

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

PUBLIC SERVICE
COMMISSION

INVESTIGATION OF THE FAILURE OF WATER)
SERVICE CORPORATION OF KENTUCKY TO)
HOLD ANNUAL PUBLIC MEETINGS IN THE)
CITIES OF CLINTON AND MIDDLESBORO)

Case No.
2014-00272

POST-HEARING BRIEF OF WATER SERVICE CORPORATION OF KENTUCKY

Because Water Service Corporation of Kentucky (“WSCK”) did not willfully fail to obey a previous order of the Commission, it cannot be not penalized under KRS 278.990.

I. Factual Background

In the final order of Case No. 2012-00133, the Commission directed the utility to “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.” The final order in that case was issued on August 13, 2012, but the closing of the transfer did not occur until December 18, 2012.¹

Utility officials interpreted that ordering paragraph to require public meetings to take place during a calendar year, starting in 2013.² As the end of 2013 approached, WSCK officials began the preparation process for the public meetings. Recognizing that the dominant focus of any public meeting at that time would be WSCK’s pending rate case, WSCK contacted Commission Staff to inquire as to the prudence of consolidating the public meeting held in

¹ Video Recording Transcript of April 9, 2014, hearing (“VR”) at 11:17:11; see also Letter from M. Todd Osterloh to Jeff DeRouen, Executive Director of the Public Service Commission, Joint Application of Corix Utilities, et al., Case No. 2012-00133 (filed Dec. 26, 2012).

² VR: 11:19:30-42.

compliance with Case No. 2012-00133 and public meetings that WSCK anticipated the Commission would schedule in the rate case. Initially, counsel for WSCK contacted Commission Staff member Gerald Wuetcher for advice on the most appropriate method of raising this issue with the Commission and Commission Staff.³ Mr. Wuetcher indicated that the proposal was reasonable and suggested that WSCK draft a letter to the Commission's Executive Director detailing the request and specifying the utility's reasoning for the request.⁴

WSCK followed the Commission Staff's suggestion and submitted via mail and email a letter to the Executive Director on December 3, 2014.⁵ Later that day, Commission Staff member James Wood responded to the letter, indicating that he would get back with counsel for WSCK.⁶ This response also contained a reply to WSCK's request for a meeting with the Commissioners, which was submitted the day before. WSCK did not thereafter receive a response from the Commission Staff regarding its request to consolidate the public meeting held in compliance with Case No. 2012-00133 and public meetings that WSCK anticipated the Commission would schedule in the rate case.

WSCK officials acknowledge that they could have done a better job of following up with Commission Staff on this issue. Ultimately, the Commission did not schedule public meetings in conjunction with the then-pending rate case. Accordingly, after the rate case was submitted to the Commission for a decision, WSCK held public meetings on June 17 and July 10, 2014, in Clinton and Middlesboro, respectively. UI Regional Vice President Bruce Haas, UI Director of Billing and Regulatory Relations Karen Sasic, and UI Regional Manager James Leonard

³ Affidavit of M. Todd Osterloh, filed Oct. 29, 2014.

⁴ *Id.*

⁵ See Letter from M. Todd Osterloh, counsel for WSCK, to Jeff DeRouen, Executive Director of the Commission (Dec. 3, 2013) (attached as Exhibit 2 to Affidavit of M. Todd Osterloh, filed Oct. 29, 2014.).

⁶ See E-mail from James R. Wood, Staff Attorney for the Commission, to M. Todd Osterloh, counsel for WSCK (Dec. 3, 2013) (attached as Exhibit 2 to Affidavit of M. Todd Osterloh, filed Oct. 29, 2014).

attended each meeting. WSCK also had several members of the local field operations staff to address any specific service questions that could have been raised at the meetings. In Clinton, only five members of the public attended, including the mayor, a city council member, and the county attorney. In Middlesboro, only one member of the public attended, and she is the spouse of a UI employee.⁷

II. Analysis

a. WSCK did not willfully fail to obey the Commission's order.

KRS 278.990 enables the Commission to issue a civil penalty to a utility if the utility willfully fails to obey the order of the Commission. The term "willful" "in its general acceptance means intentionally, not accidentally or involuntarily." Muncy v. Commonwealth, 97 S.W.2d 606, 609 (Ky. 1936). The Kentucky Supreme Court has elaborated that conduct could be considered willful even though it was not specifically intentional if the conduct "is so far from a proper state of mind that it is treated in many respects as if it were so intended." Kirschner v. Louisville Gas & Electric Co., 743 S.W.2d 840, 842-43 (Ky. 1988). Likewise, the Court of Appeals equated the statutory phrase "willful or malicious" as "the entire want of care or great indifference to" a required standard. Huddleston v. Hughes, 843 S.W.2d 901, 906 (Ky. App. 1992).

WSCK's actions do not rise to the level of a willful failure to obey the Commission's order. The communications between WSCK and Commission Staff demonstrate that WSCK intended on complying with the Commission's order in Case No. 2012-00133. It cannot be said that WSCK's actions were so far from a proper state of mind that it is treated in many respects as if it were so intended to ignore the Commission's order or that they exhibited the entire want of care or great indifference to the Commission's order. WSCK recognized that the Commission

⁷ Copies of the sign-in sheets for these meetings were previously filed in this matter on August 27, 2014.

had ordered public meetings in WSCK's two previous rate cases, and it therefore reasonably believed that the Commission would order public meetings in Case No. 2013-00237. Moreover, the concept of holding the meetings on the same evening was a reasonable one. More individuals would likely have attended the meetings if they were held on the same evening.

Accordingly, the utility contacted Commission Staff to determine the best method by which the utility could propose consolidated meetings,⁸ and the Commission Staff member did not indicate that the plan was unreasonable. At the suggestion of Commission Staff, WSCK then submitted a letter to the Commission's Executive Director, and a Commission Staff member responded that he would get back to counsel for WSCK.

Unfortunately, the Commission Staff never thereafter responded to WSCK. At the very least, this silence created confusion. Silence by the Commission Staff was the basis in Case No. 2004-00103 for the Commission to find that a utility did not "knowingly" fail to obey a previous Commission order. See Kentucky-American Water Co., Case No. 2004-00103, at 24-25 (Ky. PSC Feb. 28, 2005). The Commission has previously equated willfully and knowingly. See Kentucky Utils. Co., Case No. 90-172, at 3 (Ky. PSC Dec. 4, 1990). Therefore, WSCK's actions cannot meet the "willful" standard of KRS 278.990.

To be clear, however, WSCK officials firmly recognize their own failure in not following up with Commission Staff. Upon not receiving a follow-up response in a reasonable amount of time, it would have been appropriate for WSCK to have contacted Commission Staff again to address its proposal. WSCK places absolutely no blame on Commission Staff for WSCK's own failure in this regard. Similarly, at no time has WSCK ever argued that the correspondence

⁸ At the evidentiary hearing, cross-examination suggested that information requests received by WSCK in its rate case on October 25, 2013, served as a catalyst for WSCK to plan for public meetings and contact Commission Staff. Any such insinuation is incorrect. The temporal proximity of events was purely coincidental, as the information request was issued near the end of the year.

between counsel for WSCK and Commission Staff “abrogated WSCK of the annual meeting requirement,” as suggested by the Attorney General. It is WSCK’s position that the communications between WSCK and Commission Staff evidence WSCK’s intent to hold the public meetings in compliance with the purpose of the Commission’s order, and there was no willfulness in failing to hold the meetings during the 2013 calendar year.

b. WSCK’s interpretation of the term “annual” was reasonable.

WSCK reasonably interpreted the term “annual.” Questions have been presented as to whether the annual public meeting provision at issue in this case would have required public meetings to be held during the next calendar year, within twelve months from the date of the order, or another time frame. WSCK officials interpreted the requirement to start during the 2013 calendar year.

WSCK’s interpretation is reasonable for several reasons. First and foremost, if the Commission or the parties to the settlement agreement wanted to specifically require the public meetings to occur within one year from the date of the order, it or they could have required that language in the respective document. See, e.g., Allen Cnty. Water Dist., Case No. 2013-00188, at 2 (Ky. PSC Dec. 17, 2013)(ordering a review of certain fees “[w]ithin one year from the date of this Order”). Second, the closing of the transaction that was the subject of Case No. 2012-00133 did not occur until December 18, 2012. If the reasonableness of the transfer was contingent on certain conditions, it would not be appropriate to require those conditions unless the transfer was actually effectuated. Third, WSCK’s interpretation is consistent with the term in other regulatory contexts, such as the annual report filing with the Commission that covers information for a calendar-year period.

c. WSCK could have held a meeting in December 2013 with reasonable notice that WSCK's proposal was not acceptable.

Even if the Commission or Commission Staff indicated in a reasonable amount of time that consolidating the meetings would not be reasonable and WSCK should plan on holding the meeting by the end of 2013, WSCK could have accomplished that goal.⁹ This would have enabled there to be a minimum seven-day advance public notice, which is consistent with other regulatory requirements. See, e.g., 807 KAR 5:001, Section 9(2).

The meetings that were held in June and July 2014 further demonstrate the reasonableness of the utility's request in 2013. Only five individuals appeared at the meeting in Clinton, and the only member of the public that appeared at the meeting in Middlesboro was a spouse of a WSCK employee. Based on the number of public comments received in the rate case, it appears that more individuals would have appeared at a meeting if they had been consolidated. Regardless of this conclusion, the limited participation by the public at the meetings appears to suggest that the WSCK customers are satisfied with the transparency of WSCK's operations and their ability to contact WSCK if and when issues arise.

III. Conclusion

WSCK is and has been fully committed to holding public meetings in the cities of Clinton and Middlesboro in compliance with the ordering paragraph of Case No. 2012-00133. The correspondence between WSCK and Commission Staff evidence WSCK's intent to comply with the Commission's order. Moreover, it cannot be said that WSCK's actions were so far from a proper state of mind that it is treated in many respects as if it were so intended to ignore the Commission's order or that they exhibited the entire want of care or great indifference to the Commission's order. Because WSCK has demonstrated its intent to comply with the

⁹ VR: 11:21:30.

Commission's order, WSCK did not willfully fail to obey the Commission's order and, therefore, cannot be penalized under KRS 278.990.

Respectfully submitted,

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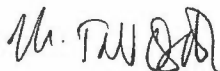
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ATTORNEYS FOR WATER SERVICE CORPORATION
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served via U.S. Mail on this the 26th day of November, 2014.

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