

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION OF JESSAMINE-)	
SOUTH ELKHORN WATER DISTRICT AND ITS)	
INDIVIDUAL COMMISSIONERS, JAMES F. HALL,)	CASE NO.
JERRY HAWS, THOMAS BEAL, AND CLAY)	2022-00344
CORMAN, ALLEGED VIOLATION OF KRS)	
278.300)	

ORDER

On April 14, 2023, the Commission entered an Order establishing this case to conduct a formal investigation into the alleged failure of Jessamine-South Elkhorn Water District (Jessamine-South Elkhorn District) and its individual commissioners, James F. Hall, Jerry Haws, Thomas Beal, and Clay Corman, to comply with KRS 278.300 by entering into four promissory notes without the Commission’s prior approval, and, if a determination is made that there has been a willful violation of KRS 278.300, for Jessamine-South Elkhorn District, Mr. Hall, Mr. Haws, Mr. Beal, and Mr. Corman (collectively, Individual Commissioners) to show cause why they should not be subject to civil penalties pursuant to KRS 278.990.

On May 15, 2023, the parties filed a joint response to the allegations by tendering a letter drafted by the utility’s attorney, Bruce E. Smith. The letter alleged that the failure to comply with KRS 278.300 is the result of Mr. Smith, either misadvising his clients or failing to advise them regarding the need to obtain prior Commission approval of the evidences of indebtedness at issue in this matter. Mr. Smith requested that any penalties be placed on him and not the Individual Commissioners.

Jessamine-South Elkhorn District and the Individual Commissioners responded to three rounds of discovery. A hearing was held on July 6, 2023, at which the Individual Commissioners were all present. Jessamine-South Elkhorn District and the Individual Commissioners responded to a post-hearing discovery request. On August 31, 2023, Jessamine-South Elkhorn District filed a motion seeking an extension of time to file a post-hearing memorandum, which had a deadline of August 31, 2023, and an extension of the date on which the case would stand submitted for a decision,¹ which had been set by Commission Order as September 1, 2023.² That motion was denied by Order of the Commission on October 3, 2023.

On October 4, 2023, Jessamine-South Elkhorn District and the Individual Commissioners propounded an offer of settlement, with, among other things, each commissioner assessed a penalty of \$500, suspended for two years and vacated if each commissioner does not violate KRS Chapter 278 or a Commission regulation or Order. Jessamine-South Elkhorn District and the Individual Commissioners also requested that the Commission not enter an Order finding the commissioners willfully violated KRS 278.300 and stated that the utility would adopt certain policies attached to their offer of settlement.

LEGAL STANDARDS

KRS 278.300 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

¹ Motion for Extension of Time (filed Aug. 31, 2023).

² Order (Ky. PSC July 10, 2023).

order of the commission.” KRS 278.300(8) provides an exception for notes for a proper purpose that are payable in two years or less. Pursuant to KRS 74.020(1), the named commissioners are responsible for the control and management of the affairs of the Jessamine-South Elkhorn 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.

BACKGROUND

Jessamine-South Elkhorn District, a water district organized pursuant to KRS Chapter 74, provides water service to approximately 3,097 residential customers and 63 commercial customers in Jessamine County, Kentucky.³ Jessamine-South Elkhorn District is administered by a board of commissioners, which control and manage the

³ *Annual Report of Jessamine-South Elkhorn District to the Public Service Commission for Water Service for the Calendar Year Ended December 21, 2021* at 12 and 49.

affairs of the district in accordance with KRS 74.020(1). It is a utility subject to the Commission's jurisdiction under KRS 278.010(3)(d), KRS 278.015, and KRS 278.040.

ALLEGED VIOLATIONS OF KRS 278.300

In the course of processing Jessamine-South Elkhorn District's application for rate adjustment in Case No. 2022-00050,⁴ the Commission became aware of four promissory notes, and a modification to two of the notes that extended the terms of the notes, that were entered into without approval of the Commission, as required by KRS 278.300. In the final Order in that case, the Commission found it was necessary to open a separate proceeding to investigate the alleged violation of KRS 278.300.⁵

The promissory notes in question are a Kentucky Infrastructure Authority (KIA) loan issued on January 2008 (KIA F07-02), a KIA Loan issued April of 2013 (KIA F11-12), and two loans held by Central Bank that were issued in September of 2014, and then modified in September of 2019.⁶

KIA loan F07-02:

KIA F07-02 loan was executed on January 2, 2009,⁷ with a principal amount of \$1,750,000 with a term of 20 years.⁸ The Jessamine-South Elkhorn District Commissioners who voted to approve the loan were Nick Strong, John Blackford, George

⁴ Case No. 2022-00050, *Electronic Application of Jessamine-South Elkhorn Water District for a Rate Adjustment Pursuant to 807 KAR 5:076* (Ky. PSC Sept. 22, 2022).

⁵ Case No. 2022-00050, Sept. 22, 2022 Order at ordering paragraph 6.

⁶ Case No. 2022-00050, (filed Feb. 25, 2022) Application, Attachment #8.

⁷ Jessamine-South Elkhorn District's Response to Commission Staff's First Request for Information (Staff's First Request) (filed May 24, 2023), Exhibit A, at unnumbered page 11.

⁸ Jessamine-South Elkhorn District's Response to Staff's First Request, Exhibit A at unnumbered page 44.

Dale Robinson, Jerry Haws, and J.F. Hall.⁹ No approval was sought for this loan from the Kentucky Public Service Commission.¹⁰

KIA Loan F11-12:

KIA F11-12 loan was executed on April 1, 2013,¹¹ with a principal amount of \$2,025,300 with a term of 20 years.¹² The Jessamine-South Elkhorn District Commissioners who voted to approve the loan were Nick Strong, Thomas Beall, George Dale Robinson, and J.F. Hall.¹³ No approval was sought for this loan from the Kentucky Public Service Commission.¹⁴

Central Bank Loan 943:

This loan was executed on September 29, 2014,¹⁵ with a principal amount of \$304,000.00¹⁶ with a term of five years.¹⁷ The Jessamine-South Elkhorn District Commissioners who voted to approve the loan were Nick Strong, Thomas Beall, George

⁹ Jessamine-South Elkhorn District's Response to Staff's First Request, Item 6.

¹⁰ Jessamine-South Elkhorn District's Response to Staff's First Request, Item 14.

¹¹ Jessamine-South Elkhorn District's Response to Staff First Request, Exhibit B, unnumbered page 10.

¹² Jessamine-South Elkhorn District's Response to Staff's First Request, Exhibit B, unnumbered page 45.

¹³ Jessamine-South Elkhorn District's Response to Staff's First Request, Item 7.

¹⁴ Jessamine-South Elkhorn District's Response to Staff's First Request, Item 15.

¹⁵ Jessamine-South Elkhorn District's Response to Staff's First Request, Exhibit C, unnumbered page 9.

¹⁶ Jessamine-South Elkhorn District's Response to Staff's First Request, Exhibit C, unnumbered page 1.

¹⁷ Jessamine-South Elkhorn District's Response to Staff's First Request, Exhibit C, unnumbered page 1.

Dale Robinson, Jerry Haws, and J.F. Hall.¹⁸ No approval was sought for this loan from the Kentucky Public Service Commission.¹⁹

Central Bank Loan 958.

This loan was executed on September 29, 2014,²⁰ with a principal amount of \$411,000.00, and a term of five years.²¹ The Jessamine-South Elkhorn District Commissioners who voted to approve the loan were Nick Strong, Thomas Beall, George Dale Robinson, Jerry Haws, and J.F. Hall.²² No approval was sought for this loan from the Kentucky Public Service Commission.²³

Central Bank Loan 943 and 958 Extension.

The extensions of Central Bank Loan 943 and 958 were executed on September 19, 2019, and the terms were extended for an additional five years.²⁴ Jessamine-South Elkhorn District was unable to provide any meeting minutes or records indicating a vote was taken regarding the extensions.²⁵

FINDINGS AND DISCUSSIONS

¹⁸ Jessamine-South Elkhorn District's Response to Staff's First Request, Item 8.

¹⁹ Jessamine-South Elkhorn District's Response to Staff's First Request, Item 16.

²⁰ Jessamine-South Elkhorn District's Response to Staffs First Request, Exhibit D at 9.

²¹ Jessamine-South Elkhorn District's Response to Staffs First Request, Exhibit D, at unnumbered page 1.

²² Jessamine-South Elkhorn District's Response to Staffs First Request, Item 9.

²³ Jessamine-South Elkhorn District's Response to Staff's First Request, Item 17.

²⁴ Jessamine-South Elkhorn District's Response to Staff First Request, Exhibit F and Exhibit G.

²⁵ Jessamine-South Elkhorn District's Response to Staff's First Request, Item 20, Item 21, Item 22, and Item 23.

Based upon the case record, the Commission finds that there are multiple violations of KRS 278.300 by Jessamine-South Elkhorn District and its Individual Commissioners, excluding Clay Corman. Pursuant to the case record, in each of four violations, Jessamine-South Elkhorn issued evidence of indebtedness, payable over a period greater than two years, without receiving prior Commission approval. The only difference between each instance is the commissioners who voted to approve issuance of the evidence of indebtedness.

Jessamine-South Elkhorn District and the Individual Commissioners filed a statement into the record responding to the allegations that alleged the responsibility of the failure to seek prior Commission approval was the result of the utility's attorney either failing to advise or providing bad advice regarding the need for prior Commission approval.²⁶ Jessamine-South Elkhorn District later clarified by stating that "it had been the practice in the past to depend upon counsel to unilaterally render advice at times he thought it appropriate, and to ensure the legality and compliance of the District's actions."²⁷

Consistent with Commission precedent, the Commission finds no merit to the contention of Jessamine-South Elkhorn District and the Individual Commissioners that they should be relieved of the obligations of, or the consequences of, failing to comply with KRS 278.300 as a result of relying on their counsel to advise them of the obligations at the appropriate time. During the July 6, 2023 hearing, the Individual Commissioners indicated their expectation that if legal advice was needed during a board meeting that

²⁶ Respondents Response to Orders Allegations (filed on May 15, 2023).

²⁷ Jessamine-South Elkhorn District's Response to Staff's Second Request for Information (Staff's Second Request) (filed June 14, 2023), Item 1.

the utility's attorney would speak up during meetings and that the attorney likely failed to do so regarding the evidences of indebtedness.²⁸ While good faith reliance on advice of counsel is a defense against the violation of certain statutes that provide such exceptions for reasonable cause, the Commission has found that no language provided for in KRS 278.990 allows for such an exception.²⁹ Given the commissioners lack of express communication with their counsel on legal matters, the Commission strongly encourages Jessamine-South Elkhorn District to establish internal policies and procedures regarding how legal advice is requested and received from the utility's attorney.

A willful violation has been defined as an act that is committed intentionally, not accidentally or involuntarily,³⁰ 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.³¹ For civil and administrative proceedings, a willful violation has been explain as one which is intentional,

²⁸ July 6, 2023 Hearing Video Transcript at 08:47:18. See also, Jessamine-South Elkhorn District's Response to Staff's Second Request, item 1.

²⁹ See Case No. 1999-00001, *In the Matter of: Bluegrass Gas Sales, Inc. Alleged Violation of KRS 278.300* (Ky. PSC July 8, 1999); 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); Case No. 2022-00061, *Corinth Water District and Its Individual Commissioners, W.D. Field, Cherish Kennedy, and Ashley Lauderman Alleged Failure to Comply with KRS 278.300* (Ky. PSC Nov. 14, 2022).

³⁰ 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).

³¹ Case No. 1993-00044, *In the Matter of: 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).

knowing, voluntary, deliberate or obstinate, although it may be neither malevolent nor with the purpose to violate the law.³²

Here, the record is clear that several violations did occur, and the below named commissioners voted to approve the evidence of indebtedness. Therefore, the Commission finds that the Jessamine-South Elkhorn District and the below named commissioners, intentionally, knowing, and voluntarily issued evidences of indebtedness without prior authorization by the Commission, and that they are subject to penalties pursuant to KRS 278.990 for violations of KRS 278.300. The Individual Commissioners are found to have violated KRS 278.300 as follows:

- James F. Hall voted to approve:
 - KIA F07-02.
 - KIA F11-01.
 - Central Bank Loan 943.
 - Central Bank loan 958.
- Jerry Haws voted to approve:
 - KIA F07-02.
 - Central Bank Loan 943.
 - Central Bank Loan 958.
- Thomas Beal voted to approve:
 - KIA F11-02.
 - Central Bank Loan 943.
 - Central Bank Loan 958.

Although each case must be examined individually, the Commission has two goals when issuing a final Order in an investigation into violation of KRS 278.300. First, the Commission's goal has been to obtain compliance with the requirements of the statute and not to merely exact penalty. Second, the Commission seeks to put utilities and commissioners on notice that certain actions place the utility and individual

³² Case No. 1999-00001, *In Matter of :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).

commissioners out of compliance with applicable statutes and regulations and those violations could result in individual penalties as well as a separate penalty against the utility.

The Commission notes that each of the commissioners who voted for issuing the evidence of indebtedness should have been aware of the requirements to seek prior Commission approval given that “the commissioners have always been conscientious about acquiring their annual training and have usually attended such trainings as a group.”³³ In addition, the record demonstrates that all of the named commissioners have attended training consistently since prior to the evidences of indebtedness being issued.³⁴

The Commissions finds that the Offer of Settlement³⁵ should be rejected due to the number of violations, the expanse of time, which the violations occurred over, and the fact that the commissioners had received training prior to the violations. Furthermore, the Offer of Settlement was filed beyond the time permitted for the parties to file any briefs, and the date on which the Commission had ordered the case would stand ready for a decision.

The Commission finds that as a result of the repeated violations of KRS 278.300 and pursuant to KRS 278.990, Jessamine-South Elkhorn District commissioners James F, Hall, Jerry Haws, and Thomas Beal should individually be subject to a penalty of \$250 each due within 180 days of entry of this and they should be required to attend 12 hours of Commission hosted water commissioner training within 12 months of entry of this

³³ Jessamine-South Elkhorn District’s Response to Response to Staff’s Post Hearing Request for Information (Staff’s Post Hearing Request) (filed July 24, 2023), Item 8.

³⁴ Jessamine-South Elkhorn District’s Response to Staff’s Post Hearing Request, Exhibit F.

³⁵ Offer of Settlement (filed Oct. 4, 2023).

Order. The Commission expects that Jessamine-South Elkhorn District will use this opportunity to improve the policies and procedures. Any unauthorized debt incurred after the date of service of this order may well result in substantial civil penalties being assessed and collected against all parties in future show cause cases.

IT IS THEREFORE ORDERED that:

1. The Offer of Settlement is rejected.
2. James F. Hall shall pay a penalty of \$250 within 180 days of entry of this Order, and that within 12 months of entry of this Order shall attend 12 hours of PSC hosted water commissioner training for his willful violation of KRS 278.300.
3. Thomas Beall shall pay a penalty of \$250 within 180 days of entry of this Order, and that within 12 months of entry of this Order shall attend 12 hours of PSC hosted water commissioner training for his willful violation of KRS 278.300.
4. Jerry Haws shall pay a penalty of \$250 within 180 days of entry of this Order, and that within 12 months of entry of this Order shall attend 12 hours of PSC hosted water commissioner training for his willful violation of KRS 278.300.
5. This case is closed and removed from the Commission's docket.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ENTERED
OCT 31 2023
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SERVICE COMMISSION

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