

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JONATHAN CREEK WATER DISTRICT AND)	
ITS INDIVIDUAL COMMISSIONERS, JIMMY)	
TUBBS, BARRY HILL, JOSH MEDLEY, MARK)	
HOLT, AND KARA WILSON)	CASE NO.
_____)	2017-00469
)	
ALLEGED FAILURE TO COMPLY WITH KRS)	
278.300)	

ORDER

By Order dated January 11, 2018, the Commission initiated this proceeding to determine whether Jonathan Creek Water District (Jonathan Creek District), and its individual Commissioners Jimmy Tubbs (also known as Jimmie Tubbs), Barry Hill, Mark Holt, (collectively, "Commissioners"), Josh Medley, and Kara Wilson, should be subject to the penalties prescribed in KRS 278.990 due to their failure to obtain Commission approval to issue evidences of indebtedness pursuant to KRS 278.300.

PROCEDURAL HISTORY

The violations cited in the Commission's January 11, 2018 Order arise from Commission Staff's review of Jonathan Creek District's rate application in Case No. 2017-00323,¹ in which Staff issued a report summarizing its findings (Staff Report). The Staff Report noted the existence of unauthorized debt, including an outstanding loan from Community Financial Services Bank dated May 3, 2016, of approximately \$600,671

¹ Case No. 2017-00323, *Application of Jonathan Creek Water District for an Alternative Rate Adjustment* (Ky. PSC Aug. 3, 2017).

(Subject Loan) for which Jonathan Creek District did not obtain Commission approval as required by KRS 278.300. The Staff Report further asserted that the Commission may initiate a separate proceeding to investigate the possible violations of Commission statutes and regulations thoroughly, and that members of the Board of Commissioners may be held accountable if a determination was made that there was a willful violation of any provision of KRS Chapter 278.

On January 31, 2018, Jonathan Creek District and the Commissioners filed separate responses to the January 11, 2018 Commission Order, requesting that the Commission dismiss the proceeding with prejudice and cancel the February 27, 2018 hearing. On February 1, 2018, Jonathan Creek District and the Commissioners filed a Joint Motion for Telephonic Conference with Commission Staff to discuss the possibility of settlement. Further, on February 14, 2018, Commissioners Kara Wilson and Josh Medley filed a joint motion to dismiss themselves as parties to the pending case on the grounds that they were not Jonathan Creek District Commissioners when the alleged violation of KRS 278.300 occurred. The Commission issued an Order on February 20, 2018, denying the requests to dismiss the proceeding and cancel the hearing, denied the Joint Motion for Telephonic Conference to discuss settlement, and granted Commissioners Kara Wilson's and Josh Medley's joint motion to be dismissed as parties from the proceeding. A formal hearing was conducted at the Commission's offices on February 27, 2018 (Formal Hearing).

Commission Staff issued Post-Hearing Requests for Information on March 1, 2018, and Jonathan Creek District and the individual Commissioners filed responses on March

19, 2018. The Commission finds that the record is complete in this matter and stands ready for a decision.

DISCUSSION

KRS 278.300(1) states 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 so to do by order of the commission.” Jonathan Creek District and the Commissioners violated KRS 278.300 when they failed to obtain approval for the issuance of indebtedness to Community Financial Services Bank dated May 3, 2016, of approximately \$600,671.

Pursuant to KRS 74.020(1), the 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, Jonathan Creek District and the Commissioners have admitted that they entered into the Subject Loan without prior approval of the

Commission, but insist they were attempting to act in the best interest of the water district and intended no harm or malevolence.² According to both Jonathan Creek District and the Commissioners, they obtained the Subject Loan to discharge previously held loans,³ purchase capital assets, and fund capital projects with the intended goal of improving the quality of the water district's services to the ratepayers.⁴ Commissioners Barry Hill, Jimmie Tubbs, and Mark Holt further argued in their responses that any attempt of criminal prosecution for a violation of KRS 278.300 would be barred pursuant to KRS 278.350 and 500.050(2).⁵ Finally, Jonathan Creek District and the Commissioners informed the Commission that although Commissioner Jimmie Tubbs was still currently serving on the Board of Commissioners, both Commissioners Barry Hill and Mark Holt resigned in 2017.⁶

² Respondent Jonathan Creek District's Response to the Commission's Order of January 11, 2018 (filed Jan. 31, 2018); Respondent Barry Hill's Response to the Commission's Order of January 11, 2018 (filed Jan. 31, 2018); Respondent Jimmie Tubbs' Response to the Commission's Order of January 11, 2018 (filed Jan. 31, 2018); and Respondent Mark Holt's Response to the Commission's Order of January 11, 2018 (filed Jan. 31, 2018).

³ Jonathan Creek District's Response to Commission Staff's Post-Hearing Request for Information (filed Mar. 19, 2018); Declarations of Barry Hill, Jimmie Tubbs, and Mark Holt in Support of Jonathan Creek's Response to Commission Staff's Post-Hearing Request for Information (filed Mar. 19, 2018). (In Jonathan Creek's response and the Commissioners' declarations, they admit that there have been numerous prior loans that have been entered into without the Commission approval. It appears that any outstanding debt on these prior unauthorized loans has been rolled into the current Subject Loan.)

⁴ Respondent Jonathan Creek Districts Response to the Commission's Order of January 11, 2018; Respondent Barry Hill's Response to the Commission's Order of January 11, 2018; Respondent Jimmie Tubbs' Response to the Commission's Order of January 11, 2018; and Respondent Mark Holt's Response to the Commission's Order of January 11, 2018.

⁵ Respondent Barry Hill's Response to the Commission's Order of January 11, 2018; Respondent Jimmie Tubbs' Response to the Commission's Order of January 11, 2018; and Respondent Mark Holt's Response to the Commission's Order of January 11, 2018.

⁶ *Id.*

Commissioners Barry Hill, Jimmie Tubbs, and Mark Holt all acknowledged while testifying at the Formal Hearing that they voted to approve the Subject Loan, and did not seek, nor obtain prior Commission approval.⁷ The Commissioners further testified that they did not believe that the Subject Loan was secured by any collateral.⁸ However, in response to a Post-Hearing Request for Information, Jonathan Creek District filed the full documentation for the Subject Loan. After careful review of the loan documents, it appears that the Subject Loan is in fact secured by an expansive amount of collateral including but not limited to: all inventory; fixtures; personal property; goods; equipment; accounts; chattel paper; instruments; general intangibles; inventory; machinery; the water distribution system including water distribution lines, water lines, water wells, storage tanks, water conditioning facilities, any and all water mains, etc.; any and all revenue; proceeds of any kind; and six tracts of land owned by Jonathan Creek District.⁹ Furthermore, Jonathan Creek District's Board of Commissioners Meeting Minutes from April 26, 2016, reflect a clear agreement by Jonathan Creek District and the Commissioners to enter into the Subject Loan agreement without seeking or obtaining prior authorization from the Commission.¹⁰

⁷ February 27, 2018 Formal Hearing (Hearing) at 9:40:25–9:45:25, 10:08:25–10:09:25, 10:25:45–10:27:05.

⁸ Hearing at 9:44:03–9:44:50, 10:08:40–10:09:25, 10:26:40–10:26:57.

⁹ Jonathan Creek District's Response to Commission Staff's Post-Hearing Request for Information (filed Mar. 19, 2018), Item 2.1–2.6.

¹⁰ Respondent Kara Wilson's Response to the Commission's Order of January 11, 2018 (filed Jan. 31, 2018), Exhibit A; Respondent Josh Medley's Response to the Commission's Order of January 11, 2018 (filed Jan. 31, 2018), Exhibit A.

Although Jonathan Creek District and the Commissioners contend that there was no willful, malevolent, or intentional violation of KRS 278.300 when they failed to obtain the Commission's approval to enter into the Subject Loan, a violation of the statute nonetheless occurred. While a willful violation has been defined as an act that is committed intentionally, not accidentally nor involuntarily,¹¹ 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.¹² 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.¹³ In this case, the evidentiary record and testimony of Jonathan Creek District and the Commissioners acknowledge that a violation of Commission statute occurred when they unanimously voted to enter into the Subject Loan. Therefore, the Commission finds that Jonathan Creek District and the Commissioners intentionally, knowingly, and voluntarily issued indebtedness without obtaining prior authorization of the Commission; and therefore, are subject to penalties pursuant to KRS 278.990 for violation of KRS 278.300.

¹¹ 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).

¹² 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).

¹³ 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).

This is the third case in the last year and a half involving a show cause order against a water district utility and/or its commissioners for violating KRS 278.300 by obtaining a loan, the term of which is in excess of two years, without prior approval of the Commission. To date the Commission has assessed, but not sought, to collect civil penalties against individual water district commissioners for essentially two reasons. First, the Commission's goal has been to obtain compliance with the requirements of the statute and not to exact a penalty and, second, the Commission was determined to send a message to these utilities and their local commissioners that they were out of compliance and future violations could result in individual penalties as well as a separate penalty against the utility. The Commission also intended to place all other water districts on notice that obtaining loans in violation of KRS 278.300 could subject both the utility and its commissioners to civil penalties, and to provide fair notice that strict enforcement could be expected in future cases.

In Case No. 2014-00440, Wood Creek Water District (Wood Creek District) filed an application to request approval from the Commission to enter a loan of \$1,633,500,¹⁴ but then increased the amount it borrowed to \$2,780,000 without obtaining additional authorization.¹⁵ In Case No. 2016-00338, a civil penalty was assessed against Wood Creek District and the commissioners, but enforcement was waived because the primary

¹⁴ 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* (Ky. PSC Jan. 5, 2015).

¹⁵ Case No. 2016-00338, *Wood Creek Water District and its Individual Commissioners, Glenn Williams, Earl Bailey, and Jimmy Keller Alleged Failure to Comply with KRS 278.300(1)* (Ky. PSC Feb. 23, 2017).

reason for the violation was the negligence of Wood Creek District's bond counsel.¹⁶ Later, in Case No. 2017-00467, a show cause proceeding was initiated against Estill Water District No. 1 (Estill District No. 1) and its individual commissioners by reason of having entered into three unauthorized loan agreements in the total amount of \$410,940 to cover operating expenses.¹⁷ Estill District No. 1 could not make at least two balloon payments without having to refinance its debt. A civil penalty against those individual water district commissioners would have potentially been assessed and collected had they not agreed to resign the day prior to the scheduled hearing.¹⁸

The Commission finds that the practice of borrowing money while subjecting water district assets to a possible sale to satisfy unauthorized indebtedness not only violates KRS 278.300, but also subjects the ratepayer to an unreasonable risk of loss of service and to an unacceptable burden through increased rates to pay off unauthorized debt. Water districts and their commissioners are hereby put on final notice that unauthorized debt incurred after the date of this order may well result in substantial civil penalties being assessed and collected against both in future show cause cases.

IT IS THEREFORE ORDERED that:

1. Jonathan Creek District is assessed a civil penalty of two thousand five hundred dollars (\$2,500) for its willful failure to comply with KRS 278.300; however, \$2,000 of the penalty is suspended under the condition that no further violation of KRS

¹⁶ *Id.* at 8–10.

¹⁷ Case No. 2017-00467, *Estill County Water District No. 1 and its Individual Commissioners, Greg Wright, William Beard, and Jerry Arnold* (Ky. PSC Jan. 11, 2018).

¹⁸ Case No. 2017-00467, *Estill County Water District No. 1 and its Individual Commissioners, Greg Wright, William Beard, and Jerry Arnold* (Ky. PSC Feb. 28, 2018).

278.300 is committed by Jonathan Creek District for a period of one year following the date of this Order. If no further violations of KRS 278.300 have occurred during the one year from the date of this Order, the suspended penalty of \$2,000 will be forgiven. If a violation of KRS 278.300 occurs during the next one year from the date of this Order, the suspended penalty of \$2,000 shall be immediately due and payable.

2. Jonathan Creek District shall pay the five hundred dollar (\$500) unsuspended portion of the assessed civil penalty within 30 days of the date of this Order by cashier's check or money order payable to the Kentucky State Treasurer, and mailed or delivered to the Office of the General Counsel, Kentucky Public Service Commission, 211 Sower Boulevard, Post Office Box 615, Frankfort, Kentucky 40602.

3. Jonathan Creek District shall develop a written policy concerning the process to obtain prior loan authorization from the Commission that requires consultation with legal counsel, and have the policy adopted by the Board of Commissioners. Jonathan Creek District shall file the adopted written policy with the Commission within 60 days of the date of this Order.

4. All current Jonathan Creek District Board of Commissioners shall complete the mandatory new-commissioner training with the Commission as required pursuant to KRS 74.020(8)(a) and (b).

5. Jonathan Creek District Commissioner Jimmie Tubbs is assessed a civil penalty of two thousand dollars (\$2,000) for his willful failure to comply with KRS 278.300. The \$2,000 penalty is suspended under the condition that Jimmie Tubbs commit no further violation of KRS 278.300 for a period of one year following the date of this Order. If Jimmie Tubbs commits no further violations of KRS 278.300 during the one year from

the date of this Order, the suspended penalty of \$2,000 will be forgiven. If Jimmie Tubbs commits a violation of KRS 278.300 during the one year from the date of this Order, the suspended penalty of \$2,000 shall be immediately due and payable.

6. If Commissioner Jimmie Tubbs who is currently serving on Jonathan Creek District'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 one year of the date of this Order.

7. Jonathan Creek District Commissioner Barry Hill is assessed a civil penalty of two thousand dollars (\$2,000) for his willful failure to comply with KRS 278.300. The \$2,000 penalty is waived since Barry Hill is no longer serving on Jonathan Creek District's Board of Commissioners, having resigned in 2017. In the event that Barry Hill assumes the role of Jonathan Creek District Commissioner in the future, he shall complete the mandatory new-commissioner training with the Commission as required pursuant to KRS 74.020(8)(a) and (b).

8. Jonathan Creek District Commissioner Mark Holt is assessed a civil penalty of two thousand dollars (\$2,000) dollars for his willful failure to comply with KRS 278.300. The \$2,000 penalty is waived since Mark Holt is no longer serving on Jonathan Creek District's Board of Commissioners, having resigned in 2017. In the event that Mark Holt assumes the role of Jonathan Creek District Commissioner in the future, he shall complete the mandatory new-commissioner training with the Commission as required pursuant to KRS 74.020(8)(a) and (b).

9. Upon Jonathan Creek District's payment of the \$500 civil penalty, this case shall be closed and removed from the Commission's docket without further Order of the Commission.

Partial Dissenting Opinion of Commissioner Talina Mathews in
Case No. 2017-00469

The majority imposes a \$2,500 fine against Jonathan Creek District, but suspends only \$2,000 of the fine, leaving \$500 due and payable immediately; however, I do not agree with this decision. It is important to note that Jonathan Creek District's ratepayers did not violate KRS 278.300, but instead, Jonathan Creek District and the Board of Commissioners committed the violation of the statute. Therefore, Jonathan Creek District's ratepayers should not be required to pay the \$500 fine incurred during this proceeding, nor should they be liable for the additional \$2,000 fine that will be due and owing if Jonathan Creek District violates KRS 278.300 during the next year from the date of this Order. Thus, while I join the rest of the Commission in all other aspects of the final Order, I respectfully dissent as to the decision that monetarily penalizes Jonathan Creek District's ratepayers \$500, and leaves the ratepayers potentially accountable for the additional \$2,000 fine if KRS 278.300 is violated again within one year from the date of this Order.

By the Commission

Commissioner Talina Mathews
dissenting in part.



ATTEST:


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