

COMMONWEALTH OF KENTUCKY BEFORE
THE PUBLIC SERVICE COMMISSION

In the Matter of:

KIRKSVILLE WATER ASSOCIATION, INC.)	
AND ITS INDIVIDUAL DIRECTORS, ARMON SANDERS,)	
WAYNE LONG, ALFRED WINKLER, RANDAL WEBB,)	CASE NO.
AND BOBBY POWELL, AND MANAGER MIKE AGEE)	2022-00197
ALLEGED FAILURE TO COMPLY)	
WITH KRS 278.300 AND KRS 278.020)	

POST HEARING BRIEF OF
KIRKSVILLE WATER ASSOCIATION

A hearing was held on July 6th to take testimony regarding alleged violations of KRS 278.300 and 278.020. Testimony was taken from Kirksville Water Association (hereinafter KWA) Board members Wayne Long, Alfred Winkler and Bobby Powell. KWA manager Aaron Owens also offered testimony. The allegations are the result of KWA's petition seeking approval for borrowed funds used to purchase an office building needed to house its office and operations. KWA purchased the building without seeking a Certificate of Public Convenience and Need from the PSC and used a bank loan to fund the purchase prior to approval from the PSC.

BACKGROUND

The testimony of KWA Board member Wayne Long established that Kirksville Water Association enjoyed a long history of sharing office space and staff with Madison County Utilities District (hereinafter MCUD). KWA was informed in the fall of 2021 that its contract with MCUD would not be renewed. As a result of the end of its relationship with MCUD, KWA needed its own office for staff to operate and had until June of 2022 to have the space operational. KWA Board members located a property at 1613 Foxhaven, Richmond, Kentucky that suited its needs and purchased the property in November of 2021. KWA had sufficient funds

on hand to purchase the building without borrowed funds but proceeded with a loan because of the favorable terms and the belief that reserving KWA's cash was better for the organization in the long run¹. KWA entered into that loan on November 18th, 2023 and filed a petition for approval of the funds in March of 2022. KWA paid off the mortgage and it was released on May 23, 2022². KWA withdrew its petition for approval of the loan after the mortgage was released. The PSC then instituted this action alleging failure to comply with KRS 278.300 and KRS 278.020.

Board members Long, Winkler and Powell testified that they believed the emergency nature of the need for office space and the competing bids for the space at 1613 Foxhaven forced them to act quickly. Long, Winkler and Powell all believed proceeding as they did was in the best interests of KWA. They each testified that they did not know the sellers and in no way benefitted personally from the transaction³. The alleged violations complained of herein were self-reported by KWA in its application for approval of the original bank note and were not independently discovered by the Commission.

LEGAL STANDARD

KRS 273.207 provides that "the affairs of a corporation shall be managed by a board of directors." KRS 273.2125 provides that,

- (1) A director of a nonprofit corporation subject to the provisions of KRS 273.161 to 273.387 shall discharge his duties as a director, including his duties as a member of a committee:
 - (a) In good faith;
 - (b) On an informed basis; and
 - (c) In a manner he honestly believes to be in the best interests of the corporation.
- (2) Such director shall be considered to discharge his duties on an informed basis if he makes, with the care an ordinarily prudent person in a like position would exercise

¹ Hearing video transcript (HVT) of the July 6th hearing at 1:49:33-1:51:41

² Case No. 2022-00197 KWA's response to Staff's post-hearing request for information

³ HVT of the July 6th hearing in response to cross examination by Staff

under similar circumstances, inquiry into the business and affairs of the corporation, or into a particular action to be taken or decision to be made.

KRS 278.300 controls the issuance or assumption of securities by utilities while KRS 278.020 and 807 KAR 5:001, Section 15(3) control when a Certificate of Convenience and Necessity is required. KRS 278.990 defines what constitutes a violation of the provisions of KRS Chapter 278 and what penalties are available to the Commission for willful violations.

DISCUSSION

1. KWA Board Members believed, based upon the advice of counsel, that a Certificate of Convenience and Necessity was not required in this situation.

KRS 278.020 provides: “No person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010, except:

1. Retail electric suppliers for service connections to electric-consuming facilities located within its certified territory;

2. Ordinary extensions of existing systems in the usual course of business; or

3. A water district created under KRS Chapter 74 or a water association formed under KRS Chapter 273 that undertakes a waterline extension or improvement project if the water district or water association is a Class A or B utility as defined in the uniform system of accounts established by the commission according to KRS 278.220 and:

a. The water line extension or improvement project will not cost more than five hundred thousand dollars (\$500,000); or

b. The water district or water association will not, as a result of the water line extension or improvement project, incur obligations requiring commission approval as required by KRS 278.300.

807 KAR 5:001, Section 15(3) states: (3) Extensions in the ordinary course of business. A certificate of public convenience and necessity shall not be required for extensions that do not create wasteful duplication of plant, equipment, property, or facilities, or conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general or contiguous area in which the utility renders service, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers.

The testimony elicited at the hearing established that KWA had no office of its own. KWA had to secure office space before June of 2022 to continue to operate⁴. KWA had no other office or property it owned which could have been used. Buying an office did not create a wasteful duplication of plant, equipment, property or facilities as prohibited by 807 KAR 5:001 (15)(3). In fact, without securing a property to operate from, KWA would not have been able to provide basic customer services.

Additionally, the total cost of the office building between purchase price and renovations was substantially below \$500,000.00⁵ and was within the usual course of business and was not going to result in the increase of rates to KWA customers⁶.

Board Member Wayne Long, Alfred Winkler and Bobby Powell testified that the Board relied on the advice of counsel regarding whether a Certificate of Convenience and Necessity

⁴ HVT of July 6th hearing at 1:49:33

⁵ KWA's response to Staff's second data request

⁶ HVT of July 6th hearing at 1:51:56-1:52:16.

was required⁷. The Board had no reason to believe Counsel was wrong regarding the necessity of a CPCN and acted prudently and with good faith in relying on the advice they received. Further, each Board member believed they were acting in the best interests of the water company and the action being taken was crucial to continuing to operate.

2. Because of the emergency need for office space and the Board's belief that it must act quickly, and because it had sufficient assets to purchase building without borrowed funds, the KWA Board believed it was substantially complying with KRS 278.300 or at least complying with the spirit of the law contained within KRS 278.300.

Board Member Long testified that the Board knew that there were three financing options available to KWA to purchase the office building. KWA could use its own cash, it could secure a line of credit with a term of 2 years or less or it could borrow some portion of the purchase price⁸. The hearing established that the Board believed that neither using its cash or securing a line of credit with a term of less than two years required PSC approval. The Board believed in good faith that an application to approve borrowed funds would be well received even though it was untimely. The Board believed this because (1) there were options available to them that required no approval at all (2) because of the emergency nature of the office situation, (3) because the financing terms were favorable to KWA, and lastly (4) because of the collaborative relationship that existed between KWA and the PSC⁹ in the past.

Upon receiving the PSC's response to its request for approval, it was clear that the request being untimely was fatal to the application. The Board took immediate action to remedy the situation by paying off the mortgage to show good faith and "clean the slate"¹⁰. There was never an effort by anyone associated with KWA to hide or otherwise conceal any aspect of this

⁷ HVT of July 6th hearing at 2:08:08;3:37:37;4:18:39

⁸ HVT of July 6th hearing at 1:52:22-1:55:36

⁹ HVT of July 6th hearing at 4:26:39

¹⁰ HVT of July 6th hearing at 1:56:11

transaction from the PSC. This case began because of the filing made by KWA in March of 2022 seeking approval for the money borrowed and not any independent discovery by the PSC. Each Board member stated that he would not have proceeded with the mortgage without the knowledge that KWA had sufficient cash assets on hand to purchase the building and that he believed the mortgage was in the best interests of the customers of KWA. While this belief does not cure the defect in the application for approval, it illustrates that the Board was trying its best to operate with good faith in extremely difficult circumstances. The Board regrets their decision led to this proceeding and hopes for a return to a more collaborative relationship with the PSC¹¹.

3. KRS 278.990 provides the standard for penalties to be levied for violations of the provisions of KRS Chapter 278. Violations must be willful to result in civil penalties or criminal penalties.

KRS 278.990 states, “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. (emphasis added)

Kentucky Courts have held that a mere technical violation of statute is insufficient to support a finding of willfulness. There must be a showing of bad faith to support the finding¹². Kentucky Courts have generally defined bad faith as “dishonesty of belief or purpose” with a “state of mind affirmatively operating with a furtive design or with some motive of self-interest

¹¹ HVT of July 6th hearing 1:57:03

¹² Bowling v. Lexington-Fayette Urban County Government, 172 S.W.3d 333,334 (Ky. 2005)

or ill will, or for an ulterior purpose.”¹³ The testimony from the Board members established that there was no self-dealing or self-interest from this transaction. Each Board member believed what they were doing was necessary for the survival of KWA and in the best interests of the customers of KWA. No one received personal benefit from any transaction and there is no evidence in the record of any ill will or ulterior purpose of anyone at KWA.

CONCLUSION

KWA has an exemplary history of providing high quality services to the people of Madison County. The Board members give freely of their time, are dedicated to the people they serve, and try earnestly to operate a water company that exceeds all standards set by the PSC. KWA has always endeavored to operate with the utmost regard for the law and regulations governing water associations. The violations alleged in this matter stem from extraordinary circumstances beyond the control of the Board that forced choices they would have preferred not to have had to make. The Board is determined to be more diligent in its understanding of the law as it applies to the choices they must make in the future and intends to pursue additional training to better understand options available to them that may have allowed them to proceed here without any violations.

However misguided, the Board acted in good faith in a manner they believed was in the best interests of the organization and customers in compliance with their duties as defined in KRS 273.2125. While it is inescapable that there was a violation of KRS 278.300, there was no ill will, self-dealing or bad faith underpinning the decision to move forward with the loan. The Board truly believed they were complying with the spirit of the law and not willfully violating KRS 278.300.

¹³ D.W. Wilburn, Inc. v. Painting Co., 577 S.W.3d 782 (Ky. App. 2019)

The Board regrets the decisions that led to this hearing, will learn from these mistakes, and move forward with every intention to be an even better water association.

Respectfully submitted,

Jud Patterson

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