

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BLUEGRASS GAS SALES, INC.)
)
 _____) CASE NO. 99-001
)
 ALLEGED VIOLATION OF KRS 278.300)

O R D E R

BACKGROUND

On June 8, 1998, Bluegrass Gas Sales, Inc. (Bluegrass) filed an application for rate adjustment pursuant to the alternative rate filing procedure for small utilities and was assigned Case No. 98-305.¹ After its review of that application, Commission Staff performed a financial review and issued a report. The report alleged that on April 30, 1998, Bluegrass had executed, without prior Commission authorization, new evidences of indebtedness to Stock Yards Bank and Trust Company to refinance outstanding debt obligations to TransFinancial Bank in violation of KRS 278.300(1). Bluegrass responded to the allegation by admitting that it had executed new evidences of indebtedness as alleged but denying that prior approval of the Commission was required.

Having found *prima facie* evidence that Bluegrass violated KRS 278.300(1), the Commission, by Order dated January 7, 1999, initiated this proceeding to determine

¹ The record of Case No. 98-305 was incorporated by reference into the record of this proceeding by Order of the Commission on January 7, 1999.

whether Bluegrass should be subject to penalties prescribed in KRS 278.990. The Order directed Bluegrass to appear before the Commission on February 23, 1999, for the purpose of presenting evidence concerning the alleged willful violation of KRS 278.300(1) and of showing cause why it should not be subject to penalties. It directed, in the alternative, that Bluegrass could waive its right to a hearing and submit a penalty payment in the amount of \$250.00.

On January 26, 1999, Bluegrass waived its right to a hearing and submitted a certified check for \$250.00 as payment of the penalty imposed but denied that it committed a willful violation of KRS 278.300 and requested return of the penalty payment. On February 19, 1999, the Commission ordered the hearing cancelled and the matter submitted for a decision.

DISCUSSION

In responding to this matter, Bluegrass put forth two arguments. First, it contended that it was not required under the statute to seek Commission approval before incurring the indebtedness to Stock Yards Bank because the new loan amount was less than the total test year outstanding debt. Second, it argued that even if Bluegrass violated KRS 278.300 its actions could not be considered willful, as required by KRS 278.990, because it sought and received advice of counsel. The Commission finds both arguments and the cases cited in support unpersuasive.

With regard to the first argument, it is a well settled principle that [w]here the words of the statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as it is written. Fryman v. Electric Steam Radiator Corporation, Ky., 277 S.W.2d 25 (1955). See also Layne v.

Newberg, Ky., 841 S.W.2d 181, 183 (1992) (citing Gateway Construction Company v. Wallbaum, Ky., 356 S.W.2d 247 (1962) (under general rules of statutory construction, we may not interpret a statute at variance with its stated language.). The stated language of KRS 278.300(1) is clear and unambiguous and requires all evidences of indebtedness to be preapproved by the Commission. It provides:

No utility shall issue **any** securities or evidences of indebtedness or liability in respect to the securities or evidences of indebtedness of any other person until it has been authorized to do so by order of the commission.

(Emphasis added). Assuming arguendo that KRS 278.300(1) is susceptible to more than one construction, Bluegrass s statutory interpretation remains untenable. The rule of statutory construction codified at KRS 446.080 requires the Commission to look at the intent of the legislature. It states in pertinent part as follows:

(1) All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. . .

To adequately determine the intent of the legislature, it is important to note that this Commission is charged with regulating utilities and enforcing the provisions of KRS Chapter 278 and is specifically granted exclusive jurisdiction over the regulation of rates and services of utilities. KRS 278.040. In order for the Commission to carry out its statutory responsibilities, it must be apprised of matters which might affect the utilities, their rates and their provision of service. It is obvious that any time a utility executes evidences of indebtedness its rates and/or services could potentially be affected. It is, therefore, clearly the intent of the legislature that all utilities under the jurisdiction of this Commission seek prior authorization before issuing any securities or evidences of

indebtedness. Moreover, if the Kentucky General Assembly had intended to create the exception advanced by Bluegrass, it would have done so.

The Commission likewise finds no merit to Bluegrass's contention that its actions were not willful because it sought and received advice of counsel. Bluegrass cited two cases in support of this argument, both of which the Commission finds inapplicable and distinguishable from the case before it.

The Commission finds that Bluegrass's reliance on the Court's holding in Genex/London v. Kentucky Bd. of Tax Appeals, Ky., 622 S.W.2d 499 (1981) is misplaced because of the significant differences in that case and the one before this Commission. One significant difference is found in the language of the statutes involved. In Genex/London, the Kentucky Department of Revenue assessed a penalty pursuant to KRS 139.980(2) against two taxpayers for failing to file sales and use tax returns as required. KRS 139.980(2) provided at that time that any taxpayer failing to file a required return would be assessed a penalty unless it could show that its failure to file was due to reasonable cause. The Supreme Court agreed with the Court of Appeals' determination that good faith reliance on the advice of impartial competent tax counsel constituted reasonable cause under the statute. No similar language is contained in KRS 278.990. Further, the Commission finds a significant difference in the result of an untimely filing of a sales and use tax return required in Genex/London and the result of Bluegrass's failure to obtain prior approval of its assumption of debt. Bluegrass's failure to file has forever deprived this Commission of prior review and preapproval of the indebtedness incurred in contravention of its statutory

responsibilities. Because of these significant differences, the Commission does not find Genex/London controlling.

Bluegrass also cited the case of Nance v. Cash, Ky., 136 S.W. 619 (1911). This case is also inapplicable. The Nance Court held that advice of counsel is a defense in an action for malicious prosecution when the facts bearing upon guilt or innocence are fully and fairly disclosed to counsel. Malicious prosecution requires malice. Raine v. Drasin, Ky., 621 S.W.2d 895 (1981). In contrast, KRS 278.990(1) requires "willful" behavior. "Willfulness" and "malice" are quantitatively different states of mind. "Malicious" means "[c]haracterized by, or involving, malice; having, or done with, wicked or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse." Black's Law Dictionary 863 (5th ed., 1979). In contrast, in civil statutes, willfulness is used in the mere cognitive sense, Intercounty Construction Co. v. Occupational Safety and Health Review Comm n, 522 F.2d 777, 780 (4th Cir. 1975), and connotes only voluntary and intentional action as contrasted with accidental. Stanton v. Machiz, 183 F. Supp. 719, 725 (D. Md. 1960).

For civil and administrative proceedings, willful conduct is most often defined simply as that which is intentional, rather than inadvertent or accidental. Hager v. D. of C. Dept. of Cong. & Reg. Affairs, 475 A.2d 367, 368 (D.C. App. 1984). For example, in Woods v. Corsey, 200 P. 2d 208 (Cal. App. 1948), which involved a civil violation of the Emergency Price Control Act, the California Court of Appeals found that a willful violation was one which is intentional, knowing, voluntary, deliberate or obstinate, although it may be neither malevolent nor with the purpose to violate the law. Id. at 211. (Emphasis added).

Kentucky law is unambiguous on the subject: [t]he word willful in its general acceptation means intentionally, not accidentally nor involuntarily. Muncy v. Commonwealth, 97 S.W.2d 606, 609, 265 Ky. 730 (1936). Proof of ill will is not a requisite element of willfulness. Louisville & N.R.Co. v. George, 129 S.W.2d 986, 989, 279 Ky. 24 (1939). Consequently, no evidence of ill will, evil intent or malice is necessary to prove that an act was willfully performed.

Bluegrass fails in its attempt to establish that the existence of a good faith defense to a charge of "malicious" conduct means that the same defense applies to a charge of "willful" conduct.

CONCLUSION

The Commission, after considering the record and being otherwise sufficiently advised, finds that:

1. Bluegrass is a Kentucky corporation that engages in the distribution of natural gas to the public for compensation and is, therefore, a utility subject to Commission jurisdiction. KRS 278.010(3)(b).

2. KRS 278.040 establishes the jurisdictional authority of the Commission over all utilities in this state and requires the Commission to regulate all utilities and to enforce the provisions of Chapter 278 of the Kentucky Revised Statutes. It further finds that it would be remiss in these statutory duties if it simply stood by while the provisions of Chapter 278 were violated in a way that could seriously jeopardize the well-being of the ratepayers as well as the company.

3. Bluegrass willfully violated KRS 278.300(1) when it executed, without prior Commission authorization, new evidences of indebtedness to Stock Yards Bank and Trust Company.

4. The penalty amount of \$250 is a fair and just penalty for the violation of KRS 278.300(1).

IT IS THEREFORE ORDERED that Bluegrass s request that its penalty payment of \$250 be returned is denied.

Done at Frankfort, Kentucky, this 8th day of July, 1999.

By the Commission

ATTEST:

Executive Director