

CASE

NUMBER:

99-001

INDEX FOR CASE: 99-001
BLUEGRASS GAS SALES, INC.
Investigation - Service
UNLAWFUL ISSUANCE OF SECURITIES

IN THE MATTER OF BLUEGRASS GAS SALES, INC. ALLEGED
VIOLATION OF KRS 278.300

SEQ NBR	ENTRY DATE	REMARKS
0001	01/07/99	Order entered scheduling 2/23 hearing
0002	01/26/99	Receipt of Payment for \$250.00 penalty assessed against Blugrass Gas Sales
M0001	01/26/99	JOHN HUGHES BLUEGRASS GAS-RESPONSE TO ORDER OF JAN 7,99
0003	02/19/99	Order entered; cancels 2/23 hearing
0004	07/08/99	Final Order entered denying the return of the \$250 penalty payment.



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

CERTIFICATE OF SERVICE

RE: Case No. 99-001
BLUEGRASS GAS SALES, INC.

I, Stephanie Bell, Secretary of the Public Service Commission, hereby certify that the enclosed attested copy of the Commission's Order in the above case was served upon the following by U.S. Mail on July 8, 1999.

Parties of Record:

Mark O'Brien
President
Bluegrass Gas Sales, Inc.
13400 U.S. Highway 42
Suite 290
Prospect, KY. 40059

Honorable John N. Hughes
Attorney at Law
124 West Todd Street
Frankfort, KY. 40601

Stephanie J. Bell

Secretary of the Commission

SB/lnh
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BLUEGRASS GAS SALES, INC.)
)
 _____) CASE NO. 99-001
)
 ALLEGED VIOLATION OF KRS 278.300)

O R D E R

BACKGROUND

On June 8, 1998, Bluegrass Gas Sales, Inc. ("Bluegrass") filed an application for rate adjustment pursuant to the alternative rate filing procedure for small utilities and was assigned Case No. 98-305.¹ After its review of that application, Commission Staff performed a financial review and issued a report. The report alleged that on April 30, 1998, Bluegrass had executed, without prior Commission authorization, new evidences of indebtedness to Stock Yards Bank and Trust Company to refinance outstanding debt obligations to TransFinancial Bank in violation of KRS 278.300(1). Bluegrass responded to the allegation by admitting that it had executed new evidences of indebtedness as alleged but denying that prior approval of the Commission was required.

Having found *prima facie* evidence that Bluegrass violated KRS 278.300(1), the Commission, by Order dated January 7, 1999, initiated this proceeding to determine

¹ The record of Case No. 98-305 was incorporated by reference into the record of this proceeding by Order of the Commission on January 7, 1999.

whether Bluegrass should be subject to penalties prescribed in KRS 278.990. The Order directed Bluegrass to appear before the Commission on February 23, 1999, for the purpose of presenting evidence concerning the alleged willful violation of KRS 278.300(1) and of showing cause why it should not be subject to penalties. It directed, in the alternative, that Bluegrass could waive its right to a hearing and submit a penalty payment in the amount of \$250.00.

On January 26, 1999, Bluegrass waived its right to a hearing and submitted a certified check for \$250.00 as payment of the penalty imposed but denied that it committed a willful violation of KRS 278.300 and requested return of the penalty payment. On February 19, 1999, the Commission ordered the hearing cancelled and the matter submitted for a decision.

DISCUSSION

In responding to this matter, Bluegrass put forth two arguments. First, it contended that it was not required under the statute to seek Commission approval before incurring the indebtedness to Stock Yards Bank because the new loan amount was less than the total test year outstanding debt. Second, it argued that even if Bluegrass violated KRS 278.300 its actions could not be considered willful, as required by KRS 278.990, because it sought and received advice of counsel. The Commission finds both arguments and the cases cited in support unpersuasive.

With regard to the first argument, it is a well settled principle that "[w]here the words of the statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as it is written." Fryman v. Electric Steam Radiator Corporation, Ky., 277 S.W.2d 25 (1955). See also Layne v.

Newberg, Ky., 841 S.W.2d 181, 183 (1992) (citing Gateway Construction Company v. Wallbaum, Ky., 356 S.W.2d 247 (1962) ("under general rules of statutory construction, we may not interpret a statute at variance with its stated language.")). The stated language of KRS 278.300(1) is clear and unambiguous and requires all evidences of indebtedness to be preapproved by the Commission. It provides:

No utility shall issue any securities or evidences of indebtedness or liability in respect to the securities or evidences of indebtedness of any other person until it has been authorized to do so by order of the commission.

(Emphasis added). Assuming arguendo that KRS 278.300(1) is susceptible to more than one construction, Bluegrass's statutory interpretation remains untenable. The rule of statutory construction codified at KRS 446.080 requires the Commission to look at the intent of the legislature. It states in pertinent part as follows:

(1) All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. . .

To adequately determine the intent of the legislature, it is important to note that this Commission is charged with regulating utilities and enforcing the provisions of KRS Chapter 278 and is specifically granted exclusive jurisdiction over the regulation of rates and services of utilities. KRS 278.040. In order for the Commission to carry out its statutory responsibilities, it must be apprised of matters which might affect the utilities, their rates and their provision of service. It is obvious that any time a utility executes evidences of indebtedness its rates and/or services could potentially be affected. It is, therefore, clearly the intent of the legislature that all utilities under the jurisdiction of this Commission seek prior authorization before issuing any securities or evidences of

indebtedness. Moreover, if the Kentucky General Assembly had intended to create the exception advanced by Bluegrass, it would have done so.

The Commission likewise finds no merit to Bluegrass's contention that its actions were not willful because it sought and received advice of counsel. Bluegrass cited two cases in support of this argument, both of which the Commission finds inapplicable and distinguishable from the case before it.

The Commission finds that Bluegrass's reliance on the Court's holding in Genex/London v. Kentucky Bd. of Tax Appeals, Ky., 622 S.W.2d 499 (1981) is misplaced because of the significant differences in that case and the one before this Commission. One significant difference is found in the language of the statutes involved. In Genex/London, the Kentucky Department of Revenue assessed a penalty pursuant to KRS 139.980(2) against two taxpayers for failing to file sales and use tax returns as required. KRS 139.980(2) provided at that time that any taxpayer failing to file a required return would be assessed a penalty unless it could show that its failure to file was "due to reasonable cause." The Supreme Court agreed with the Court of Appeals' determination that good faith reliance on the advice of impartial competent tax counsel constituted "reasonable cause" under the statute. No similar language is contained in KRS 278.990. Further, the Commission finds a significant difference in the result of an untimely filing of a sales and use tax return required in Genex/London and the result of Bluegrass's failure to obtain prior approval of its assumption of debt. Bluegrass's failure to file has forever deprived this Commission of prior review and preapproval of the indebtedness incurred in contravention of its statutory

responsibilities. Because of these significant differences, the Commission does not find Genex/London controlling.

Bluegrass also cited the case of Nance v. Cash, Ky., 136 S.W. 619 (1911). This case is also inapplicable. The Nance Court held that advice of counsel is a defense in an action for malicious prosecution when the facts bearing upon guilt or innocence are fully and fairly disclosed to counsel. Malicious prosecution requires malice. Raine v. Drasin, Ky., 621 S.W.2d 895 (1981). In contrast, KRS 278.990(1) requires "willful" behavior. "Willfulness" and "malice" are quantitatively different states of mind. "Malicious" means "[c]haracterized by, or involving, malice; having, or done with, wicked or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse." Black's Law Dictionary 863 (5th ed., 1979). In contrast, in civil statutes, "willfulness is used in the mere cognitive sense," Intercounty Construction Co. v. Occupational Safety and Health Review Comm'n, 522 F.2d 777, 780 (4th Cir. 1975), and "connotes only voluntary and intentional action as contrasted with accidental." Stanton v. Machiz, 183 F. Supp. 719, 725 (D. Md. 1960).

For civil and administrative proceedings, "willful conduct is most often defined simply as that which is intentional, rather than inadvertent or accidental." Hager v. D. of C. Dept. of Cong. & Reg. Affairs, 475 A.2d 367, 368 (D.C. App. 1984). For example, in Woods v. Corsey, 200 P. 2d 208 (Cal. App. 1948), which involved a civil violation of the Emergency Price Control Act, the California Court of Appeals found that a willful violation was "one which is intentional, knowing, voluntary, deliberate or obstinate, although it may be neither malevolent nor with the purpose to violate the law." Id. at 211. (Emphasis added).

Kentucky law is unambiguous on the subject: "[t]he word 'willful' in its general acceptation means intentionally, not accidentally nor involuntarily." Muncy v. Commonwealth, 97 S.W.2d 606, 609, 265 Ky. 730 (1936). Proof of ill will is not a requisite element of willfulness. Louisville & N.R.Co. v. George, 129 S.W.2d 986, 989, 279 Ky. 24 (1939). Consequently, no evidence of ill will, evil intent or malice is necessary to prove that an act was willfully performed.

Bluegrass fails in its attempt to establish that the existence of a good faith defense to a charge of "malicious" conduct means that the same defense applies to a charge of "willful" conduct.

CONCLUSION

The Commission, after considering the record and being otherwise sufficiently advised, finds that:

1. Bluegrass is a Kentucky corporation that engages in the distribution of natural gas to the public for compensation and is, therefore, a utility subject to Commission jurisdiction. KRS 278.010(3)(b).

2. KRS 278.040 establishes the jurisdictional authority of the Commission over all utilities in this state and requires the Commission to regulate all utilities and to enforce the provisions of Chapter 278 of the Kentucky Revised Statutes. It further finds that it would be remiss in these statutory duties if it simply stood by while the provisions of Chapter 278 were violated in a way that could seriously jeopardize the well-being of the ratepayers as well as the company.

3. Bluegrass willfully violated KRS 278.300(1) when it executed, without prior Commission authorization, new evidences of indebtedness to Stock Yards Bank and Trust Company.

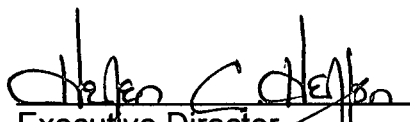
4. The penalty amount of \$250 is a fair and just penalty for the violation of KRS 278.300(1).

IT IS THEREFORE ORDERED that Bluegrass's request that its penalty payment of \$250 be returned is denied.

Done at Frankfort, Kentucky, this 8th day of July, 1999.

By the Commission

ATTEST:


Executive Director



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

February 19, 1999

Mark O'Brien
President
Bluegrass Gas Sales, Inc.
13400 U.S. Highway 42
Suite 290
Prospect, KY. 40059

RE: Case No. 99-001

We enclose one attested copy of the Commission's Order in
the above case.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Bell".

Stephanie Bell
Secretary of the Commission

SB/sa
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BLUEGRASS GAS SALES, INC.)	
_____)	CASE NO.
)	99-001
ALLEGED VIOLATION OF KRS 278.300)	

RECEIPT OF PAYMENT

This is to acknowledge receipt of one check in the amount of \$250.00, payable to Treasurer, Commonwealth of Kentucky from Bluegrass Gas Sales. This represents full payment of the penalty assessed against them in the above-styled action.

Stephanie Bell
Stephanie Bell
Secretary of the Commission
Dated 1-26-99

hv

J. Scott
Witchel

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

JAN 26 1999

PUBLIC SERVICE
COMMISSION

In the Matter of:

Bluegrass Gas Sales, Inc.:) Case No. 99-001
Alleged violation of KRS 278.300)

RESPONSE TO ORDER OF JANUARY 7, 1999

Bluegrass Gas Sales, Inc., by counsel, provides the following response to the Staff Report of January 7, 1999:

Bluegrass submits with this Response a certified check for \$250.00 as required by the Order. However, payment of the penalty imposed does not constitute agreement with or acknowledgement of the Commission's conclusion that a willful violation of KRS 278.300 occurred. Because the cost of disputing the allegation far exceeds the fine imposed, it is not financially prudent to pursue this matter. Therefore, Bluegrass waives its right to a hearing.

The Order adopts the Staff's conclusion in its Report of October 27, 1998 that a refinancing of debt from TransFinancial Bank to Stock Yards Bank requires prior Commission approval and the failure to obtain that approval warrants a "show cause" proceeding to assess penalties. The Report incorrectly considers only "long term debt" of \$190,291.57 as the basis for its conclusion. Omitted from the analysis is a short term note payable to TransFinancial in the amount of \$100,000. This note was for a period of less than two years and was obtained in August 1996. \$14,654 was the remaining balance on this note at the end of the test period.

When added to \$190,291.57, the total outstanding debt at the end of the test period was

\$204,945. The refinancing with Stock Yards Bank was for \$203,000, which is less than the test year end outstanding debt. Therefore, the Report's conclusion that additional debt had been incurred is erroneous.

Furthermore, in reviewing this matter, it was discovered that \$3846.09 recorded in "Intercompany Account" should have been included in "Notes Payable". When this is added to \$204,945, the total is \$208,792. Even if the Staff considers the \$2030.00 origination fee to Stock Yards Bank as debt requiring Commission approval, the total debt associated with Stock Yards Bank of \$205,030 is less than the previously existing debt of \$208,792. Therefore, no debt in excess of that requiring approval by the Commission was incurred as a result of the refinancing with Stock Yards. Additionally, because of the lower interest rate from Stock Yards Bank, the total debt payments will be reduced. In fact, the savings in financing costs over the life of the consolidated loans is \$7,485.59.

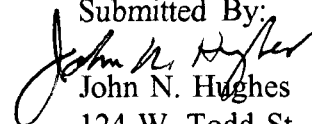
These facts demonstrate that the combination of lawfully issued notes into one did not amount to any additional debt or any additional cost to the Company. Neither note was extended for a period longer than it could have been without additional Commission approval. By penalizing the Company for attempting to reduce the cost of financing, the Commission is providing a disincentive for aggressive management oversight to reduce or minimize operating costs, which benefit both the Company and the customers.

Given these facts, there is no basis for a determination that KRS 278.300 has been violated. Even if the Commission accepts the Staff's position, there is one issue that has not been raised. Prior to consolidating the financing, the President of Bluegrass contacted counsel for advise on the appropriateness of this action. After a disclosure and review of all the facts he was advised that there was no violation of KRS 278.300. Having requested and received

advice from counsel on this matter, the only willful conduct by Bluegrass was to avoid violating the statute. The courts in this state have routinely recognized the principle that a client who seeks advice of counsel prior to acting and relies on that advice cannot be found to have acted willfully and cannot be penalized for acting on that advice. The Court in Genex/London v. Kentucky Bd. of Tax Appeals, Ky., 622 S.W.2d 499, 501 (1981) stated: "...we are of the opinion that a good faith reliance on the advice of impartial competent tax counsel to whom all relevant facts have been disclosed constitutes a reasonable cause for failure to file a use tax return." The Court also said: "Consequently, in this jurisdiction, a taxpayer is excused from payment of penalties and interest imposed by KRS 91.430 when it is judicially determined that he has resisted payment of his taxes in good faith." Cases dating to as early as 1911 state this general rule that advice of counsel mitigates penalties. For example see Nance v. Cash, Ky., 136 S.W. 620 (1911).

Given the effort by Bluegrass to comply with the Commission's regulations, it should not be punished for attempting to improve its financial condition and lower an operating expense. Although there may be a disagreement over the interpretation of the statute, there can be no disagreement over the complete lack of willfulness on the part of Bluegrass. KRS 278.990 allows a penalty only on a showing of willfulness and the Commission's Order is predicated on that conduct. Having provided proof of the lack of willfulness by Bluegrass, the Commission should absolve the Company of the penalty.

Submitted By:



John N. Hughes
124 W. Todd St.
Frankfort, KY 40601

Attorney for Bluegrass
Gas Sales, Inc.



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

January 7, 1999

Mark O'Brien
President
Bluegrass Gas Sales, Inc.
13400 U.S. Highway 42
Suite 290
Prospect, KY. 40059

RE: Case No. 99-001

We enclose one attested copy of the Commission's Order in
the above case.

Sincerely,

A handwritten signature in black ink that reads "Stephanie Bell". The signature is written in a cursive, flowing style.

Stephanie Bell
Secretary of the Commission

SB/sa
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BLUEGRASS GAS SALES, INC.)
_____)) CASE NO. 99-001
ALLEGED VIOLATION OF KRS 278.300)

O R D E R

Bluegrass Gas Sales, Inc. ("Bluegrass") is a Kentucky corporation that engages in the distribution of natural gas to the public for compensation and is, therefore, a utility subject to Commission jurisdiction. KRS 278.010(3)(b).

KRS 278.300(1) provides that "[n]o 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 to do so by order of the commission."

On October 27, 1998, Commission Staff issued a report in Case No. 98-305¹ in which it alleged that on April 30, 1998, Bluegrass had executed without prior Commission authorization new evidences of indebtedness to Stock Yards Bank and Trust Company to refinance outstanding debt obligations to Transfinancial Bank. In its response to the Commission Staff Report, Bluegrass did not dispute the issuance of new evidences of indebtedness without prior Commission authorization, but contended

¹ Case No. 98-305, The Application of Bluegrass Gas Sales, Inc. for an Adjustment of Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities.

that prior Commission authorization was not required because Bluegrass's new loan amount was less than the total test year outstanding debt.

Having considered the Commission Staff Report and Bluegrass's response thereto and being otherwise sufficiently advised, the Commission finds that prima facie evidence exists that Bluegrass willfully violated KRS 278.300(1).

The Commission, on its own motion, HEREBY ORDERS that:

1. Bluegrass shall appear before the Commission on February 23, 1999 at 10:00 a.m., Eastern Standard Time, in Hearing Room 1 of the Commission's offices at 730 Schenkel Lane, Frankfort, Kentucky, for the purpose of presenting evidence concerning the alleged willful violation of KRS 278.300(1) and of showing cause why it should not be subject to the penalties prescribed in KRS 278.990(1) for this alleged willful violation.

2. The record of Case No. 98-305 is incorporated by reference into the record of this proceeding.

3. Any motion requesting any informal conference with Commission Staff to consider any matter which would aid in the handling or disposition of this proceeding shall be filed with the Commission no later than 20 days from the date of this Order.

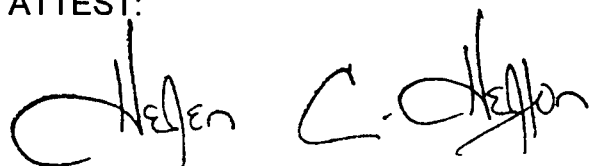
4. If Bluegrass does not dispute the allegations and desires to waive its right to a hearing in this matter, it may, no later than 20 days from the date of this Order, file with the Commission notice of such waiver and pay a penalty of \$250. Payment of the penalty shall be made by certified check or money order made payable to Treasurer, Commonwealth of Kentucky, and shall be delivered to Office of General Counsel, Public Service Commission, 730 Schenkel Lane, Frankfort, Kentucky 40602-0615. Upon

submission of such waiver and payment of such penalty, this matter shall be considered closed and this case shall be removed from the Commission's docket.

Done at Frankfort, Kentucky, this 7th day of January, 1999.

By the Commission

ATTEST:

A handwritten signature in black ink, appearing to read "Stephen C. Coffey". The signature is written in a cursive style with a large initial "S" and "C".

Executive Director