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PUBLIC SERVICE  
COMMISSION

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DEXTER-ALMO HEIGHTS WATER )  
DISTRICT AND ITS INDIVIDUAL ) CASE NO. 2017-00468  
COMMISSIONERS, JOE DAN TAYLOR, )  
CHARLES BOREN, AND PAT PASCHALL )

MOTION TO DISMISS

Dexter-Almo Heights Water District, Joe Dan Taylor, Charles Boren, and Pat Paschall (collectively “Respondents”), by counsel, move for dismissal of this proceeding with prejudice on the grounds that the Public Service Commission failed to initiate this proceeding within five years after the cause of action accrued and that KRS 424.120 thus bars the assessment of any civil penalty arising from Respondents’ actions.

In support of their motion, the Respondents state:

1. On January 11, 2018, the Public Service Commission issued an order establishing this proceeding.
2. In the Order of January 11, 2018, the Public Service Commission alleged that Dexter-Almo Heights Water District willfully violated KRS 278.300 by issuing on or about December 9, 2009 a promissory note in the amount of \$145,988 payable over a 15-year period to Murray Bank of Calloway County, Kentucky (“Promissory Note”).
3. In the same Order, the Public Service Commission also found the existence of a *prima facie* case that the present members of Dexter-Almo Heights Water District’s Board of Commissioners aided and abetted Dexter-Almo Heights Water District’s alleged violation based upon the members’ statutory duty as set forth in KRS 74.020(1) “to control and manage the affairs of the district.”<sup>1</sup>

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<sup>1</sup> Order at 2.

4. The sole purpose of this proceeding is to determine whether civil penalties should be assessed against the Respondents for their actions involving the issuance of the Promissory Note. The Public Service Commission expressly states such in its Order of January 11, 2018, wherein it directed the Respondents to appear before it “to show cause, if any, why . . . [they] should not be subject to the penalties pursuant to KRS 278.990 for failure to comply with the requirements of KRS 278.300.”<sup>2</sup>

5. KRS 278.990(1) provides:

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.

6. KRS 278.990 does not fix a time limit on when the Public Service Commission must bring an action to assess a penalty for a violation of any provision of KRS Chapter 278.

7. KRS 413.120(2) requires that any action for a liability created by statute must be commenced within five years when no other time is fixed by the statute creating the liability.

8. KRS 413.120(3) requires that any action for a penalty “when no time is fixed by the statute prescribing it” must be commenced within five years after the cause of action accrued.

9. Kentucky courts have recognized that statutes of limitations apply to administrative agencies as well as to courts. In *Natural Resources and Environmental Protection Cabinet v. Kentucky*

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<sup>2</sup> *Id.*

*Insurance Guarantee Association*, 972 S.W.2d 276 (Ky. App. 1997), the Court of Appeals found that the statute of limitations applied to administrative proceedings involving a bond forfeiture. Explaining its holding, the Court noted:

Statutes of limitations in general are designed to bar stale claims arising out of transactions or occurrences which took place in the distant past. (Citations omitted) . . . . “It would be an absurd result if, for example the Cabinet could commence a proceeding before a hearing officer of the Cabinet on a cause of action which arose ten years earlier, even though the action would be barred by the statute of limitations in every other tribunal of the Commonwealth.”<sup>3</sup>

10. The Public Service Commission has recognized and applied various statutes of limitations in its administrative proceedings.<sup>4</sup>

11. KRS 413.120(2) and KRS 413.120(3) limit the Public Service Commission’s authority to bring proceedings to assess and collect a penalty for an alleged willful violation of a provision of KRS Chapter 278 or for aiding or abetting a violation of a provision of KRS Chapter 278. The Public Service Commission must bring its proceedings within five years of when the cause of action accrued. “A cause of action accrues when a state agency first has the right to institute an action of any kind, administrative or judicial.”<sup>5</sup>

12. Assuming *arguendo* that Dexter-Almo Heights Water District violated KRS 278.300 with its issuance of the Promissory Note, the violation would have occurred on or about December 9, 2009.<sup>6</sup>

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<sup>3</sup> *Id.* at 280. See also *Scott Tobacco Co. v. Cooper*, 81 S.W.2d 588 (Ky. 1934) (holding that actions before Workmen’s compensation must be brought within one year, the “limitation statute with reference to court actions forth recovery of negligently inflicted injuries”).

<sup>4</sup> See, e.g., *Louis Encil Dalton v. Western Pulaski County Water District*, Case No. 97-303 (Ky. PSC June 11, 1998); *The Harbor At Harrods Creek Condominium Association v. Fourth Avenue Corporation – Long Corporation, Joint Venture d/b/a Shadow Wood Subdivision Sewer Service*, Case No. 2000-00379 (Ky. PSC Aug. 14, 2001); *Robert Hawkins v. Fountain Run Water District*, Case No. 2013-00017 (Ky. PSC Mar. 6, 2014).

<sup>5</sup> *Commonwealth v. EPI Corp.*, 2006 Ky. App. LEXIS 114 (Ky. App. Apr. 14, 2006) at 19.

<sup>6</sup> Assuming *arguendo* that the action did not accrue until the Public Service Commission had actual notice of the Promissory Note’s issuance, the cause of action would have accrued no later than March 30, 2011 and the Public Service Commission was required to initiate any proceedings before March 30, 2016. Dexter-Almo Heights Water District clearly notified the Public Service Commission of the existence of the Promissory Note on March 30, 2010 when it filed its annual and financial statistical report for the calendar year ending December 31, 2009. It provided additional details regarding the Promissory Note on March 30, 2011 when it filed its annual and financial statistical report for the calendar year ending December 31, 2010 and identified the Promissory Note’s maturity date. The pertinent pages of the 2009 and 2010 reports and the confirmation receipt for each report are attached to this Motion as Exhibits A and B respectively.

KRS 413.120(2) and KRS 413.120(3) required the Public Service Commission to commence on or before December 8, 2014 any administrative proceedings against Dexter-Almo Heights Water District for the purpose of assessing and collecting a penalty for the alleged violation. As the Public Service Commission commence the current proceeding long after that date, KRS 413.120(2) and KRS 413.120(3) bar the Public Service Commission from assessing any penalty against Dexter-Almo Heights Water District for the issuance of the Promissory Note.

13. Similarly, any actions by the present members of Dexter-Almo Heights Water District's Board of Commissioners to aid or abet Dexter-Almo Heights Water District's issuance of the Promissory Note would have occurred on or before December 9, 2009. KRS 413.120(2) and KRS 413.120(3) required the Public Service Commission to commence on or before December 8, 2014 any administrative proceedings against those members for the purpose of assessing and collecting a penalty for their alleged misconduct.<sup>7</sup> As the Public Service Commission commence the current proceeding long after that date, KRS 413.120(2) and KRS 413.120(3) bar the Public Service Commission from assessing any penalty against the present members of Dexter-Almo Heights Water District's Board of Commissioners for their actions involving the Promissory Note's issuance.

14. The Respondents have taken no action that would delay or prevent the Public Service Commission from learning of the Promissory Note's issuance. To the contrary, Dexter-Almo Heights has repeatedly reported to the Public Service Commission the Promissory Note's existence and its date of issuance.

a. In each of its financial and statistical reports submitted to the Public Service Commission since December 31, 2009, Dexter-Almo Heights Water District has reported the existence of the Promissory Note and its terms. These reports are incorporated by reference into this Motion.

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<sup>7</sup> See *supra* text accompanying note 6 and accompanying text regarding when proceedings against the members of Dexter-Almo Heights Water District were required to be brought if the accrual of action is based upon the date of notice to the Public Service Commission of the Promissory Note's issuance.

b. In each of its financial audit reports that Dexter-Almo Heights Water District has filed with the Public Service Commission since December 31, 2013,<sup>8</sup> the audit report has expressly noted the existence of the Promissory Note and the circumstances surrounding its issuance. These financial audit reports are incorporated by reference into this Motion.

c. In Case No. 2012-00489,<sup>9</sup> Dexter-Almo Heights Water District reported the existence of the Promissory Note in its Application to the Public Service Commission for a certificate of public convenience and necessity to construct a water main extension. Dexter-Almo Heights Water District's application, which was filed with the Public Service Commission on November 9, 2012, is incorporated by reference into this Motion.

d. In Case No. 2017-00191,<sup>10</sup> when applying for a rate adjustment, Dexter-Almo Heights Water District provided a copy of the Promissory Note in its Application.

15. As KRS 413.120(2) and KRS 413.120(3) bar the assessment of any civil penalties against the Respondents for their actions regarding the issuance of the Promissory Note and as the sole purpose of this proceeding is to determine whether civil penalties should be assessed against the Respondents for their actions regarding the Promissory Note's issuance, this proceeding should be dismissed with prejudice.

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<sup>8</sup> 807 KAR 5:006, Section 4(3) requires a utility to submit no later than September 30 of each year any financial statement audit report that was performed during the previous year.

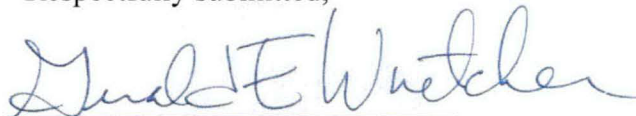
<sup>9</sup> *Application of Dexter-Almo Heights Water District for a Certificate of Public Convenience and Necessity to Construct and Finance a Waterworks Improvements Project Pursuant to KRS 278.020 and 278.300*, Case No. 2012-00489 (Ky. PSC filed Nov. 9, 2012).

<sup>10</sup> *Electronic Application of Dexter-Almo Heights Water District For Alternative Rate Adjustment*, Case No. 2017-00191 (Ky. PSC filed May 15, 2017).

WHEREFORE, the Respondents requests that this proceeding be dismissed with prejudice.

Dated: March 16, 2018

Respectfully submitted,



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*Counsel for Respondents*

**20600 Dexter-Almo Heights Water District 01/01/2009 - 12/31/2009**

**Notes Payable (Accts 232) (Ref Page: 18)**

	Description	Nominal Date of Issue	Date of Maturity	Int. Rate	Int. Payment	Principal Amt Per Bal Sheet
Account 232 - Notes Payable						
	THE MURRAY BANK	DEC 2009		5.9500	\$0.00	\$145,988.00
Total Account 232					\$0.00	\$145,988.00

<b>Confirmation Receipt</b>		
<b>Water Districts &amp; Associations Class C</b>	<b>20600 Dexter-Almo Heights Water District</b>	<b>FROM 01/01/2009 TO 12/31/2009</b>
Utility has marked all schedules as complete.		
3/30/2010 9:22:56 AM		



20600 Dexter-Almo Heights Water District 01/01/2010 - 12/31/2010

Notes Payable (Accts 232) (Ref Page: 18)

Description	Nominal Date of Issue	Date of Maturity	Int. Rate	Int. Payment	Principal Amt Per Bal Sheet
Account 232 - Notes Payable					
THE MURRAY BANK	DEC 2009	12/15/2024	5.9500	\$8,737.00	\$139,860.00
Total Account 232				\$8,737.00	\$139,860.00

<b>Confirmation Receipt</b>		
<b>Water Districts &amp; Associations Class C</b>	<b>20600 Dexter-Almo Heights Water District</b>	<b>FROM 01/01/2010 TO 12/31/2010</b>
Utility has marked all schedules as complete.		
3/30/2011 9:41:10 AM		