

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AIRVIEW UTILITIES, LLC, AND MARTIN COGAN)
AND LARRY SMITHER IN THEIR INDIVIDUAL)
AND OFFICIAL CAPACITIES)
_____) CASE NO. 2006-00558
)
ALLEGED FAILURE TO COMPLY WITH THE)
COMMISSION'S ORDER OF APRIL 28, 2005 IN)
CASE NO. 2005-00022)

O R D E R

This case involves an investigation of alleged violations of the Commission's Order of April 22, 2005 in Case No. 2005-00022.¹ At issue is whether Martin Cogan, Lawrence Smither, and Airview Utilities, LLC ("Airview") (collectively, "Respondents") willfully failed to obey the provisions of that Order and should be assessed a civil penalty for such failure. Finding in the affirmative, the Commission shall assess each a civil penalty of \$500.

STATEMENT OF THE CASE²

Airview, a Kentucky limited liability company organized pursuant to KRS Chapter 275, owns and operates facilities used to collect and treat sewage from Airview Estates Subdivision of Hardin County, Kentucky. It provides sewage collection and treatment

¹ Case No. 2005-00022, *Joint Application of Airview Estates, Inc. and Elizabethtown Utilities, LLC for Approval of the Transfer of Wastewater Treatment Plant to Elizabethtown Utilities, LLC* (Ky. PSC Apr. 28, 2005).

² A chronology of the events at issue in this case is found in the Appendix to this Order.

services to 201 customers within the Airview Estates Subdivision.³ Airview is a utility subject to Commission jurisdiction.⁴ Martin Cogan and Lawrence Smither are Airview's sole members.

In Case No. 2003-00494,⁵ Airview's predecessor, Airview Estates, Inc. ("Airview Estates"), applied to the Commission for a general rate adjustment and for authority to assess a surcharge to fund certain facility improvements. On June 14, 2004, we authorized an adjustment in Airview Estates' rates and the assessment of a monthly surcharge of \$17.31.⁶ We limited collection of the surcharge to 36 months or until \$119,023.56 was collected, whichever occurred earlier. We further limited the use of surcharge proceeds to funding specified repairs on Airview Estates' remote lift station and treatment plant and performance of a video inspection of the utility's gravity sewer mains.

On January 7, 2005, Airview Estates and Airview⁷ jointly applied to the Commission for approval for the transfer of Airview Estates' assets to Airview. On April 28, 2005, we approved the proposed transfer subject to certain conditions.⁸ These conditions included: (1) the submission of written acknowledgements from Airview and

³ *Annual Report of Airview Utilities, LLC, to the Kentucky Public Service Commission for the Year Ended December 31, 2006* at 8.

⁴ KRS 278.010(3)(f); KRS 278.040.

⁵ Case No. 2003-00494, *Application of Airview Estates, Inc. for an Adjustment of Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities* (Ky. PSC filed Dec. 22, 2003).

⁶ Case No. 2003-00494, Order of June 14, 2004.

⁷ On May 30, 2005, Airview amended its name, which was formerly Elizabethtown Utilities. See Articles of Amendment of Elizabethtown Utilities, LLC, available at <http://apps.sos.ky.gov/business/obdb/OBDBDisplayImage.aspx?id=406871>. For simplicity, Airview is used throughout this Order regardless of the entity's name at the time of the transaction.

⁸ Case No. 2005-00022, *Joint Application of Airview Estates, Inc. and Elizabethtown Utilities, LLC*, at Appendix A (Ky. PSC Apr. 28, 2005).

its members of their acceptance of all conditions; (2) completion of the transfer within 90 days; (3) obtaining bids or estimates from three nonaffiliated sources for any surcharge construction or repair project that was performed by an entity or person affiliated with Airview; and (4) restrictions on the use of the surcharge proceeds to the specified repairs listed in the Commission's Order of June 14, 2004 in Case No. 2003-00494.

On July 25, 2005, Airview and its members submitted written acknowledgements to the Commission in which each accepted the conditions that the Commission had imposed. On October 4, 2005, Airview Estates transferred ownership of its sewer collection and treatment facilities to Airview.⁹

Following Commission approval of the transfer, but prior to Airview's acceptance of the conditions imposed for that approval, Airview Estates commenced repairs on its sewage collection and treatment facilities. In June 2005, it began repair work on its remote lift station and on the blower motors and control panel at its sewage treatment plant. It purchased repair materials from Camden Environmental Sales, Inc. ("Camden") and contracted with Covered Bridge Utilities, Inc. ("Covered Bridge") to perform the repairs. Lawrence Smither is Camden's sole officer.¹⁰ Lawrence Smither and Martin Cogan are Covered Bridge's sole officers.¹¹ Airview Estates did not seek bids on the contracts from three nonaffiliated sources prior to purchasing these materials or contracting for the repair work.

⁹ Case No. 2005-00022, Notice of Transfer and Filing at 1 (Ky. PSC filed Nov. 2, 2005).

¹⁰ See Kentucky Secretary of State, [http://apps.sos.ky.gov/business/obdb/\(S\(tjdvwm45dztdlg55d4ayzz45\)\)/showentity.aspx?id=0598241&ct=09&cs=99999](http://apps.sos.ky.gov/business/obdb/(S(tjdvwm45dztdlg55d4ayzz45))/showentity.aspx?id=0598241&ct=09&cs=99999) (last visited Feb. 22, 2009).

¹¹ See Kentucky Secretary of State, [http://apps.sos.ky.gov/business/obdb/\(S\(fr lub0ah01ap5nuib oaish45\)\)/showentity.aspx?id=0261968&ct=09&cs=99999](http://apps.sos.ky.gov/business/obdb/(S(fr lub0ah01ap5nuib oaish45))/showentity.aspx?id=0261968&ct=09&cs=99999) (last visited Feb. 22, 2009).

On or about October 4, 2005, Airview determined that the structure that housed the plant's chlorinator should be replaced. It contracted with Covered Bridge to remove the existing structure and construct a new structure. Covered Bridge completed construction of the new structure on October 12, 2005 and billed Airview \$4,202.48 for this work. Airview used surcharge proceeds to cover the cost of this repair. Airview did not solicit bids from nonaffiliated sources before contracting with Covered Bridge.

In early January 2006, the chlorinator at Airview's sewage treatment plant failed. Airview contracted with Covered Bridge for the purchase and installation of a replacement. Total cost of the purchase and installation was \$1,303.15, which Airview paid with surcharge proceeds.

On March 1, 2006, Airview applied to the Commission for a four-month extension of the surcharge.¹² In its application, it acknowledged that surcharge proceeds were used to fund the replacement of the chlorinator and chlorinator housing. In response to discovery requests, Airview acknowledged that it had not sought bids from nonaffiliated sources prior to contracting with Covered Bridge.¹³ Finding that Airview had violated the Commission's Order of April 28, 2005 by its failure to obtain prior Commission authorization before spending the surcharge proceeds for construction not identified in the construction schedule and for using associated companies to perform the surcharge construction without obtaining bids or estimates from nonaffiliated sources, the

¹² Letter from Lawrence Smither, Airview Member, to Beth O'Donnell, Executive Director, Public Service Commission of Kentucky (Feb. 27, 2006).

¹³ Case No. 2006-00094, *Application of Airview Utilities, LLC to Extend the Monthly Sewer Surcharge Approved in Case No. 2003-00494*, Airview's Answers to Commission Staff's Interrogatories and Requests for Production of Documents at 5 (Ky. PSC filed June 27, 2006).

Commission denied Airview's application.¹⁴ Mr. Cogan and Mr. Smither subsequently repaid the surcharge account in full.¹⁵

PROCEDURE

On December 22, 2006, the Commission directed the Respondents to show cause why they should not be assessed a penalty for their alleged violations of the Commission's Order of April 28, 2005 in Case No. 2005-00022, why Airview's surcharge should not be revoked, and why Airview should not be required to refund all collected surcharge proceeds.¹⁶ The Respondents responded in writing to the allegations and requested an informal conference with Commission Staff.

Following two informal conferences with Commission Staff, which were held on May 15, 2007 and September 25, 2007, the Commission provided the parties¹⁷ an opportunity to request a hearing in this matter or to submit additional statements for the Commission's consideration. We further directed that, if no party requested a hearing in the designated time, the matter would stand submitted for decision. No party having requested a hearing, this matter stood submitted for decision on October 20, 2008.

DISCUSSION

The Respondents do not dispute the facts set forth in this Order, but contend that no willful violation of the Commission's Order of April 28, 2005 occurred. They

¹⁴ Case No. 2006-00094, *Application of Airview Utilities to Extend the Monthly Sewer Surcharge Approved in Case No. 2003-00494*, at 4 (Ky. PSC Dec. 22, 2006).

¹⁵ See Letter from Robert C. Moore, Counsel for Airview Utilities, to Robert Cowan, Counsel for Commission Staff (Oct. 4, 2007).

¹⁶ In the Commission's Order of December 22, 2006, we further directed that the records of Case Nos. 2003-00494, 2005-00022, and 2006-00094 be made a part of the record of this proceeding.

¹⁷ In addition to Respondents, the Attorney General was a party to this proceeding. On April 13, 2007, he moved to intervene to represent consumers' interests. We granted his motion on April 19, 2007.

assert that the assessment of a penalty against either Airview or the other Respondents for the lack of competitive bids is inappropriate because Airview Estates was the party that purchased materials from Camden and contracted with Covered Bridge. Airview Estates was not affiliated with either of those entities, nor was it under any obligation to obtain competitive bids for those materials and services. They further argue that Airview Estates' contracts with Camden and Covered Bridge should be considered reasonable, since those entities provided the cost estimates upon which the Commission had based the approved surcharge.

As to the use of surcharge proceeds for non-approved purposes, the Respondents acknowledge such use, but contend it was not willfully done. They assert that the use of proceeds to purchase a chlorinator was required because of the urgency to replace a failing chlorinator. They further note that Airview did not hide its action or attempt to mislead regulators and, upon the Commission's refusal to extend the surcharge to cover these expenses, Airview reimbursed the surcharge account for these payments. Moreover, Airview contributed approximately \$1,268 to the surcharge account to compensate the account for the difference between the amount of the surcharge assessed and actually deposited in the surcharge account.

Based upon our review of the record, we find that Airview failed to comply with the Commission's Order of April 28, 2005 and that Mr. Cogan and Mr. Smither aided and abetted this failure. Airview did not complete the transfer of utility assets within 30 days of the Commission's Order of April 28, 2005; failed to acquire three bids from nonaffiliated sources; and used surcharge funds for unauthorized system

improvements. Through this period, Mr. Cogan and Mr. Smither, as Airview's sole members, operated and managed Airview and were responsible for its actions.

We further find that the Respondents' actions were willful. A willful violation "denotes an act which is intentional rather than accidental."¹⁸ It "means 'knowing' violation or 'knowing failure to comply.'"¹⁹ The Respondents were fully aware of their obligation to obtain Commission approval prior to their acquisition and control of any utility. They were fully aware of the conditions which we attached to our approval of the facilities of Airview Estates. Despite this knowledge, they failed to comply with these conditions.

KRS 278.990(1)²⁰ provides that a utility willfully failing to comply with an Order of the Commission shall be assessed a penalty of no less than \$25 and no more

¹⁸ *Screws v. United States*, 325 U.S. 91, 101 (1945).

¹⁹ *Oldham v. Kubinski*, 185 N.E.2d 270, 280 (Ill. App. 1962); see *Muncy v. Commonwealth*, 97 S.W.2d 606, 609 (Ky. 1936) ("The word 'willful' in its general acceptation means intentionally, not accidentally nor involuntarily."); *Huddleston v. Hughes*, 843 S.W.2d 901, 905 (Ky. App. 1992) (holding that the term "willful" 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.")

²⁰ KRS 278.990(1) 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. 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.

than \$2,500. The acts, omissions, or failures of an officer, agent, or other person acting within the scope of his or her employment with a utility are attributable to the utility.

We find that the circumstances of this case do not warrant a substantial civil penalty. Airview has refunded \$5,506 to the surcharge account to cover the full costs incurred to replace the chlorinator and its housing. It has contributed an additional \$1,268 to compensate the account for the difference between the amount of the surcharge assessed and actually deposited in the surcharge account. These actions evidence an effort to mitigate any unlawful conduct, and the Commission is willing to take this fact into consideration when determining the appropriate penalty. Accordingly, we find that a civil penalty of \$500 should be assessed against each of the Respondents, and that \$250 of the penalty should be suspended for a period of one year, contingent upon the Respondents' compliance with KRS Chapter 278, Commission regulations, and Orders of the Commission. The Commission would have assessed a higher penalty if the Respondents had not contributed \$1,268 to the surcharge account. This contribution reflects a more constructive means of remediating the actions than the assessment of a higher penalty.

Our assessment of the relatively small penalty should not be misconstrued. The record is clear that the Respondents knew of the conditions contained in the Order of April 28, 2005 and made only a limited effort to comply with those conditions until faced with the prospect that the Commission would not acquiesce to their actions. We place the Respondents on notice that such conduct in the future will require our consideration of far greater sanctions than imposed today.

IT IS THEREFORE ORDERED that:

1. Airview is assessed a civil penalty of \$500 for its failure to comply with the Commission's Order of April 28, 2005.

2. Mr. Cogan and Mr. Smither are each assessed a civil penalty of \$500 for aiding and abetting Airview's failure to comply with the Commission's Order of April 28, 2005.

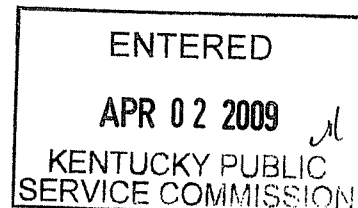
3. Within 20 days of the date of this Order, each of the Respondents shall pay the sum of \$250 in the form of a cashier's check made payable to "Treasurer, Commonwealth of Kentucky" and which shall be mailed or delivered to: Office of General Counsel, Public Service Commission of Kentucky, 211 Sower Boulevard, Post Office Box 615, Frankfort, Kentucky 40602. The remaining \$250 shall be suspended for a period of one year. If, at the end of one year, Respondents have complied with KRS Chapter 278, Commission regulations, and Orders of the Commission, this portion of the penalty will be vacated. If, at the end of one year, Respondents have not complied with these requirements, the remaining \$250 shall be immediately due and payable in the form described above.

By the Commission

ATTEST:



Executive Director



APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2006-00558 DATED APR 02 2009

CHRONOLOGY

- 12/23/2003 Airview Estates applies to Commission for surcharge.
- 06/14/2004 Commission authorizes assessment of monthly surcharge of \$17.31.
- 01/07/2005 Airview Estates and Airview Utilities, LLC apply for Commission approval of the transfer of ownership and control of facilities to Airview Utilities, LLC.
- 04/25/2005 Commission authorizes the transfer under certain conditions.
- 06/01/2005 Airview Estates commences work on diffusers, remote lift station, blower motors, and control panel.
- 06/01/2005 Airview Estates purchases materials and contracts for services from Camden Environmental Sales and Covered Bridge Utilities without obtaining bids from nonaffiliated vendors.
- 07/25/2005 Airview Utilities acknowledges and accepts conditions set forth in Commission's order of 04/25/2005.
- 10/03/2005 Covered Bridge Utilities demolishes old chlorinator building and commences construction of new building.
- 10/04/2005 Transfer of ownership and control of facilities from Airview Estates to Airview Utilities, LLC is completed.
- 10/12/2005 Covered Bridge Utilities completes construction of new chlorinator building.
- 01/05/2006 Chlorinator fails. Airview Utilities contracts with Covered Bridge Utilities for the purchase and installation of a new chlorinator and uses surcharge proceeds for the transaction.

Marty Cogan
Elizabethtown Utilities, LLC
1706 Bardstown Road
Louisville, KY 40205

Honorable Robert C Moore
Attorney At Law
Hazelrigg & Cox, LLP
415 West Main Street
P.O. Box 676
Frankfort, KY 40602

Lawrence W Smither
Airview Utilities, LLC
1706 Bardstown Road
Louisville, KY 40205

Honorable David Edward Spenard
Assistant Attorney General
Office of the Attorney General Utility & Rate
1024 Capital Center Drive
Suite 200
Frankfort, KY 40601-8204