



IN THE DOCK: SHOW CAUSE PROCEEDINGS BEFORE THE PUBLIC SERVICE COMMISSION

**Gerald Wuetcher
Stoll Keenon Ogden PLLC**



PREFACE

“We have also **emphasized the hearing of** rural water district rate and **investigative cases** in light of what appears to have been a systemic failure of local county governments to manage water utility finances, replace deteriorating infrastructure and to reliably provide safe and clean water for their residents. The Commission is working to develop in coordination with other state agencies a comprehensive plan to address these deficiencies and **to hold individual water district officials accountable for their malfeasance and misfeasance in office.**”

Michael J. Schmitt, Chair, KY PSC



ORDER OF PRESENTATION

- Statutory Authority
- Enforcement Methods
- Show Cause Procedure
- Mitigating Violations/Sanctions
- Avoiding Violations



STATUTORY AUTHORITY



STATUTORY AUTHORITY

- KRS 278.040(1): PSC shall regulate utilities and shall have the power to enforce provisions of KRS Chapter 278
- KRS 278.040(2):
 - PSC's jurisdiction extends to all utilities in state
 - PSC shall have exclusive jurisdiction over utility rates and service



STATUTORY AUTHORITY

- KRS 278.040(3): “PSC may **investigate** the methods and practices of utilities to **require them to conform** to the laws of the state and to all reasonable rules, regulations and orders of the commission”
- KRS 278.250: PSC may investigate condition of utility



STATUTORY AUTHORITY

- KRS 278.260(1): PSC may initiate investigations into rates & service on its own motion
- KRS 278.270: PSC has power to order changes in rates after hearing upon reasonable notice to utility
- KRS 278.280(1): PSC has power to require changes in rules, methods, practices, equipment after hearing upon reasonable notice



STATUTORY AUTHORITY

- KRS 278.310: PSC may establish rules for hearings and investigations
- PSC KRS 278.320: PSC may issue subpoenas, subpoenas duces tecum, & necessary process
- KRS 278.330: PSC may take sworn testimony & may compel obedience to orders to give testimony & subpoenas through application to Circuit Court



STATUTORY AUTHORITY

- KRS 278.390: PSC may compel obedience to its orders by proceedings in Franklin Circuit Ct
- KRS 278.990: PSC may assess civil penalties



ENFORCEMENT METHODS



ENFORCEMENT METHODS

- PSC Order Directing Action or Non-Action
- Injunctive Relief from Circuit Court
- Referral for Criminal Prosecution
- Assessment of Civil Penalties
- Removal of WD Commissioners



PSC ORDER

- Has force of law
- Order remains in effect until:
 - Expires
 - PSC revokes or modifies
 - Court suspends or vacates



PSC ORDER

- May prohibit action temporarily without holding hearing
- After hearing may require utility to act or refrain from acting permanently
- May require compliance with statute or regulation without hearing



INJUNCTIVE RELIEF

- KRS 278.390: PSC may request injunctive relief from Court to enforce its Orders
- Court orders utility to comply with PSC Order
- Contempt of court proceedings available if utility or its officers do not comply with court's order



CRIMINAL REFERRAL

- KRS 278.990(1): **ANY PERSON** who violates KRS Ch. 278, PSC Reg or Order may be subject to **CRIMINAL PENALTY**
- Maximum: Six Months Imprisonment
- Misdemeanor Offense
- Must be prosecuted within one year
- District Court has jurisdiction/County Attorney prosecutes



CIVIL PENALTY

- KRS 278.990(1) authorizes PSC to assess civil penalties
- **WILLFUL VIOLATION** required
- Minimum: \$25/Maximum: \$2,500
- Penalty may be assessed for **each offense**
- Action may constitute multiple offenses



WHAT IS A WILLFUL VIOLATION?

- “[A]n act that is committed intentionally, not accidentally nor involuntarily.”
- “[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.”



WHAT IS A WILLFUL VIOLATION?

- Does not require bad faith
- Lack of knowledge/ignorance of law is no excuse
- Good faith reliance on opinion of legal counsel re: legality of act – **NO DEFENSE**
- Reliance on lending institution or PSC Staff – **NO DEFENSE**



AGAINST WHOM CAN A PENALTY BE ASSESSED?

Any **Utility** that **WILLFULLY**:

- Violates KRS Chapter 278
- Violates PSC Regulation
- Fails to Obey any PSC Order
- Does any act prohibited or fails to perform duty imposed by those statute or regulation



AGAINST WHOM CAN A PENALTY BE ASSESSED?

- Employee's act may be imputed to utility
- KRS 278.990(1): "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.**"



AGAINST WHOM CAN A PENALTY BE ASSESSED?

Any Utility Officer/Employee/Agent or Any Other Person that **WILLFULLY** violates

- KRS Chapter 278
- PSC Regulation/PSC Order

OR

WILLFULLY procures, aids, or abets a violation by a Utility



“AIDING AND ABETTING”

“**Help, assist, or facilitate** the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or **encourage, counsel, or incite** as to its commission. . . . It **comprehends all assistance** rendered by words, acts, encouragement, support, or presence, actual or constructive to render assistance if necessary.”

Black’s Law Dictionary (5th ed.) 63



EXAMPLES: “AIDING AND ABETTING”

- Commissioners vote to issue a note with 4-year term without PSC authorization
- Commissioners sign a loan agreement with KIA without prior PSC authorization
- Commissioners OK start of construction of a building without obtaining a CPCN



WHO CAN AID & ABET A VIOLATION?

- Water District Commissioners
- Water Association Directors
- General Managers
- Legal Counsel
- Fiscal Agents
- Lending Institutions



PSC WARNING

“Water District Commissioners should be advised that fines and penalties may be assessed against them individually for any such violations, as the Commission does not believe that . . . [water district’s] customers should bear the cost of civil penalties in their rates for the negligence or malfeasance of the Water District Commissioners.”

Case No. 2016-00400, Order of 1/5/2018 at 5-6.



PSC FINAL WARNING

“To date the Commission has assessed, but not sought, to collect civil penalties against individual water district commissioners for essentially two reasons. First, the Commission's goal has been to obtain compliance with the requirements of the statute and not to exact a penalty and, second, the Commission was determined to send a message to these utilities and their local commissioners that they were out of compliance and future violations could result in individual penalties as well as a separate penalty against the utility.”



PSC FINAL WARNING

“Water districts and their commissioners are hereby put on final notice that unauthorized debt incurred after the date of this order may well result in substantial civil penalties being assessed and collected against both in future show cause cases.”

Case No. 2017-00469, Order of 9/17/2018 at 7-8.



REMOVAL OF WATER DISTRICT COMMISSIONERS

- KRS 74.025 authorizes PSC to remove a water district commissioner
- A grounds for removal: failure to comply with rules, regulations, and orders issued by the Public Service Commission



REMOVAL OF WATER DISTRICT COMMISSIONERS

- Other grounds
 - Incompetency
 - Neglect of Duty
 - Gross immorality
 - Nonfeasance - Misfeasance - Malfeasance in Office



PROCEDURE



SHOW CAUSE PROCEEDING: PHASES

- Preliminary Investigation
- Order To Show Cause
- Respondents' Response
- Discovery
- Hearing
- Final Order
- Appeal/Enforcement of Order



PRELIMINARY INVESTIGATION

- Initiated upon suspicion of unlawful conduct
- No formal proceeding required
- May be part of unrelated formal proceeding
- No notice required
- PSC may examine utility records without providing cause
- PSC may require submission of reports or information



ORDER TO SHOW CAUSE

- Describes Alleged Violation
- Identifies Statute or Regulation Violated/Source of Allegations
- Notice of Penalty
- Directs Response
- Establishes Hearing Date
- Sets Time to Request Staff Conference
- Orders Publication of Notice of Hearing



LEGAL REPRESENTATION REQUIRED

- Quasi-judicial proceeding
- Adversarial Proceeding
- Potential Adverse Consequences
 - Civil Penalties
 - **CRIMINAL PENALTIES**
 - Restrictions/requirements placed on utility
 - Adverse effect on reputation



LEGAL REPRESENTATION: ISSUES

- Separate v. Joint Representation
 - Who does the water utility's attorney represent?
 - Potential Conflicts of Interest with Utility
 - Potential Conflicts with Other Utility Officers
 - Benefits/Disadvantages
- Who pays the legal fees?



RESPONSE TO ORDER

- Written Response
 - Should I Respond?
 - Jt. vs. Individual Response
 - Potential Defenses
 - Mitigating Factors
- Waiver of Hearing
- Offer of Settlement/Conference with Staff



DISCOVERY

- PSC Staff permitted to conduct discovery prior to/after hearing
- No statutory or regulatory authority for Respondents to Conduct Discovery
- PSC has refused to permit discovery on its Staff
- Why should Respondents conduct discovery?



HEARING

- PSC Staff – Prosecutor
- Burden of Proof
- Order of Presentation of Evidence
- Compelling Respondents to Testify
- Witnesses
- Scope of Hearing/Relevancy of Inquiries
- Video Record/Streamed Live



FINAL ORDER

- No required deadline for decision
- Must contain factual findings
- If violation or failure to comply found, order may impose sanctions
- Publicizing the Order



SANCTIONS PREVIOUSLY IMPOSED

- Assessment of Civil Penalty
- Additional Proceedings re: Removal from Office
- Mandatory Attendance at PSC Water Management Training Programs
- Changes in Utility Practices and Procedures



SANCTIONS PREVIOUSLY IMPOSED

- Suspended/Vacated Penalties
 - Conditions Imposed
 - Finding of Violation is usually not vacated



REQUEST FOR REHEARING

- Affected Party may request rehearing from PSC within 23 days of Order
- Must show legal or factual error
- Offer additional evidence not available at time of hearing
- PSC has 20 days to rule on request



ACTION FOR REVIEW

- May file action in Franklin Circuit Ct
- No request for rehearing required
- File within 33 days of Order (or 23 days after denial of rehearing)
- Must demonstrate Order is unlawful or unreasonable



MITIGATING VIOLATIONS/SANCTIONS



ACTIONS UPON RECEIPT OF SHOW CAUSE ORDER

- Investigate the alleged violation
- Identify:
 - Mitigating factors
 - Failures in processes/procedures
 - Actions to correct/prevent failures
 - Any **UNEXPLODED TIME BOMBS!**



ACTIONS UPON RECEIPT OF SHOW CAUSE ORDER

- Take corrective/preventive actions:
 - Develop and implement written policies and procedures
 - Provide additional training
 - Hire/retain resources or professionals necessary to prevent recurrence



WITNESS PREPARATION

- Prepare each witness for hearing
- Utility officials should:
 - Review incident
 - Be able to explain what happen
 - Identify mitigating factors
 - Describe and explain all corrective actions



WITNESS PREPARATION

- Utility officials should:
 - Be familiar with major aspects of utility's operation
 - Be familiar with utility's finances
 - Be familiar with laws governing utility's operations



POINTS TO EMPHASIZE

- Acknowledge any errors or mistakes
- Corrective Actions
- Preventive Measures
- Lack of previous violations



LEGAL DEFENSES

- Statute of Limitations
- Immunity granted due to prior testimony
- Violation not willful
- Violation occurred prior to appointment to governing board



AVOIDING VIOLATIONS



AVOIDING VIOLATIONS

- Know the Law
 - Maintain/improve your knowledge of legal requirements
 - Attend training programs
 - Encourage your employees to attend relevant training programs



AVOIDING VIOLATIONS

- Retain Attorney on recurring basis to review Board actions
 - Ensure legal review of major actions
 - Have attorney attend board meetings
 - Legal review of board meeting agenda & minutes



AVOIDING VIOLATIONS

- Review other utilities' violations - develop & implement procedures to avoid
- Have attorney review any application prior to filing for evidence of possible violations
- Audit your records
- When in doubt – seek legal opinion or apply to PSC for Declaratory Order



OTHER ACTIONS TO CONSIDER

- Develop policy re: representation of Bd members and payment of legal costs
- Consider purchase of directors and officers liability insurance
- Document board meetings and discussions re: critical decisions
- Develop policy re: role of attorney in your utility



QUESTIONS

