

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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| ELECTRONIC ALLEGED FAILURE OF |) | |
| CUMBERLAND COUNTY WATER DISTRICT AND |) | |
| ITS OFFICERS, ERIC CARVER, GARLAND |) | CASE NO. |
| HIENEMAN, JAY CARY, MARK VIBBERT, TROY |) | 2022-00244 |
| NORRIS, AND ITS MANAGER, MATTHEW DYER, |) | |
| TO COMPLY WITH A COMMISSION ORDER, KRS |) | |
| 278.990 |) | |

ORDER

On August 31, 2022, the Commission opened an investigation into Cumberland County Water District's (Cumberland District) failure to file for an adjustment in base rates pursuant to 807 KAR 5:076 or 807 KAR 5:001 as ordered in Case No. 2020-00188.¹ On September 20, 2022, Cumberland District, its board of commissioners, and its manager filed answers to the opening Order.² Cumberland District filed a motion requesting an extension to respond to the Commission Staff's First Request for Information,³ and the extension was granted.⁴ Cumberland District responded to three requests for information, including a post-hearing request for information.⁵ A hearing was originally scheduled for

¹ Case No. 2020-00188, *Electronic Application of the Cumberland County Water District to Issue Securities in the Approximate Principal Amount of \$1,570,000 for the Purpose of Refunding Certain Outstanding Obligations of the District Pursuant to the Provisions of KRS 278.300 and 807 KAR 5:001* (Ky. PSC July 28, 2020), Order at 7, ordering paragraph 5.

² Each commissioner filed a separate answer and the manager, Matthew Dyer, filed an answer on behalf of Cumberland District.

³ Cumberland District's Motion for Extension of Time (filed Dec. 15, 2022).

⁴ Order (Ky. PSC Dec. 19, 2022).

⁵ Cumberland District's Response to Commission Staff's First Request for Information (Staff's First Request) (filed Jan. 5, 2023); Cumberland District's Response to Commission Staff's Second Request for Information (Staff's Second Request) (filed Feb. 15, 2023).

February 23, 2023.⁶ Cumberland District initially filed a motion to participate virtually⁷ and that motion was denied.⁸ On February 21, 2023, Cumberland District filed a motion to continue the hearing date,⁹ and that motion was granted.¹⁰ The Commission set a new hearing date on March 2, 2023.¹¹ A hearing was held on April 4, 2023.

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

LEGAL STANDARD

Pursuant to KRS 278.250 and KRS 278.260, the Commission is authorized to investigate and examine the condition of any utility subject to its jurisdiction, including any practice or act relating to the utility service. Pursuant to KRS 278.280, if the Commission finds that any practice or act is unjust, unreasonable, unsafe, improper, inadequate, or insufficient, then the Commission has the authority to determine the just, reasonable, safe, proper, adequate, or sufficient practice or method to be observed.

KRS 278.990 authorizes the Commission to assess civil penalties not to exceed \$2,500 for each offense against a utility and against any officer, agent, or employee of a utility who willfully violates any provisions of KRS Chapter 278, Commission regulations, or Orders. KRS 74.025 authorizes the Commission to utilize certain removal procedures to remove any water commissioner of a water district from office for good cause, including

⁶ Order (Ky. PSC Jan. 30, 2023).

⁷ Cumberland District's Motion to Participate Virtually (filed Feb.15, 2023).

⁸ Order (Ky. PSC Feb. 20, 2023).

⁹ Cumberland District's Motion for Continuance (filed Feb. 21, 2023).

¹⁰ Order (Ky. PSC Feb. 22, 2023).

¹¹ Order (Ky. PSC Mar. 2, 2023).

incompetency, neglect of duty, gross immorality, or nonfeasance, misfeasance, or malfeasance.

BACKGROUND

Cumberland District is a water district organized pursuant to KRS Chapter 74. It operates water distribution facilities that serve approximately 2,857 residential customers, 47 commercial customers, 5 industrial customers, and 1 public authority in Cumberland County, Kentucky.¹²

On June 25, 2020, Cumberland District filed an application seeking Commission approval to enter into a loan agreement with Kentucky Rural Water Finance Corporation (KRWFC) to borrow approximately \$1,570,000 (subject to adjustment of up to 10 percent).¹³ The proceeds of which would be used to refinance eleven outstanding debt obligations to Cumberland District and to pay the costs of issuance of the Loan.¹⁴ As part of the final Order issued on July 28, 2020, in Case No. 2020-00188, Cumberland District was ordered to file for a base rate adjustment or an alternative rate filing within one year of the date of the final Order.¹⁵

On June 28, 2021, Cumberland District filed a motion in that proceeding for an extension of time to file the rate case that it was ordered to file.¹⁶ In the motion,

¹² *Annual Report of Cumberland District to the Public Service Commission for the year ended December 31, 2021* (2021 Annual Report) 12 and 49.

¹³ Case No. 2020-00188, *Electronic Application of the Cumberland County Water District to Issue Securities in the Approximate Principal Amount of \$1,570,000 for the Purpose of Refunding Certain Outstanding Obligations of the District Pursuant to the Provisions of KRS 278.300 and 807 KAR 5:001* (Ky. PSC July 28, 2020).

¹⁴ Case No. 2020-00188, Application (filed June 25, 2020) at 1.

¹⁵ Case No. 2020-00188, July 28, 2020 Order at 7, ordering paragraph 5.

¹⁶ Case No. 2020-00188, Motion for Extension of Time (filed on June 28, 2021).

Cumberland District said that it had contacted Kentucky Rural Water Association (KRWA) for assistance in preparing the rate case filing and, due to a backlog at KRWA, Cumberland District needed six additional months for KRWA to assist Cumberland District in preparing and filing a base rate case.¹⁷ By Order entered on July 15, 2021, in Case No. 2020-00188, the motion was deferred to obtain additional information and a data request issued with a response deadline of August 13, 2021.¹⁸ Cumberland District filed a response on August 4, 2021. On August 22, 2022, the Commission denied the request for additional time to file for a general rate adjustment.¹⁹

On August 23, 2022, Cumberland District filed its Notice to file a Rate Application and on September 21, 2022, Cumberland District filed an Alternative Rate Filing Adjustment Application.²⁰

DISCUSSION AND FINDINGS

As an initial issue, the Commission finds that Garland Hieneman be dismissed as a party from this matter. Sandy Hieneman was sworn in by the Cumberland County Judge Executive at a board of commissioners' meeting in March 2022.²¹ Ms. Hieneman has been serving as a commissioner for the Cumberland District since that time. The Commission finds that the case style should be amended to reflect the appropriate members of the board. The Commission also notes that nothing in this Order shall be

¹⁷ Case No. 2020-00188, Motion for Extension of Time at 1.

¹⁸ Case No. 2020-00188, July 15, 2021 Order at 2, ordering paragraphs 1 and 2.

¹⁹ Case No. 2020-00188, Aug. 22, 2022 Order.

²⁰ Case No. 2022-00291, *Electronic Application of Cumberland County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076*.

²¹ Case No. 2022-00291, Response to Commission Staff's First Request for Information, Exhibit A4, 2022 Board Meeting Minutes (filed Nov. 3, 2022) at 6.

construed to condone or approve of the manner with which the commissioners have been appointed and serving Cumberland District.

Based upon the case record, the Commission finds that there was a clear violation of a Commission Order. Specifically, Cumberland District, Matthew Dyer, its manager, and the named commissioners acknowledged that Cumberland District failed to file an application for an adjustment in base rates as ordered in Case No. 2020-00188 as required by that Order.²² However, Cumberland District claimed the requirement was “unintentionally overlooked,” not a “willful” violation of the Order.²³ While a willful violation has been defined as an act that is committed intentionally, not accidentally or involuntarily,²⁴ 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.²⁵ 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.²⁶

²² See all responses to the Commission’s opening Order filed by Cumberland District’s manager and named commissioners on Sept. 20, 2022.

²³ See all responses to the Commission’s opening Order filed by Cumberland District’s manager and named commissioners (filed Sept. 20, 2022).

²⁴ Case No. 1992-00016, *M.A. V.I.S.S., Inc. and Mr. Darby Alleged Failure to Comply with Commission Regulations* (Ky. PSC July 1, 1992).

²⁵ Case No. 1993-00044, *Jackson Purchase Electric Cooperative Corporation, Inc. Alleged Failure to Comply with Commission Regulations* (Ky. PSC Aug 14, 1996), citing *Huddleston v. Hughes*, 843 S.W.2d 901, 905 (Ky. App. 1992).

²⁶ Case No. 1999-00001, *Bluegrass Gas Sales, Inc., Alleged Violation of KRS 278.300* (Ky. PSC July 8, 1999) at 5, citing *Woods v. Carsey*, 200 P.2d 208 (Cal. App. 1948).

The failure of the individual water district commissioners named in this matter to review the final Order in Case No. 2020-00188, which was eight pages, excluding signatures, in length and was publicly available on the Commission's website is intentional. Commissioners have a fiduciary duty and responsibility to the utility²⁷ when they accept an appointment to a board of commissioners. Before a commissioner can act in the best interest of a utility and its customers, it stands to reason that the commissioner must seek to be reasonably informed about the issues confronting the utility. Becoming and remaining informed requires a commissioner to actively seek information. At a minimum, an individual with a fiduciary duty to act in the best interest of a public utility and its customers should seek to stay informed concerning the utility's obligations to its regulating body and seek to enable the utility to meet those obligations.

To summarize the timeline based on testimony and board meeting minutes, no actions were taken to comply with the final Order in Case No. 2020-00188, a request for a six-month extension was filed 30 days before the filing deadline,²⁸ and the Commission did not make a final decision.²⁹ In Cumberland District's response, Matthew Dyer stated that Cumberland District began work toward filing the rate application on June 24, 2021.³⁰ The Commission eventually did deny the extension in August 2022.³¹ However, the rate

²⁷ KRS 74.020.

²⁸ Case No. 2020-00188, Motion for Extension of Time.

²⁹ See Case No. 2020-00188. The Commission did issue an Order on July 15, 2021, and Cumberland District filed a response to the Order on Aug. 4, 2021.

³⁰ Case No. 2020-00188, Response (filed Aug. 4, 2021).

³¹ Case No. 2020-00188, Aug. 22, 2022 Order.

application did not get filed until September 21, 2022.³² Although the Commission may have issued the denial Order in a more timely fashion, it is apparent that Cumberland District did not take steps to prepare a rate filing in a timely fashion. Had the Commission granted a six-month extension, Cumberland District would not have complied with that Order.

Of additional concern is the Cumberland District's reliance on engineers for advice. At the hearing, Mr. Dyer, already having admitted he overlooked the rate application requirement in Case No. 2020-00188, told the Commission that he learned about the filing requirement from the engineer on the underlying project.³³ Mr. Dyer stated that he did not speak to an attorney, not even the attorney who represented Cumberland District when it filed its application with the Commission in Case No. 2020-00188.³⁴ The Commission notes that while engineers are indispensable for many things a water district may undertake, an engineer cannot give legal advice. The Commission encourages Cumberland District to seek experienced legal counsel on a regular basis so that it may understand the legal expectations of the statutory and regulatory guidelines of the Commission, as well as the legal obligations of its endeavors.

The named commissioners and manager did not take steps to comply with a Commission Order. They readily admitted that they overlooked the requirement initially in the motion for an extension.³⁵ Then, they failed to make a concerted effort to comply

³² Case No. 2022-00291, Application (filed Sept. 21, 2022).

³³ Hearing Video Transcript (HVT) of the Apr. 4, 2023 Hearing, Matthew Dyer testimony at 10:10:00–10:12:00.

³⁴ HVT of the Apr. 4, 2023 Hearing, Matthew Dyer testimony at 10:10:00–10:12:00.

³⁵ Case No. 2020-00188, Motion for Extension.

with the Order after a request for an extension was filed. Failure to act is willful and intentional and has consequences. These actions exhibit an indifference to ensuring Cumberland District's compliance with the Commission's Order in Case No. 2020-00188.

Thus, based on the record and being otherwise sufficiently advised, the Commission finds that the named commissioners and manager, as amended in this Order—Matthew Dyer, Eric Carver, Sandy Hieneman, Troy Norris, Mark Vibbert, and Jay Cary—willfully violated the Commission's final Order in Case No. 2020-00188. Pursuant to KRS 278.990, the Commission finds that the named commissioners and manager, individually, shall each be assessed a civil penalty in the amount of \$500 due within 330 days of service of this Order. However, the Commission will waive the civil penalty for each individual who attends 12 hours of Commission-approved training within 330 days, in addition to any other yearly statutorily required trainings. Each individual should file proof to be provided within 30 days of completing the training.

The Commission expects that Cumberland District, the named commissioners, and its manager will use this opportunity to improve the policies and procedures of Cumberland District. The Commission also intends for this Order to serve as notice that no further violations of Commission Orders will be tolerated.

IT IS THEREFORE ORDERED that:

1. Garland Hieneman is dismissed as a party from this case.
2. The case style is amended to reflect the dismissal of Garland Hieneman.

The case style of this matter is hereinafter: Electronic Alleged Failure of Cumberland Water District and Its Officers, Eric Carver, Sandy Hieneman, Troy Norris, Mark Vibbert,

and Jay Cary and Its Manager, Matthew Dyer, to Comply with a Commission Order, KRS 278.990

3. Eric Carver, Sandy Hieneman, Troy Norris, Mark Vibbert, Jay Cary, and Matthew Dyer, individually, are each assessed civil penalty of \$500 that shall be paid within 330 days of the date of service of this Order for their willful violation of a Commission Order.

4. Payment, pursuant to ordering paragraph 3, shall be made 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.

5. The Commission shall waive the civil penalty of \$500 for each individual, Eric Carver, Sandy Hieneman, Troy Norris, Mark Vibbert, Jay Cary, and Matthew Dyer, who attends 12 hours of Commission-approved training, in addition to any other statutorily required training, within 330 days of the date of service of this Order and provides written notice that the individual attended the training within 30 days of said attendance.

6. Cumberland District shall file with the Commission, within six months of service of this date of this Order, written policies and procedures to include employee(s) responsibilities, employee(s) expectations, processes to ensure the utility is in compliance with all Commission Orders, regulations and related statutes.

7. Any written notice provided pursuant to ordering paragraphs 3, 5, or 6 shall include the case number for this case and be maintained in the post-case correspondence file for this case.

8. This case is closed and removed from the Commission's docket.

PUBLIC SERVICE COMMISSION



Chairman



Vice Chairman



Commissioner



ATTEST:



Executive Director

*Cumberland County Water District
133 Lower River Street
Burkesville, KY 42717-9622

*Garland Hieneman
Cumberland County Water District
133 Lower River Street
Burkesville, KY 42717-9622

*Cumberland County Water District
Cumberland County Water District
133 Lower River Street
Burkesville, KY 42717-9622

*Troy Norris
Cumberland County Water District
133 Lower River Street
Burkesville, KY 42717-9622

*Jay Cary
Cumberland County Water District
133 Lower River Street
Burkesville, KY 42717-9622

*Lindsey G. Bell
Cumberland County Water District
133 Lower River Street
Burkesville, KY 42717-9622

*Mark Vibbert
Cumberland County Water District
133 Lower River Street
Burkesville, KY 42717-9622

*Coleman M. Hurt
Hurt Law Office
400 Courthouse Square
P. O. Box 414
Burkesville, KENTUCKY 42717

*Eric Carver
Cumberland County Water District
133 Lower River Street
Burkesville, KY 42717-9622

*John Phelps Jr.
Cumberland County Water District
133 Lower River Street
Burkesville, KY 42717-9622

*Matthew Dyer
Manager
Cumberland County Water District
133 Lower River Street
Burkesville, KY 42717-9622