

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION OF THE FAILURE OF WATER )  
SERVICE CORPORATION OF KENTUCKY TO ) CASE NO.  
HOLD ANNUAL PUBLIC MEETINGS IN THE ) 2014-00272  
CITIES OF CLINTON AND MIDDLESBORO )

ORDER

On August 7, 2014, the Commission issued an Order directing Water Service Corporation of Kentucky ("WSCK") to show cause why it should not be subject to the penalties prescribed in KRS 278.990(1) for WSCK's failure to comply with the Commission's August 13, 2012 Order in Case No. 2012-00133<sup>1</sup> by not hosting annual public meetings in the cities of Clinton and Middlesboro, Kentucky. WSCK filed a response on August 27, 2014. The Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention ("Attorney General") is the only intervenor in this case.

The Commission held an evidentiary hearing in this matter on November 6, 2014. Testifying at the hearing were: Jeff Derouen, executive director of the Public Service Commission; Kathy Gillum, paralegal with the Public Service Commission; Steven M. Lubertozzi, WSCK president; and M. Todd Osterloh, counsel for WSCK.

WSCK and the Attorney General simultaneously filed post-hearing briefs on November 26, 2014. In his post-hearing brief, the Attorney General states that in

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<sup>1</sup> Case No 2012-00133, *Joint Application of Corix Utilities (Illinois) LLC; Hydro Star, LLC; Utilities, Inc.; and Water Service Corporation of Kentucky for the Transfer and Acquisition of Control Pursuant to KRS 278.020*, Final Order (Ky. PSC Aug. 13, 2012).

addition to assessing a penalty against WSCK, Mr. Osterloh should “be fined . . . due to his efforts to both aid and abet the [utility’s] violation of the Commission’s 2012 Order.”<sup>2</sup>

### BACKGROUND

On August 13, 2012, the Commission entered an Order in Case No. 2012-00133 approving the transfer of control of WSCK from Hydro Star, LLC to Corix Utilities (Illinois) LLC and Corix Infrastructure Inc. through Corix Utilities (Illinois) LLC’s acquisition of ownership and control of Hydro Star, LLC.<sup>3</sup> Ordering paragraph 20 of the August 13, 2012 Order states:

To provide a forum for customers to communicate with utility management, Corix Utilities and Utilities, Inc. shall host annual public meetings in Clinton and Middlesboro, Kentucky, at which the senior officers from the regional office of Utilities, Inc. that oversees [WSCK’s] operations will attend and participate.<sup>4</sup>

Additionally, paragraph 16 in the Appendix to the August 13, 2012 Order states:

Corix Utilities and Utilities, Inc. will host annual public meetings in Clinton and Middlesboro to provide a forum for customers to communicate with utility management.<sup>5</sup>

Pursuant to ordering paragraph 2 of the August 13, 2012 Order,<sup>6</sup> written acknowledgement, acceptance, and agreement to be bound by the commitments set forth in the Appendix to the August 13, 2012 Order in Case No. 2012-00133 were filed on behalf of Corix Infrastructure, Inc., Corix Utilities (Illinois) LLC., Utilities, Inc., and

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<sup>2</sup> Attorney General’s Post Hearing Brief at 11 (filed Nov. 26, 2014).

<sup>3</sup> Case No. 2012-00133, Final Order (Ky. PSC Aug. 13, 2012).

<sup>4</sup> *Id.* at 11.

<sup>5</sup> *Id.*, Appendix at 3.

<sup>6</sup> *Id.* at 8.

WSCK on August 20, 2012.<sup>7</sup> These commitments included Commitment 16, in which Corix Utilities (Illinois), LLC and Utilities, Inc. agreed to “host annual public meetings in Clinton and Middlesboro to provide a forum for customers to communicate with utility management.”<sup>8</sup> The transfer of WSCK as approved in the August 13, 2012 Order in Case No 2012-00133 did not close until December 18, 2012.<sup>9</sup>

WSCK filed an application for a rate increase in Case No. 2013-00237 on September 27, 2013.<sup>10</sup> Testimony during the April 9, 2014 evidentiary hearing in the rate case<sup>11</sup> revealed that WSCK had not held any public meetings in the cities of Clinton or Middlesboro since entry of the August 13, 2012 Order in Case No. 2012-00133.<sup>12</sup>

#### PROCEDURE

In its August 27, 2014 Response, WSCK acknowledged its failure to timely host annual public meetings, but claimed that it could not be penalized under KRS

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<sup>7</sup> *Id.*, Acknowledgement and Acceptance of the Commitments Identified in Commission’s Final Order by Corix Infrastructure, Inc. (filed Aug. 20, 2012).

<sup>8</sup> *Id.*, Appendix at 3 (Ky. PSC Aug. 13, 2012).

<sup>9</sup> *Id.*, Letter from M. Todd Osterloh, Sturgill, Turner, Barker & Moloney, PLLC, to Jeff Derouen, Executive Director Public Service Commission (filed Dec. 26, 2012).

<sup>10</sup> Case No. 2013-00237, *Application of Water Service Corporation of Kentucky for an Adjustment of Rates* (filed Sept. 27, 2013).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, Apr. 9, 2014 Hearing, Video Transcript at 15:41:40 – 15:45:59.

278.990(1)<sup>13</sup> because its action was not willful. In support of WSCK's claim, Mr. Osterloh filed an affidavit on October 29, 2014, detailing the actions taken on behalf of WSCK regarding scheduling of the required annual meetings.

In his Affidavit, Mr. Osterloh explained that on November 19, 2013, he discussed with Gerald Wuetcher, Commission Staff executive advisor/attorney, a proposal that WSCK host its required annual public meetings in the cities of Clinton and Middlesboro on the same day as any public meetings held by the Commission in those cities on the then-pending rate case. Per Mr. Osterloh's Affidavit, Mr. Wuetcher instructed Mr. Osterloh to send a letter to the Commission's executive director outlining Mr. Osterloh's proposal. Attached to Mr. Osterloh's Affidavit is a copy of electronic correspondence from Mr. Osterloh to Mr. Lubertozi dated November 19, 2013,<sup>14</sup> that purportedly relays the content of Mr. Osterloh's conversation with Mr. Wuetcher.

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<sup>13</sup> KRS 278.990(1) states:

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) 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.

<sup>14</sup> Electronic mail dated November 19, 2013 from M. Todd Osterloh, Sturgill, Turner, Barker & Moloney, PLLC to Steve Lubertozi, president, WSCK (filed Oct. 29, 2014 as Exhibit 1).

Attached to Mr. Osterloh's October 29, 2014 Affidavit is a copy of his December 3, 2013 Letter addressed to Mr. Derouen<sup>15</sup> inquiring if the Commission intended to hold public meetings in the cities of Clinton or Middlesboro in relation to the then-pending rate case, Case No. 2013-00237. Mr. Osterloh stated in his December 3, 2013 Letter that the Commission did hold public meetings in the cities of Clinton and Middlesboro for WSCK's two prior rate cases.

Mr. Osterloh indicated in his December 3, 2013 Letter his anticipation that any public meetings held by the Commission in relation to the then-pending rate case would not be held until March or early April 2014. Mr. Osterloh proposed that WSCK host its annual public meetings required by the August 13, 2012 Order in Case No. 2012-00133 on the same day as any public meetings the Commission intended to hold in the cities of Clinton or Middlesboro in relation to the then pending rate case. The purpose of Mr. Osterloh's proposal, as stated in his December 3, 2013 Letter, was to prevent two meetings from being held approximately three months apart in which the subject of the meetings would likely involve the proposed rate increase. Mr. Osterloh concluded his December 3, 2013 Letter by requesting he be advised whether his proposal was acceptable to the Commission and Commission Staff. Although the Attorney General was a party in Case No. 2012-00133, Mr. Osterloh did not copy the Attorney General on the December 3, 2013 Letter.

Also attached to Mr. Osterloh's October 29, 2014 Affidavit was a copy of electronic correspondence between Mr. Osterloh and James R. Wood, staff attorney for

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<sup>15</sup> Letter dated December 3, 2013, sent via electronic mail and United States Postal Service, from M. Todd Osterloh, Sturgill, Turner, Barker & Moloney, PLLC, to Jeff Derouen, Executive Director, Public Service Commission (filed Aug. 27, 2014, as Exhibit 1, and Oct. 29, 2014, as Exhibit 2).

the Commission. In a December 3, 2013 electronic mail, Mr. Wood indicated that Mr. Osterloh's proposal was being discussed, and that Mr. Wood would "get back with [Mr. Osterloh] later on that issue."<sup>16</sup>

In its August 27, 2014 Response to the Commission's Order initiating this show cause proceeding, WSCK advised that it hosted a public meeting in the city of Clinton on June 17, 2014, and in the city of Middlesboro on July 10, 2014. A copy of the sign in sheet for each meeting was attached to WSCK's August 27, 2014 Response.

During the November 6, 2014 Hearing, Mr. Derouen acknowledged that he never responded to Mr. Osterloh's December 3, 2013 Letter.<sup>17</sup> Mr. Derouen further stated that he had no authority to waive a requirement of an order issued by the Commission.<sup>18</sup> Mr. Derouen indicated that the proper method to waive a requirement of an order issued by the Commission is to file a motion, and that no motion was filed in Case No. 2012-00133 regarding the requirement for WSCK to host annual public meetings in the cities of Clinton and Middlesboro.<sup>19</sup>

In its post-hearing brief, WSCK acknowledges it failed to further contact Commission Staff regarding a response to Mr. Osterloh's December 3, 2013 Letter.<sup>20</sup>

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<sup>16</sup> Electronic mail dated December 3, 2013 from James R. Wood, Public Service Commission, to M. Todd Osterloh, Sturgill, Turner, Barker & Moloney, PLLC (filed Aug. 27, 2014 and Oct. 29, 2014 as Exhibit 2).

<sup>17</sup> Nov. 6, 2014 Hearing, Video Transcript at 10:42:59 – 10:43:12.

<sup>18</sup> *Id.* at 10:43:18 – 10:43:32.

<sup>19</sup> *Id.* at 10:48:10 – 10:48:39.

<sup>20</sup> WSCK's Post Hearing Brief at 4 (filed Nov. 26, 2014).

WSCK further acknowledges that the Commission did not hold public hearings in the cities of Clinton or Middlesboro regarding Case No. 2013-00237.<sup>21</sup>

### FINDINGS

The Commission does not take the failure to comply with a Commission Order lightly; however, after consideration of the evidence of record and being otherwise advised, finds that:

1. The term “annual” is not defined in the August 13, 2012 Order in Case No. 2012-00133.

2. The transfer as authorized in Case No. 2012-00133 did not close until December 18, 2012.

3. Based on the language in the August 13, 2012 Order in Case No. 2012-00133, WSCK should have hosted one public meeting in the city of Clinton and one public meeting in the city of Middlesboro during the 2013 calendar year.

4. Prior to the close of 2013, Mr. Osterloh, on behalf of WSCK, requested information from Commission Staff regarding the proper procedure to propose that WSCK's required 2013 annual public meetings be held on the same day as any meeting the Commission might hold in March or early April 2014 in the then pending rate case.

5. A Commission Staff member advised Mr. Osterloh to write a letter to the Commission's executive director proposing that WSCK host its required 2013 annual public meetings in the cities of Clinton and Middlesboro on the same day as any public meeting that might be held by the Commission in March or early April 2014 regarding the then-pending rate case.

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<sup>21</sup> *Id.* at 2.

6. Mr. Osterloh, as counsel for WSCK, sent a letter on December 3, 2013, to the Commission's executive director, as instructed by a Commission Staff member, proposing that WSCK host its required 2013 annual public meetings in the cities of Clinton and Middlesboro on the same day as any public meeting that might be held by the Commission in March or early April 2014 regarding the then-pending rate case.

7. Mr. Osterloh concluded his December 3, 2013 Letter by requesting that he be advised whether his proposal was acceptable to the Commission and Commission Staff.

8. On December 3, 2013, a Commission Staff member acknowledged receipt of Mr. Osterloh's proposal, indicated that the proposal was being discussed, and further indicated that a response would be forthcoming.

9. A response was never sent to Mr. Osterloh indicating whether the proposal in his December 3, 2013 Letter was acceptable to the Commission or Commission Staff.

10. WSCK's reliance on the Commission Staff member's December 3, 2013 acknowledgement of WSCK's proposal and indication that a response would be forthcoming was reasonable.

11. Based on WSCK's reasonable reliance on a Commission Staff member's December 3, 2013 documented correspondence that WSCK's proposal to host its required 2013 public meeting on the same day as any public meeting that might be held by the Commission in March or early April 2014 was being considered and that a response would be forthcoming, WSCK's failure to host public meetings in the cities of



Clinton or Middlesboro during 2013 is not a willful violation of the August 13, 2012 Order in Case No. 2012-00133.

12. The actions taken by Mr. Osterloh in his representation of WSCK relating to WSCK's obligation to host annual public meetings in the cities of Clinton and Middlesboro do not constitute a willful violation of the August 13, 2012 Order in Case No. 2012-00133.

13. The August 13, 2012 Order in Case No. 2012-00133 does not require WSCK to copy the Attorney General on correspondence between WSCK and Commission Staff regarding WSCK's proposal to delay hosting the 2013 public meetings required by the August 13, 2012 Order until March or early April, 2014 when the Commission might hold public meetings relating to the then pending rate case.

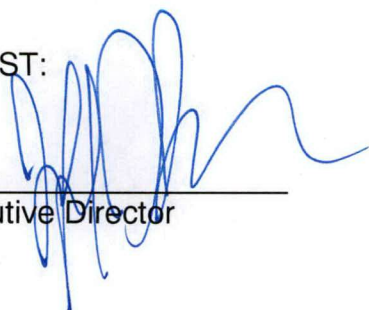
14. Based on the findings above that there are no willful violations of the August 13, 2012 Order in Case No. 2012-00133, the Commission further finds that no basis exists to impose any penalty on WSCK or Mr. Osterloh under KRS 278.990(1).

IT IS THEREFORE ORDERED that:

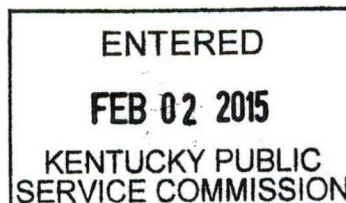
1. No penalty shall be imposed on WSCK under KRS 278.990(1).
2. No penalty shall be imposed on Mr. Osterloh under KRS 278.990(1).
3. This case is closed and removed from the Commission's docket.

By the Commission

ATTEST:



Executive Director



Gregory T Dutton  
Assistant Attorney General  
Office of the Attorney General Utility & Rate  
1024 Capital Center Drive  
Suite 200  
Frankfort, KENTUCKY 40601-8204

James Leonard  
Regional Manager  
Water Service Corporation of Kentucky  
1221 East Cumberland Avenue  
Middlesboro, KY 40965

M. Todd Osterloh  
Sturgill, Turner, Barker & Moloney, PLLC  
333 West Vine Street  
Suite 1400  
Lexington, KENTUCKY 40507