

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CITY OF DRAKESBORO d/b/a)
DRAKESBORO NATURAL GAS)
COMPANY)

CASE NO. 2019-00065

_____)
ELECTRONIC INVESTIGATION OF)
ALLEGED FAILURE TO COMPLY WITH)
KRS 278.495, 807 KAR 5:027, AND)
49 C.F.R. PART 192)

CITY OF DRAKESBORO POST-HEARING BRIEF

The City of Drakesboro (hereafter "Drakesboro"), by counsel, respectfully agrees with the recitation of the record as set forth in the Commission Staff's Post-Hearing Brief. Moreover, Drakesboro believes that the Commission Staff's recitation of KRS 278.992(1) is correct in its identification of the standard by which the Commission should determine the penalty, and penalty type, resulting from the violations.

Because Drakesboro agrees with both the recitation of the record and the description of the facts set forth relating to the violations alleged, the sole purpose of Drakesboro's response is to provide additional information relating to the factors set forth in KRS 278.992 and to proffer an alternative to the Commission Staff as to the proper form of assessment.

The essence of Drakesboro's position is that any fine imposed should be in the form of a requirement to expend funds to the resolution of the safety issues present in the gas distribution system, as any other form of penalty will only serve to further threaten the City's financial condition and fail to aid in the resolution of the underlying systemic problems. Thus, the remainder of this memorandum is dedicated to exploring this concept and providing additional information in support thereof.

Application of Assessment Factors

The factors to be considered by the Commission are as follows: 1. the nature, circumstances, and gravity of the violation(s), including adverse impact on the environment; 2. the degree of the violator's culpability; 3. the violator's history of prior offenses; 4. any good faith act by the violator in attempting to achieve compliance; and 5. the effect on the violator's ability to continue in business; and, 6. the size of the business charged.¹

Drakesboro first notes that it considers the Commission Staff's assessment of the gravity of the violations to be well-founded and well-analyzed. Similarly, the city agrees with the analysis of the Commission Staff in its analysis of the size of the operator and the good faith of the city in addressing the violations.

A. Violator's History of Prior Offenses

In this case, there is no evidence of record that Drakesboro has a history, excepting the violations specifically set forth in this action, of violation. Therefore, this factor weighs in favor of abatement of any direct civil penalty against Drakesboro.

B. Degree of the Violator's Culpability

The cause of Drakesboro's violations is undoubtedly the result of bad acts of certain individuals. As referenced in the Commission Staff brief, these individuals are "former" employees. However, the Commission should look to the true nature of the enterprise that is now before this tribunal. This is a city and not a private company comprised of stakeholders that stand to benefit from profit.

In other words, the respondent is a collection of the Commonwealth's citizens that have cooperated as a community with the goal of providing basic governance as well as essential water and gas utilities. Any assessment will not hurt anyone's dividend payout or partnership distribution. A civil

¹KRS 278.992; Case No. 2017-00119, Louisville Gas and Electric Company-Alleged Failure to Comply with KRS 278.495, 807 KAR 5:022, and 49 CFR, PART 192 (Ky. PSC March 16, 2018), at 25.

penalty will only be passed on to the members of the entity – either through increased rates/taxes or through a decrease in the offering of services.

The undersigned is certainly not arguing that public entities should not be held accountable when unsafe practices utilized. But, when fashioning a remedy, the Commission would be wise to consider the ultimate payor of the penalty.

Finally, with respect to this factor, the undersigned quotes Commissioner Schmitt at the November hearing. While speaking to the mayor and analyzing how these violations arose and how the parties should move forward, he stated to the Mayor: “I know you didn't cause of any of these problems”.² This expression accurately reflects that the current administration is not the culprit. As set forth in the brief of the Commission Staff, the current administration has spent its efforts recognizing and remedying the violations described in the charging documents.

C. Economic Ability to Continue Business

The Mayor of Drakesboro indicated at hearing that the city has been forced to deplete its depreciation fund to meet the costs of its water and gas systems.³ The City has retained Abacus Engineering to work with local funding agents, including grants and loans,⁴ to obtain financing for the upgrades and repairs that Mr. Martin testified were necessary at the hearing November 15, 2019 in great detail. Attached hereto as Exhibit A is an estimate from Abacus Engineering indicating that the first phase of upgrades will cost more than \$500,000. This underscores the great expense that Drakesboro is preparing to incur to achieve a safer and more reliable pipeline distribution system.

Thus, it is clear and it appears not in dispute, that Drakesboro's ability to pay a civil penalty out of its own cash and operating streams is not currently present if it is also required to fund upgrades separately.

²Video Transcript of November 15, 2019 Hearing (November HVT) at 10:21:32-39 a.m.

³November HVT, at 10:10:33 a.m.

⁴November HVT, at 10:10:33-55 a.m.

D. Drakesboro's Past Expenditures to Comply

The Commission Staff have pointed out that many of the receipts provided by Drakesboro are unclear. The following discussion highlights the expenditures of the city in resolving the violations cited by the Commission.

In Exhibit B, the Commission will find costs of gas and meter parts purchased in an effort to install better meters (bought from Koons Gase Measurement). There are also invoices showing the city's cost of regulator inspection and rebuild, cathodic protection assessment, creation of O and M plan and development, and repairs to the gas system – all to Russmar or Martin Contracting, Inc. At a minimum, the Russmar and Martin Contracting expenses are upgrade expenses that were necessary to incur for compliance. Repairing line leaks and other similar issues, evidenced in Invoice Number 19179, alone cost more than \$25,000 during a portion of the month of March 2019.

In Exhibit C, The Commission will find similar expenses. For example, Invoice 19166 from Martin Contracting, Inc. shows that Drakesboro paid another \$11,000 and change to procure additional line repairs in late March of 2019. Other invoices in Exhibit C illustrate the funds used to purchase excess flow valves, gas parts, and provide for an emergency telephone response system. Again, these expenses were necessary to promptly comply with the orders of the Public Service Commission.

The Commission will find that Exhibit D primarily consists of expenses relating to the hiring of Vanguard Mapping Solutions. As all would agree, Vanguard either did a terrible job of documenting its work in its invoices, or it simply invoiced large fees for little work. Nevertheless, the city of Drakesboro hired the third party operator in compliance with the February 28, 2019 order that it either shut down or contract with such an operator. Of course, for this reason, these expenses with Vanguard should be considered purely compliance costs as the law does not otherwise require such a third party operator and the expense was solely to comply with an order of this Commission (it should be noted that the undersigned does not take issue with the substance of the said order but is simply identifying its proper classification as a purely compliance expense).

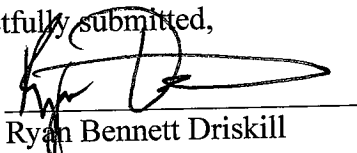
At Exhibit E there are large sums of moneys paid to, or owed to, Russmar for its work at the Drakesboro system. It could be argued that these are simply operational costs and the City of Drakesboro should not receive credit for simply spending money to operate the system. However, such an argument would only contain a half-truth. It is true that Russmar has provide consultation and assistance in many of the operations of the natural gas system. But the other half, or more, of that equation is that Drakesboro provides much of the labor through its own employees (which, by the way, it is not seeking credit for in terms of an offset against any potential civil penalty). Russmar is present, at great relative expense, per the orders of the Commission. Thus, it would be most accurate to classify a portion of the Russmar expense as an operating cost and a portion as a compliance cost (as much of the expense is not simply for work done – which is a Martin Contracting expense primarily – but for consultation, assistance, training, etc..

Conclusion

The purpose of any civil penalty should not be punish the citizens and consumers, which it would do if it were in the form of a direct civil penalty against the city. Instead, the civil penalty should serve a purpose. The civil penalty should be in the form of a requirement that the City expend its funds to complete the necessary upgrades. Further, the great compliance costs of meeting the special directives and orders of the Commission, particularly those orders that require expenditures for items that are not necessary for standard operation such as the hiring of Russmar, Vanguard, and Martin Contracting) should be credited against any award.

Finally, the City of Drakesboro seeks to comply with the law and the orders of the Commission because it wants to ensure a safe, well-served community. Please do not force Drakesboro to pay a penalty to the General Assembly that it cannot afford.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ryan Bennett Driskill', written over a horizontal line.

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