

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the Matter of:)
)
 MOUNTAIN WATER DISTRICT;)
 RHONDA JAMES, COMMISSIONER)
 AND CHAIRPERSON; LESTER)
 "JOHN" COLLINS,)
 COMMISSIONER; TONI AKERS,)
 FORMER COMMISSIONER; AND)
 MIKE LITAFIK, FORMER)
 COMMISSIONER)
 _____)
)
 ALLEGED FAILURE TO COMPLY)
 WITH KRS 278.300(1))

CASE NO. 2015-00353

RESPONDENT TONI AKERS' RESPONSE
TO THE COMMISSION'S ORDER OF NOVEMBER 2, 2015

Comes now Respondent, Toni Akers ("Akers"), by and through counsel, and states as follows:

RESPONSE TO ALLEGATIONS

1. Mountain Water District ("MWD") is a water district organized pursuant to KRS Chapter 74. It provides water service to Pike County, Kentucky.
2. MWD is a utility and is subject to the provisions of KRS Chapter 278.
3. Respondent Akers is a former Commissioner of MWD's Board of Commissioners.
4. On or about July 3, 2005, MWD entered into an Operating Agreement ("2005 Operating Agreement") with Utility Management Group ("UMG") for the management and operations of MWD.

5. On or about October 29, 2008, MWD's Board of Commissioners gave notice to UMG of MWD's intent to terminate the 2005 Operating Agreement.

6. Following several months of negotiations between MWD and UMG, MWD's Board of Commissioners agreed not to terminate the 2005 Operating Agreement with UMG, but only in exchange for a number of commercial concessions from UMG. Many of MWD's requested concessions were rejected by UMG, but some were eventually agreed to, and were included in certain amendments to the 2005 Operating Agreement.

7. On or about April 29, 2009, MWD's Board of Commissioners entered into the terms of its newly negotiated, commercial deal with UMG, entitled "Amendment to Agreement for Operations, Maintenance and Management Services" of the same date, which amended the 2005 Operating Agreement (as noted in the first paragraph of the Public Service Commission's ("PSC's") Show Cause Order of November 2, 2015).

8. One of the provisions of the April 29, 2009 amendments characterizes certain of the commercial concessions obtained from UMG as a "forgivable" \$500,000 "loan" from UMG (hereafter referred to as "Loan"). However, Respondent Akers did not perceive these concessions as involving "indebtedness" (as that term may be used, albeit undefined, in KRS Chapter 278), inasmuch as these concessions were embodied in a new and better commercial deal with UMG. This new deal was structured such that UMG would make an immediate payment to MWD of \$500,000 in exchange for which MWD would rescind its earlier notice to terminate the 2005 Operating Agreement, and, importantly, for which MWD would *not* have to "repay" UMG (as a typical bank loan would have to be repaid).

9. In fact, and pursuant to the terms of this so-called “Loan,” MWD did *not* make any “re-payments” to UMG as the “Loan” was completely “forgiven” over time.

10. Further, at the time that this so-called “Loan” was executed on or about April 29, 2009, the 2005 Operating Agreement was set to expire in less than two years. And given that this purported “Loan” was embedded in a commercial document that only amended the original 2005 Operating Agreement, *but did not extend its term*, the alleged “indebtedness” itself was set to expire before two years, and as such, does not qualify as that for which authorization from the PSC is required pursuant to KRS 278.300(8).

11. Respondent Akers did not violate KRS 278.300(1), willfully or otherwise, in her capacity as former Commissioner of MWD because she lacked any personal knowledge (a) that MWD must obtain authorization from the PSC prior to MWD’s entering into any “evidence[] of indebtedness,” and (b) that the so-called “Loan” could even qualify as “indebtedness” for which PSC authorization may be required.

12. Furthermore, Respondent Akers did not violate KRS 278.300(1), willfully or otherwise, in her capacity as former Commissioner of MWD because she relied on the MWD’s legal counsel, on UMG, and on appropriate engineers to ensure that appropriate legal and regulatory authorizations or approvals were obtained from the PSC, and in particular, with respect to whether, when and how to stay compliant with the PSC’s requirements that are the subject of the Show Cause Order of November 2, 2015.

13. Further, MWD reported this “Loan” to the PSC in a financial disclosure statement in July 2010, which is attached hereto as **Exhibit A**.

14. MWD also reported this Loan to the PSC as part of its financial audit in September 2010, which is attached hereto as **Exhibit B**.

15. In the event that MWD is deemed to have been required to obtain prior authorization from the PSC for the so-called “Loan” under KRS 278.300(1), and if such authorization was not obtained from the PSC, the payment of any fines or civil penalties for same were contractually obligated to be assumed and indemnified by UMG under the terms of the 2005 Operating Agreement, which obligation was re-affirmed in the terms of the “Amendment to Agreement for Operations, Maintenance and Management Services.”

16. Because Respondent Akers acted without knowledge of the specific requirements and applicability of KRS 278.300(1), and because she reasonably relied on others to ensure compliance with same, she did not willfully aid or abet MWD’s alleged violation of KRS 278.300(1).

FIRST AFFIRMATIVE DEFENSE

The November 2, 2015 Show Cause Order seeks the assessment of civil penalties against Respondent Akers, but same is barred by the five-year statute of limitations set forth in KRS 413.120(2). As acknowledged in the Order, the alleged unlawful action occurred on or about April 29, 2009, far more than five years ago.

SECOND AFFIRMATIVE DEFENSE

To the extent the November 2, 2015 Show Cause Order is intended to set in motion the eventual initiation of criminal offense proceedings, any offense created under KRS 278.300(1) is included within the definitional section of the Criminal Code, KRS 500.080(11), and as such, the Order is barred from setting into motion any criminal proceedings against Respondent Akers by virtue of the one-year statute of limitation in KRS 500.050(2). As acknowledged in the Order, the alleged unlawful conduct took place on or about April 29, 2009, far more than one year ago.

THIRD AFFIRMATIVE DEFENSE

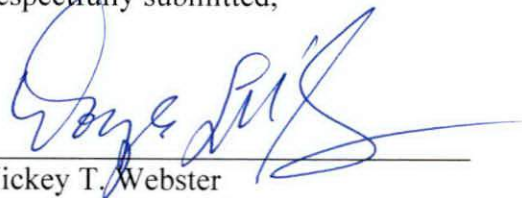
Alternatively, Respondent Akers has been compelled by the issuance of the November 2, 2015 Show Cause Order to file this Response and to participate hereafter in PSC proceedings as a result of the Order. Accordingly, KRS 278.350 provides statutory immunity to, and thus bars, any attempt to criminally prosecute for any purported violation of KRS 278.300(1).

FOURTH AFFIRMATIVE DEFENSE

Alternatively, these proceedings, as initiated and to be conducted hereafter by virtue of the November 2, 2015 Show Cause Order pursuant to KRS Chapter 278 and pertinent regulations thereunder, violate the Respondent Akers' rights pursuant to Kentucky Constitution §§ 2 & 7, and the Due Process Clause of the 14th Amendment to the United States Constitution.

WHEREFORE, the Respondent, Toni Akers, former Commissioner of MWD, respectfully requests that the PSC issue an Order dismissing this proceeding and canceling the hearing that is currently scheduled for January 5, 2016.

Respectfully submitted,



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Douglas L. McSwain
Courtney R. Samford
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250 West Main Street, Suite 1600
Lexington, KY 40507-1746

*Counsel for Respondent, Toni Akers,
Former Commissioner*

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served upon the following by U.S. Mail, postage prepaid, on this the 23rd day of November, 2015:

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

and

Daniel P. Stratton
STRATTON LAW FIRM, PSC
P.O. Box 1530
Pikeville, KY 41502

*Counsel for Respondent Mountain Water
District*

A handwritten signature in blue ink, appearing to read 'Toni Akers', written over a horizontal line.

*Counsel for Respondent, Toni Akers,
Former Commissioner*



25605 Mountain Water District (Water Division) 01/01/2009 - 12/31/2009

Long Term Debt (Ref Page: 22)

Kentucky Infrastructure Authority B90-11	08/01/82	12/01/11	3,3000	\$1,104.00	\$12,517.00
Kentucky Infrastructure Authority B291-01	08/01/84	12/01/23	3,0000	\$8,097.00	\$163,534.00
CTB Veh. # 97	12/18/04	12/18/09	5,7000	\$150.00	\$0.00
CTB Veh. # 101	08/01/06	09/01/11	0,0000	\$1,128.00	\$1,317.00
CTB Veh. # 106	08/01/06	09/01/11	7,1700	\$1,088.00	\$5,448.00
CTB Veh. # 107	08/01/06	09/01/11	7,1700	\$1,088.00	\$5,448.00
CTB Veh. # 112	08/01/06	09/01/11	7,3300	\$324.00	\$0.00
CTB Veh. # 118	08/01/06	09/01/11	6,2500	\$1,021.00	\$9,474.00
UMG (500,000)	05/01/08	04/01/14	5,0000	\$15,002.00	\$346,986.00
CTB Veh. # 124	10/25/09	09/25/13	5,2200	\$356.00	\$24,304.00
CTB Veh. # 88	12/18/04	12/18/09	5,7000	\$133.00	\$0.00
CTB Veh. # 92	08/01/06	09/01/11	0,0000	\$1.00	\$0.00
CTB Veh. # 94	08/01/06	09/01/11	0,0000	\$77.00	\$0.00



MOUNTAIN WATER DISTRICT
REPORT OF AUDIT
DECEMBER 31, 2009

MOUNTAIN WATER DISTRICT
NOTES TO FINANCIAL STATEMENTS
DECEMBER 31, 2009 AND 2008
"CONTINUED"

9. NOTES PAYABLE AND CAPITAL LEASES (CONTINUED)

Utility Management Group

A Note payable, original balance of \$500,000 at 5.0% interest; secured by assets of the District; payments are \$9,436 for 60 months, maturing April 2014.

440,317 -0-

Community Trust Bank

A lease-purchase agreement, original balance \$70,772 at 6.990% interest; secured by a vehicle; payments are \$1,405 for 60 months, maturing May 2012.

36,126 49,900

Community Trust Bank

A lease purchase agreement, original balance \$34,251; at 5.22% interest; secured by a vehicle; payments are \$792 for 48 months, maturing October 2013.

32,386 -0-

Chrysler Financial

A lease purchase agreement, original balance \$16,172 at 5.57% interest; secured by a vehicle; payments are \$310 for 60 months, maturing February 2009.

-0- 588

Chrysler Financial

A lease purchase agreement, original balance \$34,251 at 5.22% interest; secured by a vehicle; payments are \$792 for 48 months, maturing October 2013.

32,386 -0-

Community Trust Bank

A lease purchase agreement, original balance \$24,777 at 5.59% interest; secured by a vehicle; payments are \$474 for 60 months, maturing August 2009.

-0- 3,693

Brandeis Machinery and Supply Company

A lease purchase agreement, original balance \$37,580 at 0.00% interest; secured by equipment; payments are \$1,044 for 36 months, maturing June 2012.

31,317 -0-

Case Credit

A lease purchase agreement, original balance \$44,843 at 5.50% interest; secured by equipment; payments are \$853 for 60 months, maturing August 2009.

-0- 7,760