burke, his response was "I assume I will." Mr. Burke at the time of the hearing was no longer an employee of Kentucky Turnpike. Transcript of Hearing, May 15, 1997, at 3.

to the Commission's Order of November 25, 1996, to a number of reasons.³ These include the fact that the Order was initially sent to Louisville Water Company, the lessor of Kentucky Turnpike's Division I; that when Mr. Burke did receive the Order he was not knowledgeable of what he was supposed to do with it; that counsel himself was out of the country for two weeks; that there was confusion over whether the complaint had already been addressed; and that Kentucky Turnpike's board only meets once a month to discuss such matters. As for Mr. Burke, according to counsel, he resigned as superintendent in late March or early April, and his employment had officially ceased the day before the hearing.⁴

Regardless of the testimony presented by counsel at the hearing, the fact remains that the Commission issued an Order on November 25, 1996, which directed Kentucky Turnpike to satisfy or answer the Ashbaugh complaint within 10 days. While this first Order may have been misdirected, the Order was sent again by certified mail to Mr. Burke on January 24, 1997, with a copy mailed to Kentucky Turnpike's counsel as well.⁵ A response was not received until April 4, 1997, some 10 weeks after the Order was sent by certified mail to Mr. Burke and by regular mail to Kentucky Turnpike's counsel, or some 19 weeks after Kentucky Turnpike was originally directed to respond to the

³ Kentucky Turnpike's response to the Commission's Order of November 25, 1996, was received April 4, 1997.

⁴ Transcript at 10.

⁵ Furthermore, it seems likely that Louisville Water Company would have forwarded the document to the proper party, especially in light of counsel's testimony that "Louisville Water normally always gets the documents for Kentucky Turnpike Water District, Division I. They eventually will get them transferred" Transcript at 5.

Ashbaugh complaint within 10 days of service. The fact that Kentucky Turnpike eventually responded to the Order is not relevant to the issue now before the Commission. What is relevant is whether the Order of November 25, 1996, in Case No. 96-557 was obeyed. Clearly it was not.

Pursuant to KRS 278.990(1),

Any officer, agent, or employee of a utility, as defined in 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, or fails to obey any order of the commission from which all rights of appeal have been exhausted, or who procures, aids, or abets a violation by any utility, 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 more 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, or does any act therein prohibited, or fails to perform any duty imposed upon it under those sections for which no penalty has been provided by law, or fails to obey any order of the commission from which all rights of appeal have been exhausted, the utility shall be subject to a civil penalty to be assessed by the commission for each offense not less than twenty-five dollars (\$25.00) 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.
[Emphasis added.]

Kentucky Turnpike's failure to file a timely response to the Commission's Order of November 25, 1996, in Case No. 96-557, was a willful violation of the Order. By failing to assure that the Commission's Order was obeyed, Mr. Burke, as superintendent, willfully procured, aided, or abetted Kentucky Turnpike's violation of the Order. While Mr. Burke may no longer be Kentucky Turnpike's superintendent, he remains responsible

for his actions while employed in that capacity. As a result, Kentucky Turnpike should be assessed a penalty of \$500.00 for its willful violation of the Commission's Order of November 25, 1996, in Case No. 96-557, and Mr. Burke should be assessed a penalty of \$500.00 for willfully procuring, aiding, or abetting the violation.

Members of Kentucky Turnpike's board of commissioners are also advised that as duly appointed commissioners of the water district, they have a duty to "do all acts necessary to carry on the work" of the district. See, e.g., KRS 74.070.⁶ KRS 278.990(1) makes clear that individual officers and employees of a utility who allow the utility to violate any relevant statute, regulation, or Commission Order can be held just as accountable as the utility itself. It is thus in the best interest of a utility's officers and employees (and agents), as well as being their duty and obligation, to assure that the utility does not violate any statutes, regulations, or Commission Orders. It would appear that Kentucky Turnpike's commissioners should be more aware of their duties and obligations and in the future act to assure Kentucky Turnpike's consistent and prompt compliance with all relevant statutes, regulations, and Commission Orders.

IT IS THEREFORE ORDERED that:

1. Kentucky Turnpike is found to have willfully failed to obey the Commission's Order of November 25, 1996, in Case No. 96-557.

⁶ A manager also has certain duties and obligations. See, e.g., KRS 74.040.

2. Mr. Burke is found to have willfully procured, aided, or abetted Kentucky Turnpike's violation of the Commission's Order of November 25, 1996 in Case No. 96-557.

3. Kentucky Turnpike shall pay a penalty of \$500 pursuant to KRS 278.990(1) for its willful failure to obey the Commission's Order of November 25, 1996 in Case No. 96-557.

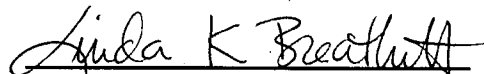
4. Mr. Burke shall pay a penalty of \$500 pursuant to KRS 278.990(1) for willfully procuring, aiding, or abetting Kentucky Turnpike's violation of the Commission's Order of November 25, 1996 in Case No. 96-557.

5. The penalties assessed hereunder shall be due and payable in full 20 days from the date of this Order.

6. The penalties due hereunder shall be paid by certified check or money order made payable to the Kentucky State Treasurer and mailed to the Kentucky Public Service Commission, Office of General Counsel, P. O. Box 615, Frankfort, Kentucky 40602.

Done at Frankfort, Kentucky, this 5th day of August, 1997.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director