

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

WOOD CREEK WATER DISTRICT AND ITS)	
INDIVIDUAL COMMISSIONERS, GLENN)	CASE NO.
WILLIAMS, EARL BAILEY, AND JIMMY KELLER)	2016-00338
ALLEGED FAILURE TO COMPLY WITH KRS)	
278.300(1))	

ORDER

By Order dated October 11, 2016, the Commission initiated this proceeding to determine whether Wood Creek Water District (“Wood Creek”), Glenn Williams, Earl Bailey, and Jimmy Keller (collectively, “Named Commissioners”) should be subject to the penalties prescribed in KRS 278.990(1) and (10) due to their failure to obtain Commission approval to issue evidences of indebtedness, pursuant to KRS 278.300, in excess of the amount approved by the Commission in Case No. 2014-00440.¹

PROCEDURAL HISTORY

The violations cited in the Commission’s October 11, 2016 Order arise from Commission Staff’s (“Staff”) discovery, during a review of Wood Creek’s recent rate application in Case No. 2015-00428,² of Wood Creek’s excess borrowing following the Commission’s Order in Case No. 2014-00440.

¹ Case No. 2014-00440, *Application of Wood Creek Water District to Issue Securities in the Approximate Principal Amount of \$1,485,000 for the Purpose of Refunding Certain Outstanding Revenue Bonds of the District Pursuant to the Provisions of KRS 278.300 and 807 KAR 5:001.*

² Case No. 2015-00428, *Application of Wood Creek Water District for Rate Adjustment Pursuant to 807 KAR 5:076.*

By Order entered January 5, 2015, in Case No. 2014-00440, the Commission approved Wood Creek's request to borrow \$1,633,500 from Kentucky Rural Water Finance Corporation ("KRWFC") to refinance three outstanding bonds issued to the United States Department of Agriculture, Rural Development ("RD").³ Wood Creek subsequently tendered an application for rate adjustment pursuant to 807 KAR 5:076 on December 28, 2015.⁴ During the review conducted by Staff in this rate case filing, Staff became aware that Wood Creek had executed a bond with KRWFC for \$2,780,000, which was \$1,146,500 more than the refinancing amount authorized in Case No. 2014-00440. At no time prior to Staff's review did Wood Creek voluntarily advise the Commission that the final amount of refinancing was in excess of the amount approved by Order, nor did it request any amendment to the prior Order, or further approval for the final amount.

Subsequent to Staff's identification of this issue, Wood Creek⁵ and its counsel⁶ wrote to the Commission explaining that after filing the application in Case No. 2014-00440, Wood Creek was advised that additional savings would be realized by reamortizing certain other KRWFC bonds made earlier in the program. The decision to reamortize these other KRWFC bonds was made after the Commission entered the January 5, 2015 Order authorizing the RD bond refinancing of the three bonds identified in Case No. 2014-00440. As a result of rolling the reamortization of the earlier KRWFC

³ Case No. 2014-00440, *Wood Creek Water District* (Ky. PSC Jan. 5, 2015), final Order

⁴ Case No. 2015-00428, *Wood Creek Water District* (Ky. PSC Dec. 28, 2015).

⁵ Case No. 2014-00440, Letter from Wood Creek Water District to Jeff Derouen, Kentucky Public Service Commission, (filed Jan. 26, 2016).

⁶ *Id.*, Letter from Randall Jones, Rubin & Hayes, to Jeff Derouen, Kentucky Public Service Commission (filed Jan. 29, 2016).

bonds into the RD bond refinancing, Wood Creek borrowed a total of \$2,780,000 from KRWFC, an amount clearly in excess of the amount authorized by the Commission. Correspondence from Wood Creek acknowledges the excess borrowing, and states that the failure to request an amendment to the Commission's Order was an unintentional error.⁷ This matter was discussed in the Staff Report issued in Case No. 2015-00428,⁸ and the Order approving new rates for Wood Creek in that case noted that Wood Creek had issued indebtedness without prior approval, and that the Commission would initiate a new proceeding to more thoroughly investigate the issuance of excess indebtedness without prior Commission approval.⁹

On October 31, 2016, Wood Creek and the Named Commissioners filed a response to the Commission's October 11, 2016 show cause Order. An informal teleconference ("IC") was held at the Commission's offices on November 16, 2016, and Staff filed an IC memorandum on November 18, 2016. On November 30, 2016, Wood Creek and the Named Commissioners filed a Response to Staff's IC memo and a motion to hold the show cause hearing in abeyance. The Commission denied the motion for failure to establish good cause to hold the hearing in abeyance, and a formal hearing was conducted on December 13, 2016, at the Commission.

Post-hearing data requests were issued by Commission Staff on December 15, 2016, and Wood Creek and the Named Commissioners filed responses on January 3, 2017. On January 5, 2017, Wood Creek and the Named Commissioners filed a notice

⁷ *Id.*, Letter from Wood Creek Water District to Jeff Derouen, Kentucky Public Service Commission (filed Jan. 26, 2016).

⁸ Case No. 2015-00428, *Wood Creek Water District* (Ky. PSC Apr. 15, 2016).

⁹ *Id.* at 4.

that they did not wish to submit a brief in this matter. The Commission finds that the record is complete in this matter and it stands ready for a decision.

DISCUSSION

KRS 278.300 states, "No utility shall issue any securities or evidences of indebtedness, or assume any obligation or liability in respect to the securities or evidences of indebtedness of any other person until it has been authorized so to do by order of the commission." There is a clear violation of this statute by Wood Creek for failure to obtain approval for the issuance of indebtedness in excess of the amount authorized by Order entered January 5, 2015, in Case No. 2014-00440.

Pursuant to KRS 74.020(1), the Named Commissioners are responsible for the control and management of the affairs of the district. KRS 278.990 (1) provides:

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.

Throughout this proceeding, Wood Creek and the Named Commissioners have maintained an argument that they should not be subject to penalty pursuant to KRS 278.990, as they relied on advice of their bond counsel (“Bond Counsel”), and that any violation of Commission statute for failure to obtain approval for the issuance of indebtedness was an inadvertent mistake rather than a “willful” violation. In their Response to Order to Show Cause, Wood Creek and the Named Commissioners stated, “The Wood Creek Water District did not intentionally make this error by failing to file the Motion to Amend the 2015 Order,” that “there was no willful intent by these Commissioners to violate any Order of the Public Service Commission,” and this violation “was purely a mistake and oversight.”¹⁰ The argument was made by counsel in the instant proceeding for Wood Creek and the Named Commissioners at the IC on November 16, 2016, and in their response to the IC memo, that their actions were taken in reliance on the advice of Wood Creek’s Bond Counsel and that their failure to obtain further approval from the Commission for additional refinancing was an inadvertent mistake.¹¹ Bond Counsel was also present for the IC on November 16, 2016. At that time, Bond Counsel also stated that it was his belief that Wood Creek and the Named Commissioners had made an inadvertent mistake in failing to request further Commission approval for the underlying refinance.

¹⁰ Response to Order to Show Cause (filed Oct. 31, 2016).

¹¹ Response to Informal Conference Memo of November 16, 2016 (filed Nov. 30, 2016).

Bond Counsel later testified that he did owe a fiduciary duty to Wood Creek, including the duty to obtain all necessary approvals from the Commission and the responsibility to ensure the final amount of indebtedness approved by Wood Creek was in compliance with the Commission's Order.¹² Bond Counsel further testified that his firm drafted the Assistance Agreement that was ultimately filed with the Commission on March 30, 2015, in Case No. 2014-00440 ("Assistance Agreement") evidencing the final amount of indebtedness issued by Wood Creek. Bond Counsel admitted he was unaware of the final amount contained therein¹³ and that he failed to provide advice to Wood Creek regarding additional Commission approval that was necessary for the indebtedness issued by Wood Creek in excess of the amount authorized by the Commission in Case No. 2014-00440.¹⁴ At no time prior to the hearing did Bond Counsel acknowledge that Wood Creek and the Named Commissioners' "inadvertent mistake" was the result of his failure to advise Wood Creek that additional Commission authorization was necessary.

Testimony from all three Named Commissioners, as well as Bond Counsel, acknowledged that Wood Creek's Assistance Agreement contained indebtedness issued by Wood Creek in an amount in excess of that granted by the Commission's January 5, 2015 Order, and that the same was filed without seeking further Commission approval for the excess indebtedness.¹⁵

¹² December 13, 2016 Hearing at 9:39:07 through 9:40:00.

¹³ *Id.* at 9:59:25 through 9:59:50.

¹⁴ *Id.* at 10:07:38 through 10:07:56; 10:12:57 through 10:13:16; and 10:17:25 through 10:17:35.

¹⁵ *Id.* at 10:37:59 through 10:38:30; 10:52:43 through 10:53:10; 11:06:08 through 11:07:05; and 10:03:10 through 10:03:40 for witnesses Glenn Williams, Earl Bailey, Jimmy Keller, and W. Randall Jones, respectively.

Wood Creek and the Named Commissioners' responsive materials to Staff's Post-Hearing Data Requests include a copy of Wood Creek's minutes from its Board of Commissioners meeting on April 13, 2015, as well as the resolution that was approved on that date by the Named Commissioners. These documents show a clear agreement by Wood Creek and the Named Commissioners to enter into indebtedness in excess of the amount authorized by the Commission in its January 5, 2015 Order.¹⁶

Though Wood Creek and the Named Commissioners claim there was no "willful" violation of Commission statute, or intentional failure to obtain the Commission's approval for the amount of indebtedness in excess of that originally granted, a violation of the statute nonetheless occurred. While a willful violation has been defined as an act that is committed intentionally, not accidentally or involuntarily,¹⁷ it has also been stated that a willful violation does not necessarily and solely entail an intention to do wrong and inflict injury, but may include conduct which reflects an indifference to its natural consequences.¹⁸ For civil and administrative proceedings, a willful violation has been explained as one which is intentional, knowing, voluntary, deliberate or obstinate, although it may be neither malevolent nor with the purpose to violate the law.¹⁹ Here, the testimony of the Named Commissioners acknowledges that a violation did occur, as they voted to approve a resolution to enter into financing in excess of that granted by

¹⁶ Response to Commission Staff's Post-Hearing Request for Information to Wood Creek Water District (filed Jan. 3, 2016).

¹⁷ See Case No. 92-016, *M.A.V.I.S.S., Inc. and Mr. Darby Alleged Failure to Comply with Commission Regulations* (Ky. PSC July 1, 1992).

¹⁸ See Case No. 93-044, *Jackson Purchase Electric Cooperative Corporation, Inc. Alleged Failure to Comply with Commission Regulations* (Ky. PSC), citing *Huddleston v. Hughes*, 843 S.W.2d 901, 905 (Ky. App. 1992).

¹⁹ See Case No. 99-001 *Bluegrass Gas Sales, Inc., Alleged Violation of KRS 278.300* (Ky. PSC July 8, 1999) at 5, citing *Woods v. Corsey*, 200 P.2d 208 (Cal. App. 1948) (Emphasis added).

the Commission, and ultimately issued the excess indebtedness, as evidenced by the Assistance Agreement. Therefore, the Commission finds that Wood Creek and the Named Commissioners intentionally, knowingly, and voluntarily issued indebtedness in excess of the amount authorized by the Commission and that they are subject to penalties pursuant to KRS 278.990 for violation of KRS 278.300.

The Commission further finds no merit to the contention of Wood Creek and the Named Commissioners that their actions were not willful because they relied upon advice of counsel. As two of the Named Commissioners admitted during testimony at the formal hearing, no advice was sought, nor received, from Bond Counsel after the financial advisor had presented the Wood Creek Board with the final proposed amount of refinancing.²⁰ While good faith reliance on advice of counsel is a defense against the violation of certain statutes that provide such exceptions for reasonable cause, the Commission has found that no language is provided for in KRS 278.990 allowing for such an exception.²¹ The Commission does acknowledge, however, that Wood Creek and the Named Commissioners had a reasonable and good faith expectation that Bond Counsel would advise them if additional Commission approval was required for the underlying financing. The Commission further notes that Bond Counsel, by his own admission, should have known that the amount to be refinanced had been increased after approval of a lesser amount had been obtained from the Commission. Because Bond Counsel failed to remain aware of the additional debt to be refinanced, he did not advise Wood Creek that approval by the Commission for the excess amount would be

²⁰ December 13, 2016 Hearing at 10:35:00, 10:52:22.

²¹ See Case No. 99-001, *Bluegrass Gas Sales, Inc. Alleged Violation of KRS 278.300* (Ky. PSC July 8, 1999).

required. Wood Creek's rate payers should not be required to bear the legal and other expenses incurred as a result of this proceeding. Accordingly, this Commission would encourage Wood Creek and the Named Commissioners to look to their Bond Counsel for payment or reimbursement of any expenses incurred in relation to this proceeding.

IT IS THEREFORE ORDERED that:

1. Wood Creek is assessed a civil penalty of \$500 for its willful failure to comply with KRS 278.300. The \$500 penalty is suspended under the condition that no further violation of KRS 278.300 is committed by Wood Creek for a period of three years following the date of this Order. If no further violations of KRS 278.300 have occurred during the three years from the date of this Order, the suspended penalty of \$500 will be forgiven. If a violation of KRS 278.300 occurs during the three years from the date of this Order, the suspended penalty of \$500 shall be immediately due and payable.

2. Wood Creek Commissioner Glenn Williams is assessed a civil penalty of \$500 for his willful failure to comply with KRS 278.300. The \$500 penalty is suspended under the condition that no further violation of KRS 278.300 is committed by Glenn Williams for a period of three years following the date of this Order. If Glenn Williams commits no further violations of KRS 278.300 during the three years from the date of this Order, the suspended penalty of \$500 will be forgiven. If Glenn Williams commits a violation of KRS 278.300 during the three years from the date of this Order, the suspended penalty of \$500 shall be immediately due and payable.

3. Wood Creek Commissioner Earl Bailey is assessed a civil penalty of \$500 for his willful failure to comply with KRS 278.300. The \$500 penalty is suspended under the condition that no further violation of KRS 278.300 is committed by Earl Bailey for a

period of three years months following the date of this Order. If Earl Bailey commits no further violations of KRS 278.300 during the three years from the date of this Order, the suspended penalty of \$500 will be forgiven. If Earl Bailey commits a violation of KRS 278.300 during the three years from the date of this Order, the suspended penalty of \$500 shall be immediately due and payable.

4. Wood Creek Commissioner Jimmy Keller is assessed a civil penalty of \$500 for his willful failure to comply with KRS 278.300. The \$500 penalty is suspended under the condition that no further violation of KRS 278.300 is committed by Jimmy Keller for a period of three years following the date of this Order. If Jimmy Keller commits no further violations of KRS 278.300 during the three years from the date of this Order, the suspended penalty of \$500 will be forgiven. If Jimmy Keller commits a violation of KRS 278.300 during the three years from the date of this Order, the suspended penalty of \$500 shall be immediately due and payable.

5. If a Named Commissioner currently serving on Wood Creek's Board of Commissioners is unable to complete his current term, the conditions of this Order shall be abated at the time of his resignation, contingent on his not being reappointed within three years of the date of this Order.

6. This case is closed and removed from the Commission's docket without further Order of the Commission.

By the Commission

ENTERED
FEB 23 2017
KENTUCKY PUBLIC
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