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

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**

REPLY BRIEF FOR APPELLANT KENTUCKY PUBLIC SERVICE COMMISSION

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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 28th day of July, 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 The undersigned does also certify that the record on appeal has not been withdrawn.

David S. Samford
Counsel for the
Kentucky Public Service Commission

I. STATEMENT OF POINTS AND AUTHORITIES

II. Argument

A. KRS 278.420(2) is jurisdictional and not merely procedural.

The Appellees' first and principle argument is titled as a discussion of the Circuit Court's "discretion" to allow an untimely designation of the record [Appellees' Brief, pp. 10-19]. The title obscures the principle point of the Appellees' argument, however, which is this – KRS 278.420(2)'s requirement to file a designation of the record is a procedural requirement, not a jurisdictional requirement. It follows (according to the Appellees) that if KRS 278.420(2) is merely a procedural requirement, the Court of Appeals has authority under Kentucky case law to apply the doctrine of substantial compliance to the statute and thereby sanction the Appellees' failure to timely designate the record due to a busy schedule and excessive workload. In support, they cite Ready v. Jamison, 705 S.W.2d 479 (Ky. 1986); Crossley v. Anheuser-Busch, Inc., 747 S.W.2d 600 (Ky. 1988); Williams v. Wal-Mart Stores, Inc., 184 S.W.3d 492 (Ky. 2005); Foxworthy v. Norstam Veneers, Inc., 816 S.W.2d 907 (Ky. 1991); and Smith v. Goodyear Tire and Rubber Co., 772 S.W.2d 640 (Ky. App. 1989); Hutchins v. General Electric Co., 190 S.W.3d 333 (Ky. 2006); Asset Acceptance v. Moberly, 241 S.W.3d 329 (Ky. 2007) and Arlinghaus Builders, Inc. v. Kentucky Public Service Com'n, 142 S.W.3d 693 (Ky. App. 2003).[1] There are *many* problems associated with the Appellees' argument that generally fall into two broad categories: 1) errors involving the misapplication of authorities; and 2) errors involving the omission of contrary authority.

1. The Appellees Misapply Several Authorities.

Ready, Crossley, Williams, Foxworthy, and Goodyear all involve the application of the substantial compliance doctrine to a Civil Rule – not a statute. Moberly simply involves the construction of CR 60.02. These cases are therefore quite different from the

[1] The Appellees also rely upon undocumented comments from the Court of Appeals panel during oral argument in order to support their position. [Appellees' Brief, p. 7]. Obviously, the Court of Appeals speaks through its written Opinions and not its questions from the bench. See Baker v. Fidelity & Deposit Co. of Md., 355 S.W.2d 150, 151 (Ky. 1962) ("This Court speaks through its orders....").

case at bar which involves the Appellees' failure to comply with a statutory mandate. On their face, they are distinguishable.

With regard to Hutchins, the Appellees claim that the question was the consequence of the appellant's "failure to name a party required by statute...." [Appellees' Brief, p. 12]. This is patently false. In the same paragraph where the Court affirmed the continued vitality of the strict compliance doctrine, it stated, "The present version of KRS 342.285(1) and KRS 342.290 do not require the Board to be made a party when appealing its decision to the Court of Appeals; therefore, the Board's presence is not indispensable to invoking the Court's jurisdiction over the matter." Hutchins, 190 S.W.3d at 337. The action for review in Hutchins was allowed to proceed because the plaintiff violated SCR 1.030(3) and CR 76.25(2), not a statute. The Appellees' misstate the question presented in Hutchins.

Likewise, one gathers from the Appellees' brief that the Commission's omission of Arlinghaus from its brief is tantamount to heresay. Yet the fact that the Appellees rely upon Arlinghaus in the first place is far more noteworthy. On its face, Arlinghaus stands for the unremarkable proposition that the good faith issuance of a summons, even if issued defectively under CR 4.04(6), is sufficient to commence an action for review. When it comes to specifying the method for perfecting service of process, KRS 278.410 is silent. The General Assembly left it to the Court to resolve this point, just as they have done in the context of other civil suits. Even the Appellees previously acknowledged that the issue in Arlinghaus was "the need to comply with the Civil Rules *where KRS 278.410 is silent* as to procedures for service [of process]...."[2]

Yet, the Appellees extrapolate from this narrow holding a much broader claim that "the Court of Appeals applied the precedent of Arlinghaus Builders, Inc." in this case to justify its implicit application of the substantial compliance doctrine to

[2] Brief for Appellants, p. 8, as filed below in 2006-CA-2166.

KRS 278.420(2). [Appellees' Brief, p. 7]. In fact, the Opinion's citation to Arlinghaus is not quite so grandiose. The Opinion cites Arlinghaus only to make the point that, "[t]he Kentucky Rules of Civil Procedure govern 'all actions of a civil nature in the Court of Justice.'" [Opinion, p. 8]. This statement of course presumes that the statutory requirements to attain the court's jurisdiction have been satisfied. In Arlinghaus they had been. The complaint was timely filed and notice was given to the parties in accordance with KRS 278.410. See Arlinghaus, 142 S.W.3d at 697. Even more importantly, the designation of the record was timely filed in accordance with KRS 278.420(2).[3] The Appellees, of course, fail to mention the latter important fact.

While KRS 278.410 may be silent as to the method for perfecting service of an action for review of a Commission decision, there is no statutory silence when it comes to establishing the deadline for designating the record. KRS 278.420(2) is clear and unambiguous. The General Assembly could have chosen to leave the method and timeframe for designating the administrative record to the Court to decide, but it did not. Instead, the General Assembly established a specific procedure with a definitive timeframe. The Appellees' request for this Court to apply the non-binding opinion of a lower court concerning a case involving unquestionable statutory silence in a manner which is directly contrary to the express legislative intent manifested in the plain language of KRS 278.420(2) is over-reaching. Arlinghaus is both factually and legally distinguishable from the present case and provides no support to the Appellees. Their

[3] See Arlinghaus Builders, Inc. v. Public Service Com'n and Sprintcom, Inc., Slip Op., Franklin Circuit Court, Division I, Case No. 01-CI-1280 (Nov. 22, 2001) ("Third, the Petitioner designated the record on time."). Although the Circuit Court originally granted the plaintiff's motion for leave to file an amended petition for review, the Circuit Court subsequently granted Sprintcom, Inc.'s motion for reconsideration and dismissed the action for failure to properly serve the Commission and Sprintcom. The Order granting reconsideration and dismissing the action was entered on April 23, 2002 and is the Order appealed from by Arlinghaus Builders and the subject of the Court of Appeals' June 12, 2003 Opinion. The Orders confirm that, despite the defective service of process, Arlinghuas Builders, Inc. still timely designated the record pursuant to KRS 278.420(2). The Court may take judicial notice of these Orders and copies of both are attached hereto as Appendix 1 and 2 respectively. See CR 76.12(4)(c)(vii), (e).

assumption that KRS 278.420(2) must be procedural and not jurisdictional in light of Arlinghaus is a false assumption and must be rejected.

All of the authorities relied upon by the Appellees to suggest that KRS 278.420(2) is procedural and not jurisdictional are plainly distinguishable. The Appellees cite no authority squarely holding, or even obliquely implying, that the Court is free to ignore a statutory requirement to perfecting an action for review of an administrative decision. The strict compliance doctrine must be applied to statutory mandates and the Court of Appeals lacks the authority to disregard this Court's binding precedent.

2. The Appellees Omit Contrary Authority.

The Appellees's argument also omits mention of the authority previously cited by the Commission which conclusively demonstrates that the substantial compliance doctrine has no application to statutory deadlines:

> 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 salutory 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) (emphasis added).

Bowen makes clear that it is the Court's rules of procedure that may be interpreted liberally, not the rules of the General Assembly as expressed in statutes such as KRS 278.420(2). Despite Bowen, the Appellees still argue that substantial compliance should apply to KRS 278.420(2), claming that strict compliance applies only to the filing of the complaint (KRS 278.410) and not to the filing of the designation of the record (KRS 278.420).[4] However, they fail to offer any explanation as to why the legislature

[4] See Appellees' Brief, p. 12 ("Other Kentucky cases support the determination of both Franklin Circuit Court and the Court of Appeals that once a party has timely filed the required document to initiate an appeal and properly identified the parties, the reviewing court has jurisdiction to hear and decide the appeal - whether it is a special statutory appeal or an appeal pursuant to the civil rules.").

would intend for one statute to be mandatory and the very next statute to be merely suggestive. Instead, they argue that amorphous "policy considerations" articulated in Ready should somehow supplant the strict compliance doctrine. [Appellees' Brief, p. 19]. As demonstrated above, Ready has no relevance to this matter. Thus, we are left with this vague statement as to when strict compliance is required:

> [Appellees], of course, do not suggest that the doctrine of strict compliance is not applied in certain cases. Obviously it is. However, appellate practice in Kentucky has a clear division between when strict compliance applies and when substantial compliance applies, but it does not rest, as the appellant argues, upon whether the appeal is pursuant to the civil rules or based upon the provisions of a statute. [Appellees' Brief, p. 11].

Incredibly, the Appellees summarily reject the Commission's position that the distinction rests upon whether the requirement is stated in a statute or a civil rule, yet fail to identify what they or the Court of Appeals perceives to be the "clear division between when strict compliance applies and when substantial compliance applies."

Why do the Appellees reject a bright-line rule supported by ample precedent while failing to articulate any clear alternative explanation within the Opinion for the "clear division" between when strict compliance and substantial compliance applies? The short answer is that they cannot discern any such distinction from the Opinion. In fact, the Court of Appeals itself ignored the Appellees' argument that properly filing the initiating document is the only act to which strict compliance applies. Nowhere in the Opinion does the Court of Appeals even acknowledge the Appellees' principal argument below for adopting a substantial compliance standard. Instead, the Court of Appeals embarked upon an equitable analysis of whether jurisdiction should have attached in the Circuit Court.[5] Thus, it is impossible for the Appellees to urge this Court to uphold the

[5] The Appellees' characterization of the Commission's brief is incorrect where they state, "The PSC attempts to distinguish Pioneer on the basis that it was a bankruptcy case." [Appellees' Brief, p. 16, n. 4]. Pioneer Investment Services Co. v. Brunswick Associated Ltd. Partnership, 507 U.S. 380 (1993), is distinguishable because it construed a bankruptcy rule as opposed to a bankruptcy statute.

Court of Appeals' Opinion based upon the rationale they originally offered to the Court of Appeals. The Court of Appeals ignored Appellees' argument that KRS 278.420(2) is procedural and not jurisdictional for good reason – it is contrary to well-established Kentucky law such as Bowen and CR 82.

The Appellees ignore other salient points as well. For instance, they seek to distinguish Stephens v. Kentucky Utilities Co., 569 S.W.2d 155, 157 (Ky. 1978) and Kentucky Utilities Co. v. Farmers RECC, 361 S.W.2d 300, 301 (Ky. 1962) by claiming that those cases do not mention KRS 278.420(2) as a jurisdictional prerequisite. [Appellees' Brief, p. 9]. Both cases strongly endorse the strict compliance doctrine and Farmers goes on to state that even a lack of prejudice is insufficient to overlook the failure to strictly comply. What the Appellees fail to mention is that the present ten day deadline to file a designation of the record in KRS 278.420(2) was enacted by the General Assembly in 1990 - well after the decisions were rendered in Stephens and Farmers and with presumptive knowledge that the ten day deadline for designating the record would be recognized as a jurisdictional requirement in light of those cases. Certainly, the General Assembly is aware of and has been acquiescent to the holding in Forest Hills Developers, Inc. v. Public Service Com'n, 936 S.W.2d 94, 96 (Ky. App. 1996) that KRS 278.420(2) is jurisdictional. [Commission Brief, p. 12].

Likewise, the Appellees cite 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). [Appellee Brief, pp. 18-19]. Shadoan is not yet final, however, as a motion for discretionary review is pending in that case. Moreover, the Appellees fail to acknowledge that a different panel of the Court of Appeals contemporaneously and unequivocally endorsed Forest Hills. 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."). [Commission

Brief, App. 6]. Yet even to the extent that they rely upon Shadoan [Appellees' Brief, p. 19], the Appellees mischaracterize Judge Moore's separate opinion which is consistent with her dissent herein. In both cases, she affirms that strict compliance should apply.

B. The Appellees have failed to show that CR 6.02 is the appropriate standard for ascertaining "cause" under KRS 278.420(2) or that the Circuit Court abused its discretion.

The remainder of the Appellees' Brief essentially argues that the "cause" standard of CR 6.02 should be applied to KRS 278.420(2) to determine whether Circuit Court jurisdiction attached to the underlying claims and that the Circuit Court erred in concluding that being busy and having an excessive workload does not constitute "cause". [Appellees' Brief, pp. 19-29]. Their discussion completely fails to respond to the holding in Cabinet for Human Resources v. Holbrook, 672 S.W.2d 672, 675 (Ky. App. 1984), that CR 6.02 does not apply until *after* jurisdiction attaches. See also CR 82. Instead, the Appellees contend that in light of Ready and Crossley, the Circuit Court erred in its "sweeping conclusion that human error would not constitute 'cause' within the meaning of KRS 278.420(2), where human error is logically the 'cause' of almost all missed deadlines in the legal practice." [Appellees Brief, p. 24]. Thus, in essence, the Appellees' argument regarding the "cause" they offered to the Circuit Court is little more than a rehashing of their prior argument that KRS 278.420(2) is procedural and not jurisdictional.

And while the Appellees dutifully repeat all the helpful findings of fact given by the Court of Appeals regarding their acknowledged failure to file a designation of the record within the statutory ten day period, they never directly state why the Circuit Court could not reasonably hold a different perspective as to the sufficiency of their proffered "cause".[6] For that matter, neither did the Court of Appeals. Instead, the Appellees

[6] To the contrary, the Appellees argue that "The Court of Appeals...did not substitute its own judgment in place of the Circuit Court." [Appellees' Brief, p. 5]. This flies in the face of the Opinion, which pointedly rejected the Circuit Court's findings: "The circuit court concluded that 'neither a busy schedule nor human error' satisfied the requirement for 'cause'. We disagree." [Opinion, p. 7].

suggest for the first time that the Circuit Court abused its discretion when it "failed to properly consider the factors that apply to failing to meet a non-jurisdictional deadline, and therefore failed to properly exercise the discretion afforded by KRS 278.420." [Appellees' Brief, p. 28]. This clever argument ignores the plain language of the Circuit Court's opinion, however:

> In this case, we do not believe the Appellants have shown sufficient cause for the failure to designate the record within the statutory time. Exactly what is cause is not at issue here, so we will not indulge in hypotheticals. The Court believes it suffices to say that neither a busy schedule nor human error is "cause" as required under KRS 278.420(2).

Record, p. 87 (Commission Brief, App. 3).

Circuit court judges are best suited to making these types of determinations and have a perspective the Court of Appeals simply does not enjoy. The abuse of discretion standard for reversing a circuit court judge's assessment of the circumstances reflects that crucial distinction. As set forth in the Commission Brief [pp. 32-33], there was ample factual and legal basis for the Circuit Court to find that that there was no cause to enlarge a previously expired deadline. Although Kentucky law conclusively demonstrates that CR 6.02 is not an appropriate standard for ascertaining whether jurisdiction attaches to an action for review under KRS 278.420(2), even if it did, the Court of Appeals erred in overturning the Circuit Court without a finding of an abuse of discretion. The Appellees have failed to demonstrate otherwise.

C. The Appellees' Brief contains additional mistakes.

The Commission concludes by noting that there are several statements and assertions which are incorrect or misleading sprinkled throughout the Appellees' Brief.

First, the Appellees claim that "so much of the PSC defense of *stare decisis* is rested upon unpublished opinions, and upon disregarding the actual language used in the applicable statute." [Appellees' Brief, p. 6]. Elsewhere they allege that "the PSC's

construction would render Circuit Court's discretion to grant enlargement for cause meaningless." [Id., p. 10]. The Appellees do not distinguish any of the published strict compliance cases cited by the Commission [Commission Brief, pp. 7-12] or offer any plausible construction of the "cause" sentence in KRS 278.420(2) which harmonizes it with the ten day deadline for filing a designation of the record [Id., pp. 20-22]. It is the Appellees who seek to diminish the statutory deadline to the point that it is meaningless.

Second, the Appellees claim, "The PSC goes to great lengths to argue that KRS 278.420 is jurisdictional rather than procedural. Yet this argument is not supported in cases cited by the PSC." [Appellees' Brief, p. 9]. This is completely false. As set forth in the Commission's Brief, "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." [Commission Brief, p. 10]. As Judge Moore pointed out, Forest Hills is squarely on point.

Third, the Appellees argue that their constitutional right of appeal is jeopardized. [Appellees' Brief, p. 22]. However, even a constitutional right of review is not an insurance policy that allows litigants to disregard statutory mandates and courts to sanction neglect. See Triad Development/Alta Glyne, Inc. v. Gellhaus, 150 S.W.3d 43, 47 (Ky. 2004) ("[W]hen the right of appeal or the trial court's jurisdiction is codified as a statutory procedure...then the parties are required to strictly follow those procedures.").

Fourth, the Appellees' seek to demonstrate the merit of their appeal by resorting to evidence that is not in the record of this case regarding an air permit. [Appellees' Brief, pp. 24-25]. KRS 278.440 clearly excludes consideration of evidence not within the Commission record.

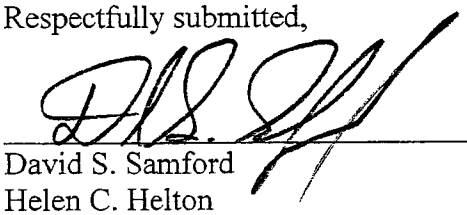
Finally, the Appellees insinuate that the Commission's interest in this proceeding is something other than upholding the rule of law. [Appellees' Brief, p. 6]. The Commission takes great exception to this suggestion and, in response, points out the

obvious. The Appellees' have a stated interest in keeping the subject transmission line off their respective properties. The Court of Appeals clearly sympathized with that interest. In the Commission's experience, no one has ever asked for an electric transmission line to be placed on their property. Transmission lines nevertheless are a necessary fixture of any electric utility. The Commission determined that the utilities' application for a certificate to construct the line met the requirements of Kentucky law. The Appellees were free to seek judicial review of that decision in accordance with KRS 278.410 to KRS 278.450. The personal interest they have in overturning that decision, however, may never trump their obligation to adhere to the law. When the law becomes purely a matter of discretion, there is no law.

III. 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.

Respectfully submitted,



David S. Samford
Helen C. Helton
Gerald E. Wuetcher
Richard W. Bertelson, III
Kentucky Public Service Commission
P.O. Box 615, 211 Sower Boulevard
Frankfort, KY 40602
(502) 564-3940
(502) 564-7279 (facsimile)

Counsel for the
Kentucky Public Service Commission