

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

RECEIVED

NOV 26 2014

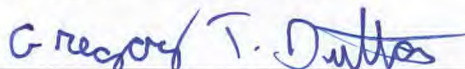
PUBLIC SERVICE
COMMISSION

ATTORNEY GENERAL'S POST-HEARING BRIEF

Comes now the Intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and states as follows for his post-hearing brief in the above-styled matter.

Respectfully submitted,

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INTRODUCTION

In Case No. 2012-00133 (hereinafter the “Transfer Case”), the Commission authorized the transfer of control of Water Service Corporation of Kentucky (“WSCK”) from Hydro Star, LLC (“Hydro Star”) to Corix Utilities (Illinois) LLC (“Corix Utilities”) and Corix Infrastructure through Corix Utilities’ acquisition of ownership and control of Hydro Star.¹ WSCK is a wholly owned subsidiary of Utilities, Inc., an Illinois corporation that indirectly owns over 70 water and wastewater systems in 15 states throughout the United States. The Commission issued an Order on 13 August 2012 (hereinafter “2012 Order”) that required in part:

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 Water Service Corporation’s operations will attend and participate.²

During the public hearing for WSCK’s most recent application for a rate increase, Case No. 2013-00237 (hereinafter the “Rate Case”), on 9 April 2014,³ Bruce Haas, Regional Director of Operations for the Midwest Region of Utilities, Inc., testified that neither he nor any other senior officer that oversees the operation of WSCK’s operations had attended or participated in a public meeting in either the city of Clinton or the City of Middlesboro.⁴ The Attorney General raised this as an issue in his Post-Hearing Brief and sought penalties as provided under KRS

¹ Case No. 2012-00133, *In the Matter of: 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*, (PSC Aug. 13, 2012).

² *Id.* at 11, paragraph 20.

³ *In the Matter of: Water Service Corporation of Kentucky’s Notice of Intent to File An Application for Rate Adjustment.*

⁴ 2013-00237 VT 15:41:40-15:42:41 and 15:47:57-15:48:05.

278.990.⁵ The Commission determined in its final Order “WSKY had not held any annual meetings as of the date of the April 9, 2014 evidentiary hearing in this case. The Commission will address the Attorney General’s concerns in a separate proceeding.”⁶

By Order dated 7 August 2014 the Commission initiated the matter of “Investigation of the Failure of Water Service Corporation of Kentucky to Hold Annual Public Meetings in the Cities of Clinton and Middlesboro” (hereinafter the “Investigation Case”). Further, the Commission ordered that “WSCK shall appear at a hearing on November 6, 2014... to show cause why it should not be subject to the penalties prescribed in KRS 278.990(1) for the alleged violations.”⁷ The Hearing took place on November 6, 2014.

ARGUMENT

1. The requirement that WSCK hold annual public meetings was of significant importance to the Commission and to the Attorney General, and this fact was known to WSCK and Mr. Osterloh as early as August 2012.

An informal conference was held on August 13, 2012 in the Transfer Case.⁸ Attending the meeting were various Commission Staff members, two representatives of the Attorney General, various employees of WSCK and UI, and Mr. Osterloh as counsel for the joint applicants.⁹ The memorandum prepared following the meeting detailed comments of one Attorney General representative, stating the following:

Mr. Spenard noted that a high level of customer dissatisfaction currently exists with Water Service Corporation. He stated that customers had the opinion that Water Service did not share their interests and concerns and that the community concerns were not considered when decisions were made at higher corporate levels. Mr. Spenard further stated that these concerns were likely to increase as

⁵ Case No. 2013-00237, Attorney General’s Post-Hearing Brief (May, 9, 2014).

⁶ 24 July 2014 Order, Case No. 2013-00372, at 30.

⁷ Case No. 2014-00272, *Investigation of the Failure of Water Service Corporation of Kentucky to Hold Annual Public Meetings in the Cities of Clinton and Middlesboro*, at 2-3.

⁸ AG Exhibit 3.

⁹ *Id.*

the proposed transaction would make the Kentucky Operations a much smaller part of the total corporate operations.¹⁰

Shortly after the informal conference was held, representatives of the Attorney General and Mr. Osterloh, representing the joint applicants, submitted to the Commission a Joint Motion to Submit the Case for Consideration without Hearing.¹¹ Paragraph 3(m) of this document states:

Corix Utilities and UI will take an active and ongoing role in managing and operating WSCK in the interests of customers, employees, and the Commonwealth of Kentucky, and will take the lead in enhancing WSCK's relationship with the Commission, with state and local governments, and with other community interests, and to advance these goals shall, among other things, arrange for meetings between Corix Utilities' and UI's senior management and the Commission and/or its Staff, at least annually.¹²

While the Joint Motion and Settlement waived hearing unless otherwise ordered, the Commission did Order a public hearing to consider the transfer application and the settlement agreement. Although the Commission waived examination of WSCK's witnesses to the transaction, it did call upon counsel for the parties to be prepared to answer questions of the Commission.

The public hearing for the Transfer Case took place on August 2, 2012. During the Hearing, Vice-Chair Jim Gardner specifically asks Mr. Osterloh, as counsel for the joint applicants, if the companies would agree and commit to holding annual public meetings between parent-company management and the communities.¹³ Commissioner Breathitt and a representative of the Attorney General stated strong agreement to a condition under which the company committed to conduct annual meetings in the communities served. Counsel for the Attorney General stated that ensuring company representatives meeting regularly with

¹⁰ *Id.*

¹¹ AG Exhibit 4.

¹² *Id.* at 4.

¹³ 2012-00133 VT 10:38:00-10:40:00.

consumers is important and in the best interest of the Commonwealth.¹⁴ Mr. Osterloh then advised that he received communication from his clients accepting the condition to hold annual public meetings with the communities of Clinton and Middleborough.¹⁵ This was confirmed by Mr. Osterloh during the Investigation Case Hearing.¹⁶ Acknowledgement of this requirement was provided by the companies via a post-hearing data request, which stated in part:

In conjunction with condition (m) identified in Paragraph 3 of the Joint Motion filed on July 26, 2012, the Applicants are willing to agree to a condition of the transfer whereby the utility hosts annual public meetings in Clinton and Middlesboro to provide a forum for customers to communicate with utility management.”¹⁷

As a requirement of the 2012 Order, various executives of Corix, UI, and WSCK were required to file notice that they collectively acknowledged, accepted, and agreed to be bound by the commitments set forth in the appendix to the aforementioned order.¹⁸ Those acknowledgment forms were electronically filed with the Commission by Mr. Osterloh. For Mr. Osterloh to state that his client, and specifically he, was unaware that the provision requiring public meetings with the community was of significant importance to the Attorney General is disingenuous to the point of absurdity.¹⁹

2. WSCK and UI did not hold annual public meetings in Clinton or Middlesboro.

Mr. Haas, senior officer from the regional offices of UI, testified at the at the Rate Case Hearing that neither he, nor any other senior officer from the Midwest regional office, attended

¹⁴ 2012-00133 VT 10:44:50-10:45:18.

¹⁵ 2012-00133 VT 10:48:30-10:49:30.

¹⁶ 2014-00272 VT 12:08:20-12:08:30.

¹⁷ AG Exhibit 5.

¹⁸ PSC Staff Exhibit 2.

¹⁹ 2014-00272 VT 12:41:31-12:14:39.

or participated in a public meeting in Clinton or Middlesboro since the 2012 Order was issued.²⁰ Mr. Lubertozi, WSCK President, admitted during his testimony that the meetings did not happen,²¹ that it was the company's responsibility to hold the meetings,²² and that they simply didn't get it done.²³ That the public meetings were not held is not in dispute.

Mr. Osterloh and Mr. Lubertozi stated during the Investigation Case Hearing that WSCK interpreted the requirement to hold "annual" meetings as requiring that they hold a meeting once a per calendar year, starting in 2013. Whether this was the proper interpretation or whether WSCK should have held a meeting once per year beginning when the 2012 Order was issued on 13 August 2012, is irrelevant. Considering that WSCK did not hold a single public meeting until 17 June 2014, either construct of the term "annual" cures the simple failure by WSCK to hold an annual meeting in either 2013 or during the time frame of 13 August 2012-13 August 2013.²⁴

3. WSCK attempted to craft a defense once the Attorney General made the company's failure to hold public meetings an issue during WSCK's last rate case.

On 25 October 2013 the Attorney General served on WSCK his initial Requests for Information (RFI) in the Rate Case.²⁵ Only after the Attorney General served his initial RFI on WSCK did counsel for WSCK contact Commission Staff seeking guidance regarding the company's obligations under the 2012 Order.²⁶ WSCK filed its initial response to the Attorney General's initial RFI on 22 November 2014, but failed to notify the Attorney General that WSCK had reached out to Commission Staff regarding its obligations under the 2012 Order. Mr.

²⁰ 2013-00237 VT 15:41:40-15:42:41; VT 15:47:57-15:48:05.

²¹ 2014-00272 VT 11:24:00-11:25:00

²² 2014-00272 VT 11:16:00-11:17:00

²³ 2014-00272 VT 11:48:00-11:50:00

²⁴ See Appendix A.

²⁵ PSC Staff Exhibit 3; See Appendix A.

²⁶ PSC Staff Exhibit 4; See Appendix A.

Osterloh then sent a letter to Jeff Derouen, PSC Executive Director, seeking further guidance regarding WSCK's obligation to hold annual public meetings.²⁷ WSCK then filed additional responses to the Attorney General's initial RFI on 13 December, 2014, yet still failed to update the Attorney General on Mr. Osterloh's outreach to Commission Staff and the Executive Director.²⁸ It was not until Mr. Osterloh misled the Commission during the Rate Case Hearing, advising on the record that the public meeting requirements set forth by the Transfer Order had been waived,²⁹ that the Attorney General was made aware that any communication regarding the 2012 Order obligations had taken place between Mr. Osterloh and Commission Staff.³⁰

4. WSCK willfully violated the Commissions 2012 Order and should be penalized under KRS 228.990(1).

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

²⁷ PSC Staff Exhibit 7, *See* Appendix A.

²⁸ *See* Appendix A.

²⁹ 2013-00237 VT 15:48:20-15:48:56.

³⁰ 2014-00272 VT 12:48:40-12:49:34.

within the scope of his employment shall be deemed to be the act, omission, or failure of the utility.

The Commission has applied KRS 278.990(1) in multiple instances, finding utilities “subject to a civil penalty to be assessed by the Commission for each willful violation.”³¹ The Commission has recognized that for administrative proceedings, “willful conduct is most often defined simply as that which is intentional, rather than inadvertent or accidental.”³²

A willful violation “denotes an act which is intentional rather than accidental.” *Screws v. U.S.*, 325 U.S. 91, 101 (1945). It “means ‘knowing’ violation or ‘knowing failure to comply.’” *Oldham v. Kubinski*, 185 N.E.2d 270, 280 (III. App. 1962). See *Muncy v. Commonwealth, Ky.*, 97 S.W.2d 606, 609 (1936) (“The word ‘willful’ in its general acceptance means intentionally, not accidentally nor involuntarily.”); *Huddleston v. Hughes, Ky.App.*, 843 S.W.2d 901, 905 (1992) (The term “willful” 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.”). See also *Woods v. Corsey*, 200 P.2d 208, 211 (Cal.App. 1948) (A willful violation is “one which is intentional, knowing voluntary, deliberate or obstinate. . . .”).³³

The Commission has adopted Kentucky’s jurisprudence regarding the meaning of “willfully” in the context of KRS 278.990(1).

In Kentucky, “[t]he word ‘willful’ in its general acceptance means intentionally, not accidentally nor involuntarily.” *Muncy v. Commonwealth*, 265 Ky. 730, 736, 97 S.W.2d 606, 609, (1936). Proof of ill will is not a requisite element of willfulness. *Louisville & N. R. Co. v. George*, 279 Ky. 24, 29, 129 S.W.2d 986, 989 (1939). Consequently, no evidence of ill will, evil intent, or malice is necessary to prove that an act was willfully performed.

³¹ *In the Matter of: S. Kentucky Rural Elec. Coop. Corp. for Alleged Failure to Comply with Comm’n Regulation 807 KAR 5:041*, PSC Case No. 97-343, 1998 WL 35435621 (Feb. 25, 1998); see also, *In the Matter of: Kentucky Utilities Co. Alleged Failure to Comply with Comm’n Regulation 807 KAR 5:041, Section 3(1)*, PSC Case No. 93-035, 1996 W: 34589789 (Apr. 2, 1996) and *In The Matter of: Investigation Into The Provision Of Service By Pilgrim Telephone, Inc. In Violation of KRS 278.160 And The Commission's Order In Administrative Case No. 359 In Response To Formal Complaint*, PSC Case No. 98-181, 1998 WL 35436010 (Apr. 24, 1988).

³² *Hager v. D. of C. Dept. of Cong. & Reg. Affairs*, 475 A.2d 367, 368 (D.C. App. 1984), (quoted in *In the Matter of: KU*, PSC Case No. 93-035, *supra*).

³³ *In the Matter of: S. Kentucky Rural Elec. Coop. Corp. for Alleged Failure to Comply with Comm’n Regulation 807 KAR 5:041*, PSC Case No. 97-343, 1998 WL 35435621 (Feb. 25, 1998).

In *Huddleston v. Hughes*, Ky.App., 843 S.W.2d 901 (1992), the Court of Appeals interpreted the term “willful” as used in the Kentucky Recreational Use Statute (KRS 411.190). After reviewing various usages of the term, the Court concluded that the term “willful” does not “necessarily and solely entail an ‘intention to do wrong and inflict an injury,’” but may also include conduct which reflects an “indifference to [its] natural consequences.” *Id.* at 906.³⁴

Similarly, the Kentucky Supreme Court in *Kirschner v. Louisville Gas & Electric Co.*, 743 S.W.2d 840 (Ky. 1988), held that as to the duty of a landowner to trespassers, a statute using “willful” applied to “conduct which is still, at essence, negligent rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if it were so intended....”³⁵

The issue presented to the Commission is whether WSCK/UI willfully failed to comply with the Commission’s Order to conduct annual public meetings in the communities of Clinton and Middlesboro. Further, the Attorney General posits that in light of the facts presented during the WSCK Rate Case and the hearing on this matter, the Commission is confronted with the additional issue of whether Mr. Osterloh willfully procured, aided and abetted his client, WSCK/UI, in pursuing a defense that would permit them to avoid compliance until after the Rate Case.

Mr. Osterloh was not merely acting as the WSCK’s attorney, as he went beyond that capacity and acted as an agent. The numerous communications with Commission Staff in the record where Mr. Osterloh’s clients are not copied, plus his participation in the Investigation Case as a fact witness both evidence that Mr. Osterloh was a central figure in WSCK’s failure to comply with the Commission’s 2012 Order, as well as their efforts to mitigate their liability once

³⁴ *In the Matter of: KU*, PSC Case No. 93-035, *supra*.

³⁵ *Id.* at 842-843 (cited in *Collins v. Rocky Knob Associates, Inc.*, 911 S.W.2d 608, 611 (Ky. Ct. App. 1995).

the Attorney General made WSCK's noncompliance an issue during the Rate Case. As such, Mr. Osterloh should also be penalized under KRS 278.990.

WSCK's President and the officer directly responsible for the operations of UI in Kentucky, Steve Lubertozi, admitted that the companies failed to comply with the Commission's Order. He testified that this failure was knowing. He testified that the company sought to delay the meeting until after the rate case. Specifically, Mr. Lubertozi stated "could we have acted earlier for our customer meetings, yes we could have. And I think I've said it before, we recognized our failure"³⁶ Both Lubertozi and Osterloh admitted that no formal motion was made to seek a deviation from the Commission's Order. Moreover, the company only contacted the Commission after being asked in RFIs by the Attorney General whether it had complied.³⁷ The conduct by WSCK and its counsel was "knowing, voluntary, deliberate and obstinate" and, therefore, willful. As such, the Commission should find WSCK in violation of KRS 278.990(1) for failing to conduct public meetings in the communities of Clinton and Middlesboro during calendar years 2012 and 2013, and should assign for each violation the maximum fine of \$2,500 for a total penalty of \$5,000.

The questions of (1) waiver or (2) whether WSCK may be held immune from penalty as a result of WSCK's efforts is wholly irrelevant and inapplicable to this matter. WSCK has asserted that "correspondence from WSCK to Commission Staff demonstrates that WSCK intended on complying with the Commissions' order in Case No. 2012-00133. Moreover, at the very least, Commission Staff's silence created confusion."³⁸ Firstly, the Commission as an administrative

³⁶ 2014-00272 VT 11:48:32-11:48:40

³⁷ See Appendix A.

³⁸ Water Service Corp. Of Kentucky Response to PSC's Order Regarding Annual Public Meetings, Case No. 2014-00272 (Aug. 27, 2014).

agency is a creature of statute,³⁹ and may only speak through its orders.⁴⁰ As such, no implied waiver may be effectuated or stand by or through the actions or non-actions of the Commission staff.

Second, the notion that WSCK was acting in good faith in seeking Commission guidance only *after* being challenged in requests for information by the Attorney General is nonsensical. Nonetheless, it is important to discuss the distinction between a ministerial act and a discretionary act to dispel the notion that a waiver occurred or immunity from penalty should stand.

“Ministerial acts are by definition acts that involve “obedience to instructions or laws instead of discretion, judgment, or skill.”⁴¹ Under KRS 278.990, the Commission has ruled that in the context of a ministerial directive, failure to do the act may infer willfulness: “Where the act which a utility is required to do is merely clerical in nature, willfulness or deliberate intent can be inferred from the fact of noncompliance.”⁴²

Under the requirements of Paragraph 20 of the 2012 Order, WSCK should have held *at least* two meetings each year, one meeting annually 2012-2013 in Clinton and one meeting annually 2012-2013 in Middlesboro. That should be interpreted under KRS 278.990 as two separate offenses punishable by “not less than twenty-five dollars nor more than two thousand five hundred dollars.” Due to WSCK’s failure to comply with the 2012 Order for nearly two full

³⁹ *Kentucky Ret. Sys. v. Bowens*, 281 S.W.3d 776, 784 (Ky. 2009).

⁴⁰ *Union Light Heat & Power Co. v. Pub. Serv. Com’n, Ky.*, 271 S.W.2d 361, 365 (1954) (“the commission, like a court, acts and speaks only through its written orders”).

⁴¹ *Black’s Law Dictionary* 1011 (7th ed. 1999). 2 Am.Jur. 2d *Administrative Law* § 64 (1994), A ministerial duty is defined as “one in respect to which nothing is left to discretion.” 2 Am.Jur. 2d *Administrative Law* § 60 (May, 2004).” See *In Re Union Light, Heat & Power Co.*, 2005 WL 589006 (Jan. 27, 2005).

⁴² *In the Matter of: Investigation of the Failure of Ctr. Ridge Water Dist. No. 2 to File Required Reports*, PSC Case No. 2011-00337, 2011 WL 6740310 (Dec. 20, 2011).

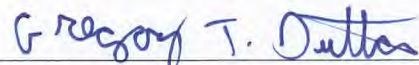
years, and the company's efforts to fight complying with the 2012 Order, the maximum penalty should issue against WSCK for this egregious failure to comply. In addition, acting as an Agent of the Utility, Mr. Osterloh should also be fined up to \$2,500 per offense due to his efforts to both aid and abet the utilizes violation of the Commission's 2012 Order.⁴³

CONCLUSION

WSCK willfully failed to comply with provisions of a lawfully issued Commission Order requiring WSCK to hold annual public meetings in both Clinton and Middleborough, Kentucky. All levels of management of UI and WSCK, and WSCK's attorney, were aware of this requirement and took no action toward complying with the Commission's Order until June of 2014. As such, WSCK should be issued the maximum fine permitted under KRS 278.990.

Respectfully submitted,

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⁴³ See KRS 278.990; "Any officer, agent, or employee of a utility...who willfully violates any of the provisions of this chapter...or who procures, aids, or abets a violation by any utility, shall be subject to either a civil penalty to be assess by the Commission not to exceed two thousand five hundred dollars (\$2,500) for each offence."

APPENDIX A

2012-00133
Order
requiring
WSCK to hold
"annual"
public
meetings:
8.13.12

Call from Mr.
Osterloh to
Mr.
Weutcher:
11.19.13

Letter from
Mr. Osterloh
to Jeff
Derouen
regarding
annual public
meetings:
12.3.13.

2013-00237
Rate Case
Hearing:
9.4.14

Public
meeting held
in
Middlesboro:
7.10.14



First Request
for
Information
from AG to
WSCK
regarding
public
meetings:
10.25.13

WSCK files
first
response to
AG's initial
RFI: 11.22.13

WSCK files
second
response to
AG's initial
RFI: 12.13.13

Public
meeting held
in Clinton:
6.17.14

2014-00272
Investigative
Hearing :
6.11.14

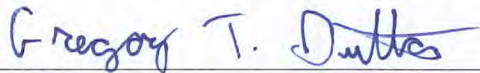
Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of the foregoing were served and filed by hand delivery to Jeff Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; counsel further states that true and accurate copies of the foregoing were mailed via First Class U.S. Mail, postage pre-paid, to:

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

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Sturgill, Turner, Barker & Moloney, PLLC
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this 26th day of November, 2014



Assistant Attorney General