

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-354-DG

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KENTUCKY PUBLIC SERVICE COMMISSION,

APPELLANT

V.

On Appeal from the Franklin Circuit Court
Civil Action No. 06-CI-1041

Kentucky Court of Appeals

Case Nos. 2006-CA-002124-MR; 2006-CA-002165-MR & 2006-CA-002166-MR

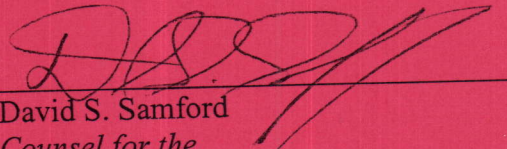
HARDIN & MEADE COUNTY PROPERTY
OWNERS FOR CO-LOCATION;
CDH PRESERVE, LLC; LISA HARRISON;
JENNIFER HARDIN; CHARLES THOMPSON;
GERALDINE THOMPSON; JAMES K. THOMPSON;
SANDY THOMPSON; SAMUEL COYLE;
EWONA COYLE; FLOYD DODSON;
IRENE DODSON; MARY JENT;
VIOLET MONROE; DIANE OWSLEY;
KENNETH WIMP; DENNIS CUNNINGHAM;
AND CATHY CUNNINGHAM,

APPELLEES

BRIEF FOR APPELLANT
KENTUCKY PUBLIC SERVICE COMMISSION

CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that copies of this Brief were served upon the following named individuals by delivering same to the custody and care of the U.S. Postal Service, postage pre-paid, on this 12th day of May, 2009: Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Thomas D. Wingate, Franklin Circuit Court Judge, Division II, 214 St. Clair St., Frankfort, KY 40601; W. Henry Graddy, IV, W. H. Graddy & Associates, 103 Main St., P.O. Box 4307, Midway, KY 40347; Robert Griffith, Stites & Harbison, 400 W. Market St., Suite 1800, Louisville, KY 40202; Allyson K. Sturgeon and J. Gregory Cornett, E.ON U.S., LLC, 220 W. Main St., Louisville, KY 40202; Sheryl G. Snyder and Griffin Terry Sumner, Frost Brown Todd, LLC, 400 W. Market St., 32nd Floor, Louisville, KY 40202; and Robert M. Watt, III, Stoll Keenon Ogden, PLLC, 300 W. Vine St., Suite 2100, Lexington, KY 40507. The undersigned does also certify that the record on appeal has not been withdrawn.


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I. INTRODUCTION

This case arises from an action for review of a decision by the Kentucky Public Service Commission ("Commission") granting a certificate of public convenience and necessity to Louisville Gas and Electric Company ("LG&E") and Kentucky Utilities Company ("KU") to construct an electric transmission line over the Appellees' objections. The issue on appeal is whether the Circuit Court had jurisdiction to consider the action for review when the Appellees admittedly failed to strictly comply with the statutory requirements for obtaining judicial review.

II. STATEMENT CONCERNING ORAL ARGUMENT

The Commission believes that oral arguments will be helpful to the Court and respectfully requests that this case be heard. The case has implications far beyond the limited facts of this one controversy and the Commission will be pleased to respond to any questions the Court may have regarding the issues presented herein.

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IV. SUMMARY

The Court of Appeals' December 14, 2007 Opinion (the "Opinion") abandoned the strict compliance doctrine, ignored published precedent squarely on point, judicially amended KRS 278.420, substituted its own judgment for a factual determination of the Circuit Court without making any finding of an abuse of discretion, and substantially lowered the standard of care for all attorneys practicing under statutory deadlines. All of these errors would have been avoided if the Court of Appeals had instead respected the principle of *stare decisis*. Nevertheless, the Court is now confronted with an opinion that squarely contradicts several previously well-settled points of law.¹ Instead of following existing law, the Court of Appeals is making new law. The Commission is grateful that the Court has granted discretionary review and respectfully requests the Court to overturn the Opinion of the Court of Appeals and remand this case to the Circuit Court with instructions that it be dismissed for lack of jurisdiction.

V. STATEMENT OF THE CASE

On May 26, 2006, the Commission granted the joint application of LG&E and KU for a certificate of public convenience and necessity to construct an electric transmission line over the objection of the Appellees,² who were intervenors in the case

¹ A copy of the Order denying the petition for rehearing and designating the Opinion as "to be published" and the Opinion itself are attached hereto as Appendix 1 and Appendix 2 respectively. A copy of the Circuit Court's Order dismissing the action for review is attached as Appendix 3.

² Hardin and Meade County Property Owners for Co-Location is an unincorporated association. It did not intervene in the Commission proceeding and is not a proper party to the appeal. By Order entered on December 31, 2008, Appellees Lisa Harrison and Jennifer Hardin were permitted to voluntarily withdraw as parties from the case. The Complaint also named "E.On US" as a defendant. E.On US, LLC is the parent company of LG&E and KU, but was not a party to the underlying Commission proceeding and therefore was also not a proper party to the action.

before the Commission.³ On July 6, 2006, the Commission entered an order denying the Appellees' motion for rehearing. Appellees thereafter sought review of the Commission's order in the Franklin Circuit Court on July 26, 2006, pursuant to the statutory process specifically established in KRS 278.410 through KRS 278.450. See Circuit Court Record ("Record"), pp. 5-26. Appellees failed to timely designate the record in violation of the express statutory requirement of KRS 278.420(2), which provides:

Unless an agreed statement of the record is filed with the court, **the filing party shall designate, within ten (10) days after an action is filed, the portions of the record necessary to determine the issues raised in the action.** Within ten (10) days after the service of the designation or within ten (10) days after the court enters an order permitting any other party to intervene in the action, whichever occurs last, any other party to the action may designate additional portions for filing. The court may enlarge the ten (10) day period where cause is shown. Additionally, the court may require or permit subsequent corrections or additions to the record. (Emphasis added).

On August 14, 2006, LG&E and KU filed a motion to dismiss the Complaint for lack of jurisdiction arising from the Appellees' failure to timely designate the record. Record, pp. 27-34. The motion was filed under the authority of Forest Hills Developers, Inc. v. Public Service Com'n, 936 S.W.2d 94 (Ky. App. 1996), which thoroughly considered the nature and application of the specific requirement of KRS 278.420(2) that the administrative record must be formally designated within ten days of the filing an

³ In the Matter of: Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky, Commission Case No. 2005-00467; In the Matter of: Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for the Construction of Alternative Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky, Commission Case No. 2005-00472. A copy of the Commission's Orders denying the motion for rehearing and granting the certificate are attached as Appendix 4 and Appendix 5 respectively.

action for review of a Commission order. The Commission joined LG&E and KU in the motion to dismiss. Record, pp. 89-90.

Appellees concede they failed to timely designate the record. Record, p. 36. In response to the motion to dismiss, Appellees filed a Motion for Designation of the Record on August 16, 2006. The motion argued that: 1) KRS 278.420(2) permitted the Circuit Court to enlarge the time for filing the designation of the record; 2) Appellees had shown cause sufficient to grant an enlargement of time; and 3) the statutory requirement to file a designation of the record within ten days of filing the action was not jurisdictional. Record, pp. 40-42. Appellees attached affidavits to their motion explaining the failure to timely file the designation of the record:

In pursuing this appeal, it was Mr. Graddy's role to handle the filing of the appeal and related matters. As a reflection of this division of labor, Mr. Graddy was responsible for drafting the Complaint. I reviewed that document and provided minor editing but had no other role in the preparation of that document. I know Mr. Graddy to be experienced in handling administrative appeals and believed that he would attend to the designation of the record on appeal. Based on this, I did not docket the designation of the record myself. I did not realize the extraordinary job pressure Mr. Graddy was under at this time.

Affidavit of Robert W. Griffith, Record, pp. 44-45.

William Henry Graddy, IV, states that due to the excessive workload and in human error he failed to mark on the calendar the ten (10) day deadline for filing the designation of record.

Affidavit of William H. Graddy, IV, Record, p. 49.

Following oral arguments and supplemental briefing, the Circuit Court issued an Order on August 28, 2006 dismissing Appellees' Complaint. Record, pp. 86-87. The Circuit Court found that failure to timely file a designation of the record did not mandate dismissal of the action and construed KRS 278.420(2) to give the Circuit Court discretion

to enlarge the ten day period for designating the record even after the ten day period had elapsed. The Circuit Court found, however, “it suffices to say that neither a busy schedule nor human error is ‘cause’ as required under KRS 278.420(2).” Record, p 87. Ultimately, the Circuit Court dismissed the action for review under the rationale set forth in Forest Hills that the Appellees could not satisfy their burden of proof:

Because the Appellants failed to designate the portions of the record required for appeal within the statutorily specified time, and because this Court does not believe cause has been shown sufficient to justify enlargement of the time limits, the Appellants can present to this Court no evidence and their case will necessarily fail for lack of proof.

Id.

Appellees filed an appeal before the Court of Appeals, pursuant to KRS 278.450, and argued that an attorney’s “excessive workload” and “human error” constitute “cause” under KRS 278.420(2) sufficient to require enlargement of the ten days for filing a designation of the record and that a substantial compliance standard should be applied to KRS 278.420. The Commission cross-appealed, arguing that: 1) Kentucky law requires strict compliance with statutory prerequisites for seeking review of an administrative decision; 2) failure to timely designate the record under KRS 278.420(2) is a jurisdictional defect under Forest Hills; and 3) even if failure to strictly comply with a statutory prerequisite is not jurisdictional, the Circuit Court properly found as a matter of fact that the Appellees failed to show “cause” under KRS 278.420(2).

The Court of Appeals heard oral arguments on November 7, 2007 and entered an opinion on December 14, 2007. The Opinion acknowledged that under Forest Hills, “the failure of the party to designate the record deprived the court of subject-matter

jurisdiction to adjudicate the action.” Opinion, p. 6. Rather than stopping there, however, the Opinion went on to state:

In the action now before us, the circuit court correctly found that it could in its discretion enlarge the ten-day period prescribed for the designation of the record. KRS 278.420(2). It also correctly determined that its decision turned upon counsel’s ability to show cause for the delay. The circuit court concluded that “neither a busy schedule nor human error” satisfied the requirement for “cause”. We disagree.

Opinion, p 7.

The Opinion further found that the Civil Rules “apply to this administrative appeal just as surely as they do to any other civil action.” *Id.*, p. 7. In applying CR 6.02 to the action, the Opinion emphasized one particular portion of the rule:

When by statute...an act is required to be done at or within a specified time, **the court for cause shown may, at any time in its discretion, (a) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or (b) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect[.]**

Id., pp. 7-8 (Emphasis in original).

In framing its analysis, the Court of Appeals wrote:

We have reviewed our published and unpublished opinions and have found that motions to dismiss based upon a timely designation of the administrative record are routinely dispositive. However, the relationship between the provisions of KRS 278.420(2) and CR 6.02 has never been carefully considered. Consequently, this case places in issue the circuit court’s interpretation of *cause* as used in KRS 278.420(2) in conjunction with the phrase *excusable neglect* as used in CR 6.02.

Id., pp. 8-9.

Applying the equitable standards in Pioneer Investment Services Co. v. Brunswick Associated Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), which was not cited or briefed by any party to the action, the Court of Appeals found that “*excusable neglect* under CR 6.02 equates with *cause shown* under KRS 278.420(2)....” Opinion, p. 12 (Emphasis in original). The Opinion concludes, “[w]e believe that the unique circumstances of this case dictate that the court erred in dismissing these appellants.” Id., p. 12.

In her dissent, Judge Moore wrote, “Forest Hills is a well-reasoned decision, based on a long-held view of the nature of administrative appeals....It is well settled that an appeal from an administrative agency’s decision to the circuit court is a matter of legislative grace and strict compliance is mandatory.” Opinion, pp. 12-13. The dissent also states that, in the alternative, even if failure to timely designate is not jurisdictional, there is no finding of abuse of discretion by the circuit court and its discretion should not be disturbed. Id., p. 13.

The Commission filed a petition for rehearing, as did LG&E & KU. Those petitions were denied in a one-paragraph order entered on April 15, 2008, wherein the Court of Appeals, on its own motion, designated the Opinion to be published.

VI. ARGUMENT

The facts of this case are undisputed and the law is well-settled. The failure of a party seeking review of an administrative agency’s determination to strictly comply with statutory mandates deprives the reviewing court of jurisdiction to hear the case. *Stare decisis* requires the Court of Appeals to respect and follow the strict compliance doctrine and the Court of Appeals is not at liberty to construe a jurisdictional statute so broadly as

to create an exception that swallows the rule. Moreover, the Court of Appeals may not freely substitute its judgment for that of the Circuit Court – particularly where there is no finding of an abuse of discretion.

A. THE STRICT COMPLIANCE DOCTRINE MANDATES DISMISSAL OF THE ACTION.

In an action for review of an administrative decision, the failure to timely comply with a statutory mandate deprives the reviewing court of jurisdiction. This is a well-settled principal of law that the Court of Appeals is not free to ignore under the doctrine of *stare decisis*. Moreover, the Court of Appeals may not construe a jurisdictional statute in such a way as to: a) render a portion of the statute meaningless; b) extend jurisdiction by use of a procedural rule; or c) rely upon principles of equity to determine whether jurisdiction exists as a matter of law.⁴

1. The strict compliance doctrine is a well-established rule of Kentucky administrative law.

There is no appeal to the courts from an action of an administrative agency as a matter of right. When grace to appeal is granted by statute, a strict compliance with its terms is required. Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy.

Board of Adjustments of City of Richmond v. Flood, 581 S.W.2d 1, 2 (Ky. 1978).

This is the doctrine of strict compliance. The Circuit Court and the Court of Appeals both ignored it to the point of rendering the doctrine essentially meaningless. Both courts erred as a result.

⁴ Pursuant to CR 76.12(4)(c)(v), the Commission states that this argument was preserved through review. See Commission Response joining in LG&E and KU's motion to dismiss [Record, pp. 89-90]; Commission Brief to the Court of Appeals, pp. 3-10; Commission Petition for Rehearing, pp. 2-8; and Commission Motion for Discretionary Review, pp. 7-15.

Administrative agencies such as the Commission are established by statute. See Boone Co. Water and Sewer District v. Kentucky Public Service Com'n, 949 S.W.2d 588, 591 (Ky. 1997). The right to review the decisions of administrative agencies is therefore also established by statute. See Stephens v. Kentucky Utilities Co., 569 S.W.2d 155, 157 (Ky. 1978) (“The General Assembly has provided for judicial review of orders of the Public Service Commission. KRS 278.410 through KRS 278.450 sets out the procedure and limitations of judicial review.”). It is the prerogative of the legislative branch to provide for judicial review of administrative decisions and, in its discretion, to prescribe the precise prerequisites for obtaining judicial review. Statutes governing the review of administrative decisions therefore express the legislature’s intention to balance the need for review with the equally important need for finality. Reflecting this balance, this Court observed, “[p]ublic policy dictates that these actions not be unnecessarily prolonged.” Kentucky Utilities Co., 569 S.W.2d at 158. Statutory deadlines are imposed by the legislature and not by the courts. Hence, the courts are not free to ignore them or render them meaningless.

In the context of reviewing a decision of the Commission, the General Assembly has established only two statutory deadlines. First, an action for review of a Commission decision must be filed within thirty days after service of the Commission’s order under KRS 278.410(1). Second, the party seeking review of a Commission decision must “designate, within ten (10) days after an action is filed, the portions of the record necessary to determine the issues raised in the action” pursuant to KRS 278.420(2). Both KRS 278.410 and KRS 278.420 are jurisdictional statutes. Failure to strictly comply with either statute deprives the reviewing court of jurisdiction.

Statutory deadlines established by the General Assembly are not whimsical aspirations. They are “conditions for the exercise of power by a court” and where they are not strictly complied with, “the judicial power is not lawfully invoked” and “the court lacks jurisdiction or has no right to decide the controversy.” Flood, 581 S.W.2d at 2. The doctrine of strict compliance is well-established and has been consistently applied by Kentucky’s courts for well over half a century. See Hutchins v. General Electric Co., 190 S.W.3d 333, 336-337 (Ky. 2007) (“The right to appeal the decision of an administrative agency to a court is a matter of legislative grace; therefore, the statutory conditions for invoking the power of the court to hear such an appeal are strictly construed.”); Kentucky Utilities Co. v. Farmers RECC, 361 S.W.2d 300, 301 (Ky. 1962) (“Appellee seeks to excuse its failure to conform to the requirements of the statute by contending that no prejudice resulted to either the commission or the Kentucky Utilities Company. The contention is unavailing since the requirements of the statute are jurisdictional.”); Roberts v. Watts, 258 S.W.2d 513 (Ky. 1953) (“The right of appeal in administrative as well as other proceedings does not exist as a matter of right. When the right is conferred by statute, a strict compliance with its terms is required. It is the general rule that where the conditions for the exercise of the power of a court are wanting the judicial power is not, in fact, lawfully invoked.”); Taylor v. Duke, 896 S.W.2d 618, 621 (Ky. App. 1995) (“Since an appeal from an administrative decision is a matter of legislative grace and not a right, the failure to follow the statutory guidelines for an appeal is fatal.”); Frisby v. Board of Educ. of Boyle Co., 707 S.W.2d 359, 361 (Ky. App. 1986) (“Where a statute prescribes the method for taking an appeal from an administrative action and the time in

which the appeal must be taken, these requirements are *mandatory* and must be met in order for the circuit court to obtain jurisdiction to hear the case.”) (Emphasis added).

Indeed, the doctrine of strict compliance has arisen several times within the very narrow context of the case at bar where prior panels of the Court of Appeals consistently recognized and affirmed the jurisdictional nature of KRS 278.420(2). In Forest Hills, 936 S.W.2d 94 (Ky. App. 1996), the Court of Appeals concluded: “we find no error in the court’s reliance on Frisby for the proposition that the failure to abide by the statutory scheme for seeking review of a commission’s order *deprives the reviewing court of jurisdiction.*” Id., at 96. Subsequent cases before the Court of Appeals have yielded the same result. See Callihan v. Kentucky Public Service Com’n, Slip. Op., Case No. 2007-CA-1227, p. 5 (Ky. App. Dec. 5, 2008) (“In [Forest Hills], this court clearly explained why compliance with the record designation requirements of KRS 278.420(2) is a condition precedent to any action by the circuit court.”); Krauser v. Kentucky Public Service Com’n, Slip Op., Case No. 01-CA-02006, 2003 WL 21360560, p. *2 (Ky. App., Jun. 13, 2003) (“The holding in *Forest Hills* is clear and it requires the timely and proper designation of the record pursuant to KRS 278.420 in order for the subject-matter jurisdiction of the Franklin Circuit Court to be invoked pursuant to KRS 278.410.”); Holly Creek Production Corp. v. Public Service Com’n, Slip Op., Case No. 00-CA-1186, pp. 4-5 (Ky. App., Aug. 24, 2001) (“Substantial compliance, a policy guiding judicial construction of the civil and criminal rules, generally does not apply to such questions of statutory or regulatory construction.”); Spears Water Company v. Kentucky Public Service Com’n, Slip Op., Case No. 1998-CA-1925, Case No. 1998-CA-1994, p. 9 (Ky. App., Nov. 12, 1999) (“KRS 278.410 and KRS 278.420 both set out the requirements for

seeking review of a decision by the Commission. The procedures outlined by both statutes must be met in order for the circuit court to obtain (and retain) jurisdiction over the action.”); Inter-County RECC v. Public Service Com’n, Slip Op., Case No. 96-CA-2340, p. 4. (Ky. App., Nov. 21, 1997) (“Upon the authority of Forest Hills, we must conclude that Inter-County’s failure to so designate the record within the time prescribed in KRS 278.420(2) mandated dismissal of the action”); Nuckols Farm, Inc. v. Public Service Com’n, Slip Op., Case No. 96-CA-2069, pp. 1-2 (Ky. App., Oct. 3, 1997) (“[W]e agree with the trial court that subject matter jurisdiction was lost when appellant failed to timely designate the record pursuant to KRS 278.420.”).⁵

Forest Hills is dispositive of this case for several reasons. First, it recites and applies the doctrine of strict compliance in a straightforward legal analysis of the consequences flowing from the failure to timely designate the record. Second, it quite plainly summarizes the duty of a party seeking review of a Commission decision to timely designate the record – “KRS 278.420(2) states in clear and unambiguous terms that the party filing the complaint shall designate the portions of the record necessary to resolve the issues raised in its complaint.” Id. Third, it confirms that when the party who seeks review of a Commission decision fails to timely designate the record and the Circuit Court dismisses the action for lack of jurisdiction, there is “no error.” Id. Fourth, it states the obvious – when there is no administrative record to consider, the party

⁵ These unpublished Opinions are not cited as binding precedent. They are cited to illustrate the many times that the strict compliance doctrine has been applied to KRS 278.420(2) by the Court of Appeals. In the Opinion, the Court of Appeals stated that it reviewed both its published and unpublished Opinions on KRS 278.420(2). Opinion, p. 8. Copies of these unpublished Opinions are attached collectively as Appendix 6.

seeking review cannot sustain the “clear and satisfactory” evidentiary standard in KRS 278.430. Id. On this last point, the Circuit Court agreed, writing in its order of dismissal:

Because the Appellants failed to designate the portions of the record required for appeal within the statutorily specified time, and because this Court does not believe cause has been shown sufficient to justify enlargement of the time limits, the Appellants can present to this Court no evidence and their case will necessarily fail for lack of proof.

Record, p. 87.

Finally, Forest Hills is over one decade old and has been cited and applied many times. If the General Assembly was not satisfied with the courts’ construction of KRS 278.420(2) as set forth in Forest Hills and the many subsequent cases applying the strict compliance doctrine in this context, it has had ample time to amend the statute. The General Assembly’s inaction is tangible evidence of its agreement with Forest Hills. See Hughes v. Com., 87 S.W.3d 850, 856 (Ky. 2002) (“the failure of the legislature to change a known judicial interpretation of a statute [is] extremely persuasive evidence of the true legislative intent. There is a strong implication that the legislature agrees with a prior court interpretation when it does not amend the statute interpreted.”); City of Richmond v. Public Service Com’n, 294 S.W.2d 513, 514 (Ky. 1956) (“...the General Assembly has had several sessions during the nine years since the decision was rendered and has impliedly acquiesced in our interpretation as to its intent by not having amended the statute.”) (Overruled on other grounds).

It bears particular emphasis that there is no dispute the Appellees failed to timely file a designation of the record and that their motion for an enlargement of time in which to file a designation was filed after the statutory deadline had passed. Record, p. 36. In light of this fact and the well-established doctrine of strict compliance, the Circuit Court

lost jurisdiction and nothing it or the Appellees could do would restore jurisdiction. The doctrine of strict compliance mandates dismissal of the action for lack of subject matter jurisdiction. The doctrine has not been abandoned by this Court, and “[w]here the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy.” Flood, 581 S.W.2d at 2. The requirement that the Appellees designate the record on appeal within ten days of filing their action is jurisdictional.

The Court of Appeals obviously came to a different conclusion. Its refusal to apply the strict compliance doctrine errs in two material respects. First, the Court of Appeals failed to honor the doctrine of *stare decisis*. Second, it construed KRS 278.420(2) in such a manner as to effectively render the ten day statutory deadline as meaningless.

2. The Court of Appeals may not ignore the Strict Compliance Doctrine.

It is not within the power of the Court of Appeals to ignore a rule of law that is squarely on point, such as the strict compliance doctrine discussed above, when deciding a case. Supreme Court Rule 1.030(8)(a) provides: “The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court.” This Rule articulates the doctrine of *stare decisis* – the purpose of which is to “maintain stability and continuity in our jurisprudence.” Thomas v. Com., 931 S.W.2d 446, 447 (Ky. 1996). The doctrine:

[I]s based upon the belief that similar cases should be decided in a similar manner. When a court of institutional review announces a principle of law to apply to a general set of facts, the doctrine of *stare decisis* requires the court, in the absence of “sound legal reasons to the contrary” to adhere to that same principle in future cases where there is a similar factual pattern.

Id.

The need for courts to respect judgments of higher courts is manifest. As this

Court has said:

If every tier of courts in the judicial hierarchy were free to disregard the decisions of a higher court, the Court of Appeals could freely disregard the decisions of the Supreme Court, the circuit courts could freely ignore the decisions of the Court of Appeals and the Supreme Court and our District Courts would be bound by no law at all, free to ignore the decisions of all higher courts. The result of that course is anarchy.

The Court of Appeals is compelled to follow precedent established by the decisions of the Supreme Court. That is not to say, however, that disagreement is prohibited or constructive criticism banned. Any court, though required to follow precedent established by a higher court, can set forth the reasons why, in its judgment, the established precedent should be overruled but cannot, on its own, overrule the established precedent set by a higher court.

Special Fund v. Francis, 708 S.W.2d 641, 642 (Ky. 1986).

Likewise, in Tucker v. Tri-State Lawn & Garden, Inc., 708 S.W.2d 116, 118 (Ky. App. 1986), the Court of Appeals stated, “[I]t is not our function to establish new rules of law or enunciate changes in Kentucky jurisprudence.... If we, or any one of us, disagree with an established rule of law, then we point out its fallacy but simultaneously adhere to it.” Yet in this case, the doctrine of *stare decisis* fared no better than the doctrine of strict compliance. For instance, the Opinion comments upon the prior decision in Forest

Hills, noting:

We upheld the court's conclusion that the failure of the party to designate the record deprived the court of subject-matter jurisdiction to adjudicate the action.... [W]e also rejected the contention that ‘the court abused its discretion by denying [the parties'] motion to enlarge the period during which the record could be designated.’

Opinion, pp. 6-7.

Notwithstanding these statements, the Court of Appeals' adherence to the strict compliance doctrine ends with the acknowledgment that the failure to designate has been "routinely dispositive." Opinion, p. 8. What follows is an equitable analysis of the Appellees' effort to seek judicial review under the framework of a rule of procedure. There is no discussion as to why strict compliance should not be followed – just a generous discussion of why a different result is preferred. The Court of Appeals' Opinion in this matter therefore stands in direct conflict with the doctrine of *stare decisis*.

The anomalous nature of this Opinion is magnified in two respects. First, a subsequent panel decided a similar case under KRS 278.420(2) by expressly affirming the strict compliance doctrine in general and Forest Hills in particular. See Callihan, *supra*.⁶ Second, the Opinion in this case was originally designated as "not to be published", but upon consideration of the petitions for rehearing was designated as "to be published" on the Court's own motion.

Although the Opinion does not expressly state that it is abolishing or limiting the strict compliance doctrine, it plainly achieves that result. The Opinion does not promote stability and continuity in Kentucky jurisprudence. Moreover, it does not articulate a "sound legal reason" to depart from the doctrine of strict compliance. The Opinion does not even go so far as to say that Forest Hills should be overturned. Instead, it sidesteps

⁶ A copy of the Callihan Opinion is attached in Appendix 6. Between the entry of the Opinion at issue herein and the Callihan decision, the Court of Appeals entered an Opinion on a third case involving KRS 278.420(2), Kentucky Public Service Com'n v. Shadoan, Slip Op., Case No. 2007-CA-00697 and Case No. 2007-CA-00713 (Ky. App., Dec. 31, 2008) (equating the attachment of uncertified copies of Commission orders to a Complaint as an adequate designation of the record under KRS 278.420(2)). A motion for discretionary review is pending in Shadoan and is docketed as Case No. 09-SC-00053-D.

the principles of *stare decisis* by ignoring the authorities which govern this action. As a result, the Opinion is in error and should be reversed.

3. The Court of Appeals misconstrued KRS 278.420(2) in three ways.

The Court of Appeals also misconstrued KRS 278.420(2) by: a) rendering the ten day deadline for filing the designation of the record meaningless; b) using a procedural rule to create jurisdiction; and c) applying principles of equity to a jurisdictional determination.

a. The Court of Appeals rendered the statutory deadline in KRS 278.420(2) meaningless.

The Court of Appeals did not feel bound by *stare decisis* to apply the doctrine of strict compliance because it endorsed a particular and unique construction of KRS 278.420(2) that was first adopted by the Circuit Court. Specifically, both courts seized upon language set forth in the statute which gives the Circuit Court some discretion in determining whether an enlargement of time in which to file the designation of the record may be authorized. KRS 278.420(2) states:

Unless an agreed statement of the record is filed with the court, the filing party shall designate, within ten (10) days after an action is filed, the portions of the record necessary to determine the issues raised in the action. Within ten (10) days after the service of the designation or within ten (10) days after the court enters an order permitting any other party to intervene in the action, whichever occurs last, any other party to the action may designate additional portions for filing. **The court may enlarge the ten (10) day period where cause is shown.** Additionally, the court may require or permit subsequent corrections or additions to the record. (Emphasis added).

Simply put, both the Circuit Court and the Court of Appeals construed the highlighted sentence to mean that the Circuit Court could enlarge the ten day statutory deadline even *after* that deadline had passed, provided there was an adequate showing of

“cause”. As the Opinion states, “the circuit court correctly held that it could in its discretion enlarge the ten-day period prescribed for the designation of the record. KRS 278.420(2). It also correctly determined that its decision turned upon counsel's ability to show cause for the delay.” Opinion, p. 7.

It is a fundamental tenet of statutory construction that a statute should not be construed in a manner that renders any portion of it meaningless. See Lewis v. Jackson Energy Co-op. Corp., 189 S.W.3d 87, 91 (Ky. 2005) (“Statutes should be construed in such a way that they do not become ineffectual or meaningless.”) citing Commonwealth v. Phon, 17 S.W.3d 106 (Ky. 2000). Without a doubt, the General Assembly had something in mind when it prescribed a ten day deadline for designating the record. See Dannheiser v. City of Henderson, 4 S.W.3d 542, 549 (Ky. 1999) (“The legislature certainly knows the scope of its power to provide mandatory, as distinguished from permissive, legislation.”). Something was to be done within that period – either the filing of the designation of the record or the filing of a motion for an enlargement of the statutory deadline.

By holding that the Circuit Court could enlarge the statutory deadline even after it had passed, the Court essentially rendered the ten day statutory period meaningless. Instead of strict compliance remaining the objective standard for determining whether an action for review has been perfected and jurisdiction attaches, the subjective standard of “cause” now becomes the overriding consideration. This plainly shoves the legislatively struck balance between judicial review and finality toward judicial review and away from achieving finality. Of course, under the long line of cases applying the strict compliance doctrine, this is not the role of the courts.

Allowing an untimely designation to be given retroactive effect is impermissible. See Oertel v. Louisville and Jefferson County Planning and Zoning Com'n, 251 S.W.2d 275, 276 (Ky. 1952) (untimely filing of certified copy of a planning commission order will not be given retroactive effect and is jurisdictional). Moreover, a prior panel of the Court of Appeals specifically rejected the notion that the Circuit Court had jurisdiction to enlarge the period for designating the record after the statutory deadline has passed. In Spears Water Company v. Kentucky Public Service Com'n, Franklin Cir. Ct. Case No. 97-CI-00669 (July 17, 1997), the Franklin Circuit Court granted an untimely motion for enlargement of time after the attorney who failed to timely file the designation of the record tendered an affidavit stating that the failure was due to "an unusually heavy workload" – which is the same evidence of "cause" provided herein.⁷ On appeal, however, the Court of Appeals reversed, stating:

In the case before us, Spears filed a timely appeal in compliance with KRS 278.410, but failed to designate the record or any portion of the record within ten days of that filing as required by KRS 278.420. Approximately forty-three days after seeking review of the Commission's order by the circuit court, Spears filed a motion for enlargement of time to designate the record. However, at this belated juncture, the circuit court no longer had jurisdiction over the action as the statutory requirements of KRS 278.420 had not been met....KRS 278.410 and KRS 278.420 both set out the requirements for seeking review of a decision by the Commission. The procedures outlined by both statutes must be met in order for the circuit court to obtain (and retain) jurisdiction over the action. Furthermore, although KRS 278.420(2) authorizes the court to grant enlargements of the ten-day period for cause shown, some action must be taken within the specified ten-day period....We find that the circuit court erred in granting Spears's motion for an enlargement of time to designate the record.

⁷ The Franklin Circuit Court Order granting the untimely enlargement of time to designate record, dated July 17, 1997 and Spears Water Company's Cross Motion for Enlargement of Time to Designate the Record and Response to Motion to Dismiss are collectively attached as Appendix 7. As public records, the Court may take judicial notice of these documents.

The court had already lost jurisdiction over the action due to Spears's failure to comply with KRS 278.420(2); dismissal was the only option that remained.

Spears, Slip. Op., pp. 8-9 (Emphasis added).⁸

Concluding that a proper showing of "cause" will enlarge an expired statutory deadline creates a broad exception to the strict compliance doctrine that swallows the rule, which is impermissible. Commonwealth v. Wirth, 936 S.W.2d 78, 83-84 (Ky. 1996) (a reviewing court must not construe a statute in a manner which would effectively abolish it). Although the General Assembly enacted a statute stating, "the filing party shall designate, within ten (10) days after an action is filed, the portions of the record necessary to determine the issues raised in the action," the Court of Appeals turned that mandate into a guideline that more properly reads "the filing party *may* designate, within ten (10) days after an action is filed, the portions of the record necessary to determine the issues raised in the action, provided the filing party is not too busy." The erroneous statutory construction notwithstanding, this is a terrible result. It makes "cause" the fulcrum of the statute – the balancing point between whether jurisdiction is perfected or whether it is lost. A court must not be guided by a single sentence or word of a sentence, however. It must look to the provisions of the whole statute and to its object and policy. See Lewis, 189 S.W.3d at 92; Democratic Party of Kentucky v. Graham, 976 S.W.2d 423, 429 (Ky. 1998); Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transp. Cabinet, 983 S.W.2d 488, 492 (Ky. 1998).

⁸ Spears Water Company v. Kentucky Public Service Com'n, Case No. 1998-CA-1925-MR, Case No. 1998-CA-1994-MR (Ky. App. Nov. 12, 1999). A copy of the Opinion is attached in Appendix 6. This case is not cited as binding precedent, but to illustrate that the appellate courts have already considered and rejected the argument in favor of untimely expansion of the period to designate the record. CR 76.28(4)(c). In the Opinion, the Court of Appeals stated that it reviewed both its published and unpublished Opinions on KRS 278.420(2). Opinion, p. 8.

The Court of Appeals plainly misconceived the nature of “cause” in KRS 278.420(2). The sentence authorizing an enlargement of time for “cause” is a rule of convenience for diligent counsel, not a rule of neglect. For instance, Commission proceedings generate tremendous administrative records. One utility’s response to a single Commission data request was over 49,000 pages in a recent case.⁹ Contested rate cases and major construction projects routinely generate administrative records several thousand pages in length. Legislators understood that requiring the preparation and filing of the full record in every Commission proceeding would be expensive and inefficient, not just for the Commission but also for the courts.

KRS 278.420(2) plainly evidences a legislative intent to allow for the designation of only those portions of the record necessary for review – something less, perhaps, than the full administrative record. The quickest way for a party seeking review of a Commission decision to comply with KRS 278.420(2) is to designate the record in its entirety at the time they file their complaint. Often times, this will be a very inefficient use of the resources of both the Commission and the Circuit Court. The statute therefore expressly encourages parties to separate the relevant portions of the record from the irrelevant by mandating that they designate “the portions of the record necessary to determine the issues raised in the action.” KRS 278.420(2). The statute thereby balances speed (designating the record in its entirety) with efficiency (designating only the

⁹ *In the matter of: Petition of BellSouth Telecommunications, Inc., to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law*, Commission Case No. 2004-00427, BellSouth d/b/a AT&T Kentucky Response to Commission Order, filed on Jan. 28, 2008.

relevant portions of the record).¹⁰ In essence, KRS 278.420(2) encourages diligent conciseness with respect to perfecting judicial review of a Commission decision.

When the entire statute is read within the context of this legislative intent, the sentence giving the court discretion to enlarge the period for designating the record upon a showing of cause makes perfect sense. Given the voluminous nature of some administrative records, ten days may not be enough time to fully comb the record and separate the relevant from the irrelevant.¹¹

The Court of Appeals, however, construed “cause” as being synonymous with “excuse”. In other words, even though the Appellees could have designated the record in its entirety when filing the complaint (speed) and even though the plaintiff made no apparent effort to limit the record on review to only those items “necessary to determine the issues raised in the action” (efficiency), the Appellees will still be allowed to pursue their claim. The Opinion’s construction of KRS 278.420 violates the clear legislative intent and creates unnecessary tension within the statute itself. Statutes should be harmonized. See Lewis v. Jackson Energy Co-op. Corp., 189 S.W.3d 87, 91 (Ky. 2005) citing DeStock No. 14, Inc. v. Logsdon, 993 S.W.2d 952, 957 (Ky. 1999).

As applied here, however, the concept of “cause” has been transformed from a basis for encouraging judicial economy and efficiency into a standard for defining the minimum threshold of acceptable legal practice. The Court of Appeals misconstrued

¹⁰ Under KRS 278.420(2), “any other party” may designate additional portions of the record as well. Recognizing that plaintiffs may sometimes overlook important material in the record, the statute also allows the record to subsequently be corrected or supplemented. All of these elements of the statute are clearly designed to promote as narrowly focused a review as possible.

¹¹ The deadline to file a designation of the record is actually forty-three days after the entry of the Commission’s order when the time for service of the order (KRS 278.400), the deadline to file an action for review (KRS 278.410) and the deadline to designate the record (KRS 278.420) are added together.

KRS 278.420(2) and effectively over-ruled the requirement to act within ten days of filing the action for review.

b. The Court of Appeals misconstrued KRS 278.420(2) by allowing a Civil Rule to confer jurisdiction on a Circuit Court.

The Court of Appeals further erred in expanding the Circuit Court's jurisdiction through application of a procedural rule to a jurisdictional statute, justifying its departure from precedent on the basis that the principles of CR 6.02 should be incorporated into its consideration of what constitutes "cause" under the statute:

As the property owners have duly noted, the Kentucky Rules of Civil Procedure apply to this administrative appeal just as surely as they do to any other civil action.... When a statute sets forth the procedure to be followed, it pre-empts our rules of procedure if they are in conflict or inconsistent with the statutory authority. CR 1(2). However, in this case, rather than conflicting with the statute, the civil rules are complementary as to the provisions of KRS 278.420(2) that authorize the circuit court to enlarge the ten-day time period based upon the reasons underlying the failure for timely designation of the administrative record.

Opinion, pp. 7-8.

The Opinion goes on to state that "the relationship between the provisions of KRS 278.420(2) and CR 6.02 has never been carefully considered" and that "this case places in issue the circuit court's interpretation of *cause* as used in KRS 278.420(2) in conjunction with the phrase *excusable neglect* as used in CR 6.02." Opinion, pp. 8-9 (Emphasis in original). The Opinion concludes that, "*excusable neglect* under CR 6.02 equates with *cause shown* under KRS 278.420(2)" *Id.*, p. 12 (Emphasis in original).

While this analysis is superficially appealing, it ignores the express limitations on applying Civil Rules as set forth in CR 82. Plainly stated, the Civil Rules cannot be applied so as to extend the jurisdiction of a circuit court: "These rules shall not be

construed to extend or limit the jurisdiction of any court of this Commonwealth...." CR 82; see also Johnson v. Smith, 885 S.W.2d 944, 949 (Ky. 1994) ("Our rule does not create jurisdiction, but only prescribes 'the method by which the jurisdiction of an appellate court is invoked.'" (Citation omitted). Only when jurisdiction is properly invoked may the Civil Rules be properly applied. Pollitt v. Kentucky Unemployment Insurance Com'n, 635 S.W.2d 485, 487 (Ky. App. 1982) ("The civil rules do not apply to this type of litigation (appeals from administrative decisions) until after the appeal has been perfected.").

The Court of Appeals' conclusion eviscerates the statutory requirement that some action must be taken with regard to designating the administrative record within the statutorily prescribed ten day period. The Opinion makes the determination of whether the Circuit Court has jurisdiction derivative of whether the party initiating the action for review can demonstrate excusable neglect under CR 6.02. In light of the jurisdictional nature of KRS 278.420(2), the Courts have never needed to consider whether there exists any nexus between the statute and CR 6.02(b). This is exactly the conclusion of a prior panel of the Court of Appeals in considering an action for review in a similar context:

It is uncontested that appellees filed five days after the appeal time ran. The inquiry must now turn on what effect, if any, the allegations in appellees' affidavit have on the issue. Since the civil rules do not come into effect in appeals from decisions of administrative agencies until the appeal is perfected, the excusable neglect concept of CR 6.02, which permits late filing of appeals if excusable neglect is alleged, is not a viable argument for appellees to utilize because the appeal was untimely filed. Thus, the appeal was never perfected according to KRS 210.270(1), and the civil rules never became effective. On this ground alone the trial court should have dismissed the appeal from the DHR panel.

Cabinet for Human Resources v. Holbrook, 672 S.W.2d 672, 675 (Ky. App. 1984) (Emphasis added).

The Opinion unquestionably evidences an express interest in preserving the Appellees' right to judicial review. Indeed, this is one of the primary considerations of the Court of Appeals in incorporating CR 6.02(b) into KRS 278.420(2):

However, our application of the civil rules cannot be merely perfunctory. Instead, it must be undertaken in such a manner as to facilitate rather than to frustrate an adjudication of the issues on the merits.

We conclude that CR 6.02 and KRS 278.420(2) can best be reconciled by ordering that this appeal be reinstated.

Opinion, pp. 10, 12.

Without expressly saying so, this portion of the Opinion demonstrates the Court of Appeals' desire to adopt and apply the rule of substantial compliance to the review of administrative proceedings. This position has been advocated by the Appellees from the outset of this proceeding and, in support of a rule of substantial compliance, they cited the case of Ready v. Jamison, 705 S.W.2d 479 (Ky. 1986) and its progeny, including: Williams v. Wal-Mart Stores, Inc., 184 S.W.3d 492 (Ky. 2005); Crossley v. Anheuser-Busch, Inc., 747 S.W.2d 600 (Ky. 1988); Foxworthy v. Norstam Veneers, Inc., 816 S.W.2d 907 (Ky. 1991); Smith v. Goodyear Tire and Rubber Co., 772 S.W.2d 640 (Ky. App. 1989). Record, pp. 147-49.

Ready relaxed the standard for perfecting an appeal, but it did so in a very limited context – where the deadline in question was actually governed by a rule of procedure – not where the deadline is set forth in the statutes. In fact, all of the cases previously relied upon by the Appellees to support a substantial compliance standard – which the Court of Appeals implicitly adopted – are cases where the court has permitted substantial compliance with a Civil Rule as opposed to a statutory requirement.

Ready has no application to deadlines that are established by statute – a point so obvious that the Opinion makes no mention of the case principally relied upon by the Appellees even while granting them all the relief they sought! It intrinsically makes sense that, in light of the separation of powers so fundamental to our form of government, the judiciary may not ignore or invalidate a deadline established by the legislature. In fact, this Court has expressly stated that Ready has no application to statutory deadlines:

Bowen cites the case of Ready v. Jamison, Ky., 705 S.W.2d 479 (1986) as authority to apply the doctrine of substantial compliance to the Constitution and all three cited statutes. In that case, we adopted a change from "the policy of strict compliance with rules of procedure regarding appeals" to a new policy of substantial compliance as set out in CR 73.02(2). Ready simply interprets a new rule involving this particular appeals procedure, and by judicial fiat adopts a liberal policy of interpretation that leads to the salutary result of not dismissing litigants from court for technical violations of our rules of procedure. The lesson of Ready is clearly not applicable to the case at bar, which involves the interpretation of the Constitution as well as statutes rather than procedural rules.

Bowen v. Com. ex rel. Stidham, 887 S.W.2d 350, 352 (Ky. 1994).

The Court of Appeals' employment of CR 6.02(b) to determine a jurisdictional question resulted in a use of the Civil Rules in a manner directly contrary to their express purpose and led the Court to impermissibly adopt the doctrine of substantial compliance in an administrative context.

c. The Court of Appeals misconstrued KRS 278.420(2) to include equity as a jurisdictional determination.

The Court of Appeals misconstrued KRS 278.420(2) in a third respect as well. After improperly applying CR 6.02 to KRS 278.420(2), the Court of Appeals made its determination of jurisdiction on the basis of principles of equity set forth in non-relevant case law:

[T]his case places in issue the circuit court's interpretation of *cause* as used in KRS 278.420(2) in conjunction with the phrase *excusable neglect* as used in CR 6.02. The leading case construing the meaning of *excusable neglect* in the context of the civil rules is Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). In Pioneer, the Supreme Court compared the meaning of *excusable neglect* as used in the rules governing bankruptcy proceedings to the meaning of the same phrase as used in the federal rules of civil procedure.

Opinion, p. 9.

Jurisdiction is established by the constitution and statutes, not by principles of equity. See e.g. Ky. Const. § 112; KRS 23A.010(4). Yet in considering whether the Circuit Court possessed jurisdiction to hear the action for review, the Court of Appeals embarked upon an extended analysis of the equities of the “unique circumstances of this case”. Opinion, p. 12. The Opinion makes no effort to articulate what exactly is so unique about the Appellees’ failure to timely designate the record, however. A quick survey of the prior cases involving KRS 278.420(2) (both published and unpublished) reveals that the failure to timely designate the record almost always relates to counsel’s workload or calendar system. Moreover, none of this Court’s cases articulating the strict compliance doctrine recognizes an equitable exception to the doctrine. To the contrary, Kentucky Utilities Co. v. Farmers RECC, 361 S.W.2d 300 (Ky. 1962) specifically rejects such an argument:

Appellee seeks to excuse its failure to conform to the requirements of the statute by contending that no prejudice resulted to either the commission or the Kentucky Utilities Company. The contention is unavailing since the requirements of the statute are jurisdictional.

Id. at 301.

As set forth above, if equity governs the perfection of jurisdiction to review administrative decisions, the strict compliance doctrine is finished.

Furthermore, Pioneer Investment Services, Co. v. Brunswick Associated Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), has no application to this case and does not create an exception to the strict compliance doctrine. First, the deadline to which the Supreme Court applied equitable analysis in Pioneer was a rule set by the Federal Rules of Bankruptcy Procedure. The statutory authority for filing proofs of claim is 11 U.S.C. § 501. That statute does *not* establish a deadline for filing a claim. The deadline under consideration in Pioneer was set forth in Bankruptcy Rule 3003(c)(3) which read, “Time for Filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed....” As set forth above, a court clearly has jurisdiction to extend the time in which a proof of claim may be filed where the deadline to file the claim is established by a court rule. For this reason, the Supreme Court understandably applied Bankruptcy Rule 9006(b) – which is the rule governing excusable neglect in the bankruptcy context – to the deadlines established in Bankruptcy Rule 3003(c)(3). The equitable principles of Pioneer do not apply to statutory deadlines in the bankruptcy code, however.

Bankruptcy Rule 9006(b) refers to deadlines set by ‘these rules or by a notice given thereunder or by order of the court.’ It does not refer to enlarging time periods prescribed by statute. The 60-day deadline for filing a motion to assume a non-residential lease, however, is set by statute, not by the Bankruptcy Rules, not by a notice given under the Bankruptcy Rules, and not by and order of the Court. Thus, Bankruptcy Rule 9006(b) does not give the bankruptcy court the discretion to allow a late motion to extend the time for assuming a lease, even if the mistake were the result of excusable neglect.

In re: Federated Food Courts, Inc., 222 B.R. 396, 398, 40 Collier Bankr.Cas.2d 764 (N.D. Ga. Bnkr. 1998). Pioneer concerns a deadline established by a procedural rule and is therefore completely distinguishable from the case at bar.

Second, even if the United States Supreme Court's consideration of Bankruptcy Rule 9006 somehow did apply to this Court's construction of KRS 278.420(2), the Opinion's *sua sponte* analysis of Pioneer's equitable considerations is erroneous. The first two considerations under Pioneer are prejudice and the length of the delay and its potential impact on judicial proceedings. The Opinion finds *de novo* that the Appellants:

[D]id not suffer any prejudice as the result of the [Appellees'] delay in designating the administrative record. The delay was briefthe delay was essentially de minimus in nature.... To reiterate, it was a brief delay - a matter of a few days rather than weeks or months.... A review of the *entire* proceedings was manifestly necessary. The utilities candidly acknowledge the relevance of the entire record. Therefore, judicial economy suffered no discernible prejudice.

...

There was absolutely no evidence that the omission at issue was a deliberate attempt to delay the litigation. The Commission had denied the stay that they requested, and the property owners clearly had a compelling interest in keeping the litigation moving forward as expeditiously as possible.

Opinion, pp. 10, 11 (Emphasis in original).

The Opinion fails to take into account that it was the diligence of the Appellants, who filed the motions to dismiss under authority of published precedent, which triggered the Appellees' filing of the untimely motion for enlargement of time. Both affidavits from Appellees' counsel indicate that neither calendared a date by which the designation of the record was intended to be filed. But for the diligence of the Appellants in raising the jurisdictional issue quickly, the action for review would have languished. Under any

standard of equitable analysis, it is patently unfair for the Appellants' diligence to be used as a basis for finding the Appellees' neglect to be excusable.

The third consideration of Pioneer is the reason for the delay. Without citation to other authorities, the Opinion essentially concludes that "excusable neglect" will include anything but "sharp practice, pretense, posturing or tactical strategizing." Opinion, p. 11. The *de novo* conclusion that "a busy schedule" or "human error" also constitutes excusable neglect is inconsistent with Kentucky Supreme Court precedent. See *infra*.

The final consideration of Pioneer is that of good faith. The Circuit Court is in the best position to evaluate whether a party is acting in good faith. Even assuming that the Appellees acted in good faith to move for an untimely enlargement of time, good faith is not a basis to create jurisdiction. The Court of Appeals freely substituted its judgment for the judgment of the Circuit Court. As noted below, it did so without even finding an abuse of discretion on the part of the Circuit Court. This over-reaching cannot be sanctioned if for no other reason than it puts the Court of Appeals in charge of the docket of each and every circuit court. Questions of motive and intent are best left to deciders of fact.

Finally, as this Court has stated, public policy favors a speedy resolution of actions for review of Commission decisions. See Stephens et al. v. Kentucky Utilities Co., 569 S.W.2d 155, 158 (Ky. 1978). Plainly, the legislative objective of achieving finality in cases affecting the safe and reliable provision of basic services such as electricity is a consideration that cannot be dismissed. Pioneer was previously considered and rejected in this precise context in Spears Water Company.¹² Yet, the Opinion gives

¹² See n. 5 and n.7 *supra*.

no consideration to the financial and operational impact of an unnecessary appeal upon the affected utilities and their ratepayers. Equities do not apply to the construction of a jurisdictional statute. See Richardson v. Louisville/Jefferson County Metro Govt., 260 S.W.3d 777, 779 (Ky. 2008) (“the construction and application of a statute is a question of law”). Yet even if they did, the Appellees have failed to demonstrate any equitable basis to proceed.

B. TRIAL COURTS MAKE FINDINGS OF FACT. THE COURT OF APPEALS DOES NOT.

Even if the Court of Appeals was correct in not applying the strict compliance doctrine, not following principles of *stare decisis* and correctly construed the statute, it erred in substituting its own judgment as to the factual basis for failing to timely designate the record. A “busy schedule” and “human error” do not equate to “excusable neglect” and the Circuit Court’s factual determination must be upheld in the absence of a finding of an abuse of discretion.¹³

1. An “excessive workload” and “human error” do not equate to “excusable neglect”.

The Appellees failed to timely file the designation of the record because of an “excessive workload” and “human error”. The Court of Appeals opined, “[t]he circuit court concluded that ‘neither a busy schedule nor human error’ satisfied the requirement for ‘cause.’ We disagree.” Opinion, p. 7. Here again, the Court of Appeals disregarded binding precedent. Being busy simply does not equate to excusable neglect. See Motors Ins. Corp. v. Fields, 294 S.W.2d 518 (Ky. 1956) (being “engaged in other litigation that

¹³ Pursuant to CR 76.12(4)(c)(v), the Commission states that this argument was preserved through review. See Commission Response joining in LG&E and KU’s motion to dismiss [Record, pp. 89-90]; Commission Brief to the Court of Appeals, pp. 12-13; Commission Petition for Rehearing, pp. 2-8; and Commission Motion for Discretionary Review, pp. 7-15.

consumed all [an attorney's] time" is not excusable neglect); A.K. Steel Corp. v. Carico, 122 S.W.3d 585, 586 (Ky. 2003) ("a misunderstanding over the filing date is not the type of excusable neglect that would enlarge the time for filing the jurisdictional document after that time expired"). These pronouncements by the Court are fully in accord with the decisions of other jurisdictions holding that simply being busy does not equate to excusable neglect.¹⁴

In this regard, the Opinion's impact upon the practice of law as a whole is significant. At a time when this Court has issued new rules to assure greater accountability within the bar, the Opinion unmistakably lowers the standard of care and diligence. The scheduling challenges and professional demands identified here apply to all attorneys with a robust practice. Yet, in order to protect the equitable interests of the

¹⁴ See e.g. Grover v. Commercial Ins. Co., 104 F.R.D. 136, 138 (D.Me. 1985) ("The law of the First Circuit is clear, however, in that neither interoffice delays nor an attorney's busy schedule can form the basis for a finding of excusable neglect."); McLaughlin v. City of LaGrange, 662 F.2d 1385, 1387 (11th Cir. 1981) ("The fact that a counsel has a busy practice does not establish 'excusable neglect' under Rule 6(b)(2)."); Baker v. Raulie, 879 F.2d 1396, 1400 (6th Cir. 1989) (being "busy" and involved in another matter is not excusable neglect); Mawhinney v. Heckler, 600 F.Supp. 783, 784 (D.Me. 1985) (reason for failure to timely file "because of a backlog of cases...does not amount to a showing of excusable neglect"); Pinerno Schroder v. Federal Nat. Mortgage Ass'n, 574 F.2d 1117, 1118 (1st Cir. 1978) (per curiam) ("most attorneys are busy most of the time and they must organize their work so as to be able to meet the time requirements of the matters they are handling or suffer the consequences"); Graham v. Pennsylvania Railroad, 342 F.2d 914, 915 (D.C.Cir. 1964) (being engaged "in the preparation of seven appellate cases" is not excusable neglect), cert. denied 381 U.S. 904 (1965); Citizens' Protective League v. Clark, 178 F.2d 703, 704 (D.C.Cir. 1949) ("That an attorney has other matters in his office which require his attention does not constitute excuse for neglect of attention to any one matter"); Astor's Beechwood v. People Coal Company, Inc., 659 A.2d 1109, 1115-16 (RI 1995) ("The term excusable neglect is not meant to cover the usual excuse that the lawyer is too busy, which can be used, perhaps truthfully, in almost every case"); Bernard v. United Brands Co., 538 N.E.2d 1003, 1006 n. 8 (Mass. App. Ct. 1989), citing Felch v. General Rental Co., 421 N.E.2d 67, 78 (Mass. App. Ct. 1981) ("Excusable neglect" looks to "circumstances that are unique or extraordinary"; "is not meant to cover the usual excuse that the lawyer is too busy, which can be used, perhaps truthfully, in almost every case"; is meant "to take care of emergency situations only"; "a flat mistake of counsel about the meaning of a statute or rule may not justify relief; relief is not extended to 'cover any kind of garden-variety oversight.'"); Swicker v. Ryan, 346 N.W.2d 367, 369 (Minn. App. 1984) ("Failure of counsel to follow the rules, or to timely make appropriate motions cannot be countenanced. Unfamiliarity with the rules, a heavy work load, or overwork is not good cause."); Jolitz v. Graff, 106 N.W.2d 340, 343 (Wis. 1960) citing Millar v. City of Madison, 9 N.W.2d 90, 91 (Wis. 1943) (Affidavit of plaintiff's attorney for an extension of time which stated that the press of other business prevented more prompt attention to the appeal "does not amount to even an excuse for failure to comply with the rule" in question).

Appellees, the Opinion essentially sanctions neglect on the part of their counsel. The interests of a client do not make the neglect of an attorney excusable. The Opinion thereby establishes a dangerous precedent that holds an excessive workload or human error constitutes excusable neglect.

2. A Circuit Court's factual determination may not be reversed without a finding of an abuse of discretion or clear error.

The Circuit Court ruled in its August 28, 2006 Order that it had discretion to enlarge the ten day period mandated by KRS 278.420(2) even though the Appellees failed to file a motion to enlarge the time prior to the expiration of that deadline. Because KRS 278.420(2) is jurisdictional, this was in error. Nevertheless, the Circuit Court ruled that the Appellees did not satisfy the standard of "cause" set forth in the statute, finding, "neither a busy schedule nor human error is 'cause' as required under KRS 278.420(2)." Record, p. 87.

In the absence of an abuse of discretion, a circuit court judge's decision may not be overturned. Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982). The Court of Appeals never found that the Circuit Court abused its discretion. As the dissent rightly points out, "A determination of good cause is properly within the province of the circuit court, and our Court does not disturb the circuit court's discretion unless we find abuse." Opinion, p. 13. The test for determining whether an abuse of discretion has occurred is "whether the resulting decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Officeware v. Jackson, 247 S.W.3d 887, 892 (Ky. 2008) citing Sexton v. Sexton, 125 S.W.3d 258, 272 (Ky. 2004).

Judge Wingate's determination that the Appellees failed to show "cause" is entirely reasonable and proper. The Appellees were represented by two capable and

experienced attorneys – not just one. The reason the Appellees failed to timely designate the record was plainly set forth in affidavits signed by the Appellees’ own counsel. The Appellees’ counsel could not claim ignorance of the statutory obligation as one of them had a prior action dismissed for a previous failure to timely designate the record under KRS 278.420(2).¹⁵ The Appellees had every opportunity to make their case through two rounds of briefing and one oral argument. Case law provided clear and unambiguous guidance that being busy did not equate to excusable neglect. With this information before him, Judge Wingate’s factual judgment that the Appellees failed to show adequate “cause” is beyond reproach.

Despite this, the Opinion overturns the Circuit Court’s determination of “cause”. Certainly, there are situations where reasonable minds may differ as to whether certain conduct rises to the level of “cause”. This is not one of them, but even if it was, it does not matter. The Opinion “disagrees” with the judgment of the circuit court, but does not go so far as to say that the Circuit Court’s judgment was arbitrary, unreasonable, unfair or unsupported by sound legal reasons. It cannot. In the absence of a finding of an abuse of discretion, the factual determination that inadequate cause was shown should never have been overruled.

VII. CONCLUSION

For the reasons set forth above, the Commission respectfully requests the Court to overturn the Opinion of the Court of Appeals and to remand this case to the Circuit Court with instructions that it be dismissed for lack of jurisdiction.

¹⁵ See Nuckols Farm, Inc. v. Public Service Com’n, Slip Op., Case No. 96-CA-2069 (Ky. App., Oct. 3, 1997).

Respectfully submitted,



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