COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-000354-DG

KENTUCKY PUBLIC SERVICE COMMISSION — APPELLANT

v.

ON APPEAL FROM THE COURT OF APPEALS
CASE NOS. 2006-CA-002124-MR
2006-CA-002165-MR, and 2006-CA-002166-MR

HARDIN & MEADE COUNTY PROPERTY OWNERS FOR CO-LOCATION; CDH PRESERVE, LLC; 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

ON APPEAL FROM FRANKLIN CIRCUIT COURT, CIVIL ACTION NO. 06-CI-1041

* * * * * *

BRIEF FOR APPELLEES

* * * * * *

Respectfully submitted,

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CERTIFICATE OF SERVICE ON BACK OF COVER

CERTIFICATE OF SERVICE

I hereby certify that this Brief was duly served upon the parties by mailing a true copy of same via first-class U.S. Mail, postage prepaid, to the following: Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Thomas Wingate, Franklin County Courthouse, 214 St. Clair Street, P.O. Box 678, Frankfort, Kentucky 40602-0678; Hon. Sheryl G. Snyder and Hon. Griffin Terry Sumner, Frost Brown Todd, LLC, 400 W. Market St., 32nd Floor, Louisville, Kentucky 40202; Hon. Robert M. Watt, III, and Hon. David T. Royse, Stoll Keenon Ogden, PLLC, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507; Hon. Allyson K. Sturgeon and Hon. J. Gregory Cornett, E.ON U.S., LLC, 220 West Main Street, Louisville, Kentucky 40202; and Hon. David S. Samford, Hon. Helen C. Helton, Hon. Gerald E. Wuetcher, and Hon. Richard W. Bertelson, Commonwealth of Kentucky, Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, Kentucky 40602-0615. The undersigned also certifies that the record on appeal has not been withdrawn. This the 13th day of July, 2009.

W. Henry Graddy, IV

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant, PSC expressed their belief that oral argument would be helpful to the Supreme Court. Appellees agree with Appellants on this point.

Appellees believe that oral arguments will be helpful and respectfully request that the Supreme Court schedule oral arguments in order to facilitate the presentation of this appeal.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

These Appellees do not accept the Summary and Statement of the Case as submitted by the Appellant, Kentucky Public Service Commission ("PSC"), and offer this Counterstatement of the Case.

This case arises from the proposed construction of an Electric utility line by Louisville Gas and Electric Company and Kentucky Utilities Company. Kentucky law requires that the Appellant PSC find that such a project is necessary. This question was the subject of In the Matter of: Joint Application of Louisville Gas and Electric Company and Kentucky Utilities for Construction of Alternative Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky. In this proceeding the PSC issued orders on July 6, 2006 and May 26, 2006. These orders are attached to the PSC Brief, at Appendix 4 and 5.

Appellees, Hardin and Meade County Property Owners for Co-Location; CDH Preserve, LLC; 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 (hereinafter "Property Owners" or "Appellees") initiated this action by timely filing a complaint on July 26, 2006, in the Franklin Circuit Court, pursuant to KRS 278.410. Property Owners seek judicial review and reversal of the July 6, 2006, Order of the PSC, (seeking a rehearing) and the May 26, 2006 Order of the PSC in Case Number 2005-00467, (granting the LG&E/KU application), and in Case Number 2005-00472, (dismissing the LG&E/KU application as moot).

Appellees are citizens and property owners (or legal entities of property owners) of the Commonwealth of Kentucky, who were granted full intervention by the Commission in Case Number 2005-00467 and Case Number 2005-00472. Their interest is set forth more fully in the record of this matter. Appellee, Hardin & Meade County Property Owners is an unincorporated association of citizens and residents of Hardin County and Meade County, including the above named intervenors, who are directly or indirectly adversely impacted by the action of the PSC on the above referenced applications. The association was formed to assist the Appellees obtain judicial review of the above-referenced PSC decisions.

This appeal does not concern the merits of the PSC's decision but a procedural matter. Although the undersigned counsel for the Appellees filed a timely complaint, fully complying with KRS 278.410, he failed to designate the record on appeal from the PSC within ten days after the action was filed on July 26, 2006, as provided in KRS 278.420(2). This oversight was discovered upon receipt of the Appellants' motion to dismiss, and the undersigned counsel promptly sought to cure such oversight by filing a motion for designation of record on August 16, 2006 to designate the entire record before the PSC in Case Number 2005-00467 and Case Number 2005-00472, with a memorandum in support of the motion to designate the record, and a response in opposition to the motion to dismiss, with attached affidavits of counsel in support of a finding that cause existed to enlarge the time to designate the record. Record on Appeal (ROA), pages 35-57.

KRS 278.420 addresses the procedure to be followed to provide the Franklin Circuit Court with the administrative record necessary for judicial review.

KRS 278.420. Designation and filing of record.

(1) In any action filed against the commission because of its order in a proceeding before it, the commission shall file a certified copy of the designated record and evidence with the court in which the action is pending.

(2) *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).

The PSC took final action on July 6, 2006 on Appellants' petition for rehearing. See PSC Brief, Appendix 4. Pursuant to KRS 278.410(1), Appellants had 20 days after service of the order, with that statute providing that service was complete three days after the date the order is mailed.

The PSC order was mailed on July 6 so it was served 3 days later on July 9 [Sunday]; 20 days thereafter would be July 29 [Saturday], so such appeal must be filed by Monday, July 31, 2006. However, to insure that there was no issue as to timely filing, the undersigned counsel elected to file the complaint initiating the appeal on July 26, 2006, without any opportunity for co-counsel and client review. As set forth in the affidavit of undersigned in support of cause to enlarge, [Record on Appeal, pages 79-84, with particular reference to paragraph 11 on pages 83 - 84] the undersigned then asked his clients and his co-counsel to review it as filed, in order to determine whether to file an amended complaint and appeal by Monday July 31, 2006, to correct any errors or omissions and to insure that the complaint and appeal was complete and accurate. The

undersigned intended to tickle the law firm calendar when the amended complaint and appeal was filed on July 31, 2006. However, their review revealed that there was no need to file an amended complaint and appeal. This change of plans caused the undersigned to fail to tickle the office calendar to comply with the KRS 278.420(2) requirement to designate the record on appeal ten days after commencing the action under KRS 278.410(1). ROA, page 84.

The pending motions were heard on August 23, 2006, and, on August 28, 2006, the Franklin Circuit Court dismissed the Appellants' complaint and appeal.

In dismissing the Property Owners' complaint and appeal, the Franklin Circuit Court recognized that:

> [Forest Hill Developers v. PSC, 936 S.W.2d 94 (Ky. App. 1996)] does not stand for the idea that dismissal is *mandated* any time an appellant fails to file a designation of record within ten days. This would render meaningless the plain language of the statute granting this court discretion to enlarge the filing deadline.

Order Dismissing Appellants' Complaint and Appeal, August 29, 2006, page 2; PSC Brief, Appendix 3 (emphasis not added).

Nevertheless, the Circuit Court found that cause did not exist to enlarge the time to file a designation of the record and found that it was error to designate the entire record before the PSC on appeal, and dismissed the Property Owners' complaint and appeal.

Thereafter, Appellees appealed from the Franklin Circuit Court Order entered on August 28, 2006, dismissing Appellants' timely complaint and appeal filed pursuant to KRS 278.410, and the subsequent order dated September 26, 2006, denying Appellants' Motion to Alter, Amend or Vacate.

The PSC and LG&E/KU, also filed cross appeals from the above orders of the Franklin Circuit Court.

Before the Court of Appeals, the Property Owners argued that the August 28, 2006 Franklin Circuit Court order dismissing Appellants' complaint and appeal for late designation of the record is contrary to controlling case law governing judicial review, which requires that the consequence of a late filing of pleadings needed to adjudicate an appeal must be commensurate with the magnitude of the consequence of such late filing, and that Kentucky courts no longer favor dismissal of an appeal where such action is unfairly harsh on a litigate seeking judicial review. The Property Owners also argued that the circuit court erred in ruling that the Property Owners could not designate the administrative record in its entirety. PSC agrees with Property Owners on this error by the Franklin Circuit Court. Court of Appeals Opinion Vacating and Remanding, December 14, 2007, page 5; PSC Brief, Appendix 2.

The PSC begins the brief with a Summary that completely mischaracterizes the opinion of the Court of Appeals. The Court of Appeals did not abandon the strict compliance doctrine, did not ignore published precedent, did not judicially amend KRS 278.420, and did not substitute its own judgment in place of the circuit court. As the PSC Brief makes clear, it is the PSC that seeks to "make meaningless" words actually used by the General Assembly in KRS 278.420, and given meaning by both the Franklin Circuit Court and the Court of Appeals.

The Court of Appeals rejected the arguments of the PSC and agreed with the Property Owners, stating that:

> 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 Vacating and Remanding, page 7; PSC Brief, Appendix 2.

On the issue of the Property Owners ability to show cause, the Court of Appeals states:

> [T]he unique circumstances of this case dictate that the court erred in dismissing these appellants. Excusable neglect occurred and cause was shown. We conclude that CR 6.02 and KRS 278.420(2) can best be reconciled by ordering that this appeal be reinstated.

Opinion Vacating and Remanding, page 12; PSC Brief, Appendix 2.

Appellant's Petition for Rehearing was denied, and the Court of Appeals ordered the Opinion to be published. Thereafter, this Court granted the Appellant's Motion for Discretionary Review. This Court also granted LG&E/KU's Motion for Discretionary Review, and ordered that this matter would be heard at the same time as Case No. 2008-SC-00348.

ARGUMENT

I. OVERVIEW OF PSC BRIEF TO THIS COURT

Like the LG&E/KU Brief in the related case, a recurring – and misleading – theme of the argument that the PSC makes in its Brief is that the PSC is the defender of the concept of rule of law and that the Court of Appeals is not. See for example, PSC Brief page 14, suggesting that the Court of Appeals opinion was on the course toward anarchy. It is therefore noteworthy 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. It is also telling that the PSC completely ignores Arlinghaus Builders,

Inc. v Kentucky PSC, 142 S.W.3d 693 (Ky. App. 2003), one of the most recent opinions related to appealing from final action by the PSC. This opinion was ordered published by the Supreme Court on September 16, 2004.

The controlling law that the Court of Appeals relied upon was the actual language used by the General Assembly in KRS 278.420. That language vests the Franklin Circuit Court with discretion to enlarge the ten (10) day time period when cause is shown. However, that statute does not otherwise define "cause". For that definition, the Court of Appeals looked to the Civil Rules and the U. S. Supreme Court case of Pioneer Investment Services Co. v. Brunswick Associated Ltd., 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993).

Property Owners urged the Franklin Circuit Court to apply Ready v. Jamison, 705 S.W.2d 479 (Ky. 1986) and Crossley v. Anheuser-Busch, Inc., 747 S.W.2d 600 (Ky. 1988). Property Owners argued that where the statute vests the Circuit Court with discretion to enlarge the time for preparing the administrative record for judicial review, the Circuit Court should consider such request based upon three objectives set forth in Crossley. The Circuit Court failed to apply the Crossley objectives.

When this matter was argued before the Court of Appeals, that panel noted Property Owners reference to Ready and Crossley, and suggested that such argument was consistent with the Pioneer decision. This court cited to Pioneer in the matter of judicial review of an order under CR 60 setting aside a default judgment in Asset Acceptance v. Moberly, 241 S.W.3d 329 (Ky. 2007).

In addition to Pioneer, the Court of Appeals applied the precedent of Arlinghaus Builders, Inc., *supra*, an opinion ordered published by the Supreme Court on September

16, 2004 as noted above. This opinion makes clear that the jurisdiction of the Franklin Circuit Court was properly invoked when a timely complaint was filed, and the issuance of summons in good faith. This opinion makes clear that KRS 278.410, the statute that controls obtaining the jurisdiction of the Franklin Circuit Court to provide judicial review of PSC final action, may – or must – be implemented with the aide of the Civil Rules.

The PSC misreads the holding in Hutchins v. General Elec. Co., 190 S.W.3d 333 (Ky. 2006). That case involved Supreme Court review of a decision by the Court of Appeals to dismiss an appeal from the Worker's Compensation Board. The Court of Appeals provides the first opportunity for judicial review from an administrative agency final action – sitting in the position that corresponds to the Franklin Circuit Court in this matter. The Court of Appeals dismissed the appeal for failure to name the Board, as required by CR 76.25(4)(a).

The Supreme Court reversed, holding that, "Under the circumstances, dismissal was an unwarranted sanction." The Supreme Court recognized a critical distinction that PSC refuse to recognize: "A policy of strict compliance governs the time within which an appellant must invoke the court's jurisdiction, naming all indispensable parties." Hutchins, page 337. That opinion continues, "However, the present case does not involve a tardy petition for review."

The legal position of Mary Hutchins before the Supreme Court is parallel to the position Property Owners were in before the Court of Appeals. Under the precedent of Hutchins, the opinion of the Franklin Circuit Court should have been reversed and this matter remanded for a determination on the merits, as the Court of Appeals concluded.

The primary published opinion that the PSC relies upon is the opinion of Forest Hills Developers, *supra*. See PSC Brief, page 10. As is apparent from the application of Forest Hills in the several unpublished opinions PSC cite, that opinion has generated conflicting opinions and frequent dissenting opinions. The Supreme Court should now make clear that to the extent Forest Hills has been applied to mean that KRS 278.420 is jurisdictional, such interpretations are in error, where that statute by its terms is to be implemented based upon the discretion of the court, and where the scope of the statute is the procedural matter of preparing the record of the PSC for judicial review.

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. The PSC cites to Stephens v. Kentucky Utilities, Co., 569 S.W.2d 155 (Ky. 1978), quoting the following, "KRS 278.410 through 278.450 sets out the procedures and limitations of judicial review." However, the PSC failed to quote the next sentence in that opinion: "KRS 278.440 provides for the procedure to be followed by the Franklin Circuit Court after an action has been brought against the Commission under KRS 278.410...." Nowhere in that opinion is there any reference to KRS 278.420 as a basis for Franklin Circuit Court jurisdiction.

The PSC cites to Kentucky Util. Co. v. Farmers Rural Electric Coop., 361 S.W.2d 300 (Ky. 1962), which involved an appeal from an order of the PSC. The Court of Appeals cited KRS 278.410, and observed, "This statute provides the exclusive method by which on order of the commission can be reviewed by the circuit court." There is no mention in that opinion of KRS 278.420.

Where the controlling statute affords the Circuit Court with discretion, the failure of that court to exercise such discretion according to the above Kentucky and U.S. Supreme Court instructions was an abuse of discretion and warranted reversal and remand, as the Court of Appeals concluded.

II. THE FRANKLIN CIRCUIT COURT HAS DISCRETION TO ENLARGE THE TIME FOR PLAINTIFFS TO DESIGNATE THE RECORD

A. The Ten Day Designation Requirement is subject to the Circuit Court's Discretion.

KRS 278.420 (2) states in relevant part:

> 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).

The PSC argues that notwithstanding the power granted to the circuit court to enlarge the ten day period to designate the record specifically provided by this statute, failure to file a designation within ten days robs the Franklin Circuit Court of subject matter jurisdiction to consider the Property Owners' appeal. PSC Brief, page 12. As the circuit court observed, a ruling that strict compliance with the ten day filing provision is jurisdictional ". . . would render meaningless the plain language of the statute granting this Court discretion to enlarge the filing deadline." In addition, such a rule would in clear violation of long-established rules favoring the harmonious construction of statutes so that no parts are rendered meaningless or ineffectual. Brooks v. Commonwealth, 217 S.W.3d 219, 223 (Ky. 2007) ("When presented with a statutory conflict whereby one

interpretation would render a portion of a statute meaningless and the other would harmonize and give effect to both provisions, rules of statutory construction require the interpretation that harmonizes the statutes and prevents a part of a statute from becoming meaningless or ineffectual.") See also Commonwealth v. Phon, 17 S.W.3d 106, 107 (Ky. 2000); and DeStock # 14, Inc. v. Logsdon, 993 S.W.2d 952, 957 (Ky. 1999). KRS 278.420(2) was written by the General Assembly to give the Franklin Circuit Court discretion to evaluate whether cause existed to enlarge the ten day period.

Property Owners, 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. In either case, the document that is required to initiate the appeal has several "strict compliance" requirements: whether it is a complaint in circuit court or a notice of appeal, it must be timely filed and must properly identify all parties to the appeal.[1] Compare these special statutory appeals: Frisby v. Board of Education of Boyle County, 707 S.W.2d 359 (Ky. App. 1986) (dismissing for failure to file appeal within 30 days of notice of final agency action); Board of Adjustments of City of Richmond v. Flood, 581 S.W.2d 1 (Ky. 1978) (dismissing zoning appeal for failure to name party required by statute to be named; with appeals pursuant to the civil rules); United Tobacco Whse. Inc. v. Southern States Frankfort Coop., 737 S.W.2d 319 (Ky. App. 1987) (holding that compliance with the

[1] The PSC cites to Motors Ins. Corp. v. Fields, 294 S.W.2d 518 (Ky. 1956) and A.K Steel Corp. v. Carico, 122 S.W.3d 585 (Ky. 2003) [PSC Brief, page 30], however, these cases also involve an appellant's failure to file a timely notice of appeal and a timely motion for discretionary review, respectively, not a designation of the record.

time requirement of Civil Rule 73.02 is mandatory and jurisdictional); City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990) (holding that CR 73.02 singles out the timely filing of notices of appeal as being different from other rules relating to appeals and mandates that the failure to file notice of appeal within the time specified shall result in dismissal, and that the failure of appellant to name indispensable parties in a timely filed notice of appeal makes the notice of appeal jurisdictionally defective.)

Flood, *supra*, and Hutchins, *supra*, cited by the appellant, are not to the contrary. In fact, these cases involve one of the situations described above, the failure of an appellant to name a party required by statute, not, as in this case, the failure to designate the record within ten days. Furthermore, the relevant statutes in Flood and Hutchins do not contain the provision found in KRS 278.420 (2) that, "The court may enlarge the ten (10) day period where cause is shown." As noted above, Hutchins is precedent that *supports* the decision of the Court of Appeals, that, "Under the circumstances, dismissal was an unwarranted sanction."

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.

Arlinghaus Builders Inc., *supra*, for example, was an appeal from the PSC and therefore involved the same special statutory appeal as is before this court. The Franklin Circuit Court dismissed the appeal (filed as an original action, as is the case here) on the ground that neither SprintCom (the applicant for a Certificate of Public Convenience and

Necessity) nor the PSC had been timely served. The trial court agreed with the argument of the applicant and PSC that late service was jurisdictional. Two months after the PSC's final action, Arlinghaus moved for leave to cure the "technical defects" relating to service of process.

The Franklin Circuit Court considered KRS 278.410 to determine if Arlinghaus had properly invoked that court's jurisdiction for judicial review of agency action. The circuit court applied the Civil Rules governing service of process and applied Flood, *supra*, to conclude that it lacked jurisdiction to hear the matter and dismissed.

The Court of Appeals found that the circuit court correctly held that the Civil Rules applied to that special statutory procedure unless the "procedural requirements of the statute" are inconsistent with the Civil Rules, in which case the procedural requirements of the statute prevail.

The Court of Appeals concluded:

> We are persuaded that Arlinghaus timely commenced this action. It filed its complaint in the court within 30 days after service of the PSC order as provided by KRS 278.410 . . . The jurisdiction of the circuit court has been properly invoked; the parties are now properly before the court. Consequently we reverse the order of dismissal of the Franklin Circuit Court and remand for further proceedings for a determination on the merits of the action.

In Arlinghaus, the Court of Appeals found that the jurisdiction of the Franklin Circuit Court had been properly invoked even though the Circuit Court is not given discretion to extend the time to name parties to an appeal as it is given the discretion to extend the time for the filing of the record as it is in KRS 278.420.

Arlinghaus supports a rejection of the PSC's strict compliance arguments; however, the PSC fails to mention this case anywhere in its Brief. This is striking,

because in its Brief in the Court of Appeals, the PSC sought to distinguish this case. PSC Court of Appeals Brief, page 9. Failing to argue otherwise supports the Property Owners' argument that Arlinghaus is controlling in this case, and that strict compliance is not warranted here.

B. The Circuit Court and Court of Appeals Correctly Looked to the Civil Rules to Define "Cause."

Even more importantly, Arlinghaus stands for the proposition that where terms are not defined in a statute, courts are instructed to rely on the Civil Rules to arrive at consistent interpretations.[2] See Arlinghaus, *supra*, at page 695, "The circuit court correctly held that the Kentucky Rules of Civil Procedure ("CR") apply to this action." In this case, the Court of Appeals held the same, and made the further determination that "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 Vacating and Remanding, page 8; PSC Brief, Appendix 2.

Based upon Arlinghaus, the circuit court was thus required to consider a request to enlarge the time for designation of the record under KRS 278.420(2) by application of CR 6.02 concerning "Enlargement" and cases that have applied that rule, such as Montfort v. Archer, 477 S.W.2d 143 (Ky. 1970), *infra*.

Another case makes this point as well. Smith v. Goodyear Tire and Rubber Co., 772 S.W.2d 640 (Ky. App. 1989), involved the judicial review of a decision by the Workers Compensation Board, a special statutory proceeding pursuant to KRS 342.290

[2] This claim was also contradicted by the PSC in PSC's Court of Appeals Brief, but has since been dropped from its argument.

in which the Court of Appeals considered a motion to dismiss the appeal where the filing fee was not included with the timely tendered petition for review filed per Civil Rule 76.25.[3] Upon receipt of the petition without the filing fee, the clerk notified the appellant's counsel who promptly paid the filing fee. Goodyear moved to dismiss as untimely. The Court of Appeals noted the prior policy of strict compliance and then noted the decision by the Supreme Court in Ready, *supra,* to abandon the policy of strict compliance in favor of a policy of substantial compliance. Goodyear thus makes clear that where a petition for judicial review is timely filed, substantial compliance applies to the subsequent steps necessary for judicial review.

These cases thus support the Opinion of the Court of Appeals in this case, when it held that "the Kentucky Rules of Civil Procedure apply to this administrative appeal just as surely as they do to any other civil action." Opinion Vacating and Remanding, page 7; PSC Brief, Appendix 2.

Regarding the application of the Civil Rules to statutory appeals, the Court of Appeals states:

> The Kentucky Rules of Civil Procedure govern "all actions of a civil nature in the Court of Justice." *Arlinghaus Builders, Inc. v. Kentucky Public Service Comm'n*, 142 S.W.3d 693 (Ky. App. 2004). They "prescribe a practical pattern for the conduct of litigation and the effective administration of justice." *Naive v. Jones*, 353 S.W.2d 365 (Ky. 1961). 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 period based upon the reasons underlying the failure for timely designation of the administrative record.

[3] Because KRS 342.290 grants the Court of Appeals jurisdiction to hear appeals from the Workers Compensation Board, the case was therefore at a parallel stage of judicial review to the Franklin Circuit Court when judicial review is sought of final PSC action.

Opinion Vacating and Remanding, page 8; PSC Brief, Appendix 2.

CR 6.02, titled "Enlargement" applies to statutes as well as to the Civil Rules:

> When **by statute** . . . an act is required or allowed 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 the 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 expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect**[.] (Emphasis added).

The Court of Appeals turned to the United States Supreme Court to construe the meaning of excusable neglect. Since CR 6.02 mirrors its federal counterpart, Federal Rule of Civil Procedure 6(b), the Court of Appeals accepted as persuasive authority several leading federal cases.[4] Opinion Remanding and Vacating, page 9; PSC Brief, Appendix 2. See also Taylor v. Morris, 62 S.W.3d 377 (Ky. 2001). Excusable neglect is discussed in § **III**, *infra*.

C. Kentucky's Courts Have Adopted a Substantial Compliance Standard with Increasing Frequency.

[4] See Pioneer Investment Services Co., *supra*. The PSC attempts to distinguish Pioneer on the basis that it was a bankruptcy case. PSC Brief, page 27. However, in Pioneer, the Supreme Court reconciles Federal Rule of Bankruptcy Procedure 9006(b)(1) with Federal Rule of Civil Procedure 6(b):

> Our view that the phrase "excusable neglect" found in Bankruptcy Rule 9006(b)(1) is not limited, as petitioner would have it, is also supported by the Federal Rules of Civil Procedure, which use that phrase in several places. Indeed, Rule 9006(b)(1) was patterned after Rule 6(b) of those Rules. Under Rule 6(b), where the specified period for the performance of an act has elapsed, a district court may enlarge the period and permit the tardy act where the omission is the "result of excusable neglect." As with Rule 9006(b)(1), there is no indication that anything other than the commonly accepted meaning of the phrase was intended by its drafters. It is not surprising, then, that, in applying Rule 6(b), the Courts of Appeals have generally recognized that "excusable neglect" may extend to inadvertent delays. Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under Rule 6(b) is a somewhat "elastic concept," and is not limited strictly to omissions caused by circumstances beyond the control of the movant. Id., page 391 (citations omitted).

In recent years, Kentucky's courts have made a marked transition from strict compliance to substantial compliance. In Williams V. Wal-Mart Stores, Inc., 184 S.W.3d 492 (Ky. 2005), the Williams argued that the Court of Appeals erred in allowing Wal-Mart to proceed despite Wal-Mart's failure to designate the record for appeal in accordance with CR 75.01. The Supreme Court rejected the position that failure to designate requires dismissal of the appeal, noting that the former approach to judicial review had gone through a "fundamental change" in Ready v. Jamison, *supra*, where the standard of "substantial compliance" had been adopted. According to the Williams Court, "while dismissal still may be appropriate where the breach of the rule and the harm to the opponent is sufficiently serious, under CR 73.02(2) the appellate court is charged with the burden of deciding the appropriate sanction on a case by case basis." Since Williams had shown no prejudice or harm, "aside from her plea that we return to a regime of strict compliance" the Supreme Court rejected the argument that failure to designate the record on appeal warranted dismissal.

Moreover, in Montfort, *supra*, the Notice of Appeal was filed on January 20, 1970. Over a month later, on February 26, 1970, the appellants filed a motion pursuant to CR 6.02 and CR 75.01 for enlargement of time and leave to file a designation of the record on appeal. On March 16, 1970, the circuit court heard the motion and granted an enlargement of time to designate the record on appeal, and the designation was filed on March 16, 1970. At that time, CR 75.01 required that "Within 10 days after filing the notice of appeal, appellant **shall** serve upon the appellee and file with the circuit court a designation. . ." (Emphasis in the opinion of the court).

In that case the motion to enlarge was filed 26 days after the expiration of the mandatory ["shall"] time provided for designation of evidence to appeal. It was nevertheless designated a "motion to enlarge" and the Court of Appeals opinion corrected an earlier error it made when it dismissed the appeal, but subsequently recognized that it did so without properly considering the action of the circuit court in granting the CR 6.02 motion for enlargement. That court stated:

> CR 6.02 relates to permissible enlargement of time for the performing of certain acts required or allowed to be done at or within a specified time. The rule prescribes procedures for obtaining such enlargements, whether sought before the expiration of the period originally prescribed or extended, or after the expiration of such period where the failure to act was the result of excusable neglect. Enlargement under the rule is to be granted by the circuit court for cause shown, in the exercise of a judicial discretion.
>
> The employment of the mandatory language by the use of the word "shall" in the rule 75.01 as it now exists did not remove the rule from the enlargement procedures prescribed in CR 6.02.

Finally, in Kentucky Public Service Com'n, et al. v. Shadoan, No. 2007 CA-000697-MR and No. 2007-CA-000713-MR, an Opinion of the Court of Appeals that was ordered to be published, but is currently awaiting a ruling on PSC's Motion for Discretionary Review,[5] the PSC argued that the Franklin Circuit lacked subject matter jurisdiction because the Shadoans failed to designate the record for an administrative appeal pursuant to KRS 278.410. While the Shadoans failed to strictly comply with KRS 278.410(2), the Court nevertheless states, "We cannot say that the circuit court erred in concluding that the statutory requirements under the circumstances of this case were satisfied." Id. page 5.

[5] This case is not cited as precedent but as another example of the ruling at issue from an essentially identical panel.

Judge Moore's Opinion concurring in part and dissenting in part is also compelling. Judge Moore cites to Forest Hills Developers and Flood, but nevertheless agrees with the majority that a strict compliance standard should not be applied to the Shadoans. Id., page 11.

Since Kentucky case law is now clear that service of process after a timely appeal from the PSC and paying the filing fee after timely filing a petition for review of final action by the Workers Compensation Board are not jurisdictional but procedural, and that substantial compliance replaces strict compliance based upon the policy considerations enunciated in Ready, *supra*, this Supreme Court, like the Court of Appeals before it, should find and conclude that there is no merit to the Appellants arguments otherwise, and that the requirements of KRS 278.420 are procedural requirements in the statute, not jurisdictional requirements.

The Supreme Court should also affirm the Court of Appeals Opinion and the portion of the circuit court order that declined to apply Forest Hills as sought by the PSC and LG&E/KU and recognize that the General Assembly gave the circuit court discretion to enlarge the time within which to designate the record, so that the reading advanced by the Appellants, ". . . would render meaningless the plain language of the statute granting this Court discretion to enlarge the filing deadline." August 28, 2006 Order, page 2; PSC Brief, Appendix 3.

III. THE COURT OF APPEALS CORRECTLY FOUND THE STANDARD FOR EXCUSABLE NEGLECT TO BE THAT FOUND IN CASES ARISING FROM CR 6.02

The Court of Appeals determined that "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." Opinion Vacating and Remanding, page 8; PSC Brief, Appendix 2. As stated above, since CR 6.02 mirrors its federal counterpart, Federal Rule of Civil Procedure 6(b), the Court of Appeals accepted as persuasive authority several leading federal cases. Id., page 9. Based on the leading federal case construing "excusable neglect", Pioneer Investment Services Co., *supra*, the Court of Appeals determined that excusable neglect[6] is to be determined by a consideration of several factors: (1) whether there was any prejudice, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reasons for the delay, and (4) whether the moving party acted in good faith. Opinion Vacating and Remanding, page 9; PSC Brief, Appendix 2. This standard is similar to the test articulated by the Appellees in the Court of Appeals that seeks to accomplish the following three objectives: (1) achieving an orderly appellate process, (2) deciding cases on the merits, and (3) seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal. Crossley v. Anheuser-Busch, Inc., 747 S.W.2d 600 (Ky. 1988) citing Ready, *supra*, at 482.

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[6] The term "excusable neglect" includes acts of inadvertence, mistake, carelessness, or intervening circumstances beyond a party's control. See Pioneer, *supra*:

> The ordinary meaning of "neglect" is "to give little attention or respect" to a matter, or, closer to the point for our purposes, "to leave undone or unattended to *esp[ecially] through carelessness*." Webster's Ninth New Collegiate Dictionary 791 (1983) (emphasis added). The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry "their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Hence, by empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control. Id., page 388.

Unlike the Circuit Court, which applied not discernable standard whatsoever, the Court of Appeals found, based on undisputed facts, that the Property Owners satisfied all four criteria to establish excusable neglect. First, the Court of Appeals determined that there was not any prejudice because the delay in designating the record was "*de minimus* in nature." Opinion Vacating and Remanding, page 10; PSC Brief, Appendix 2. Second, the Court of Appeals determined that "judicial economy my suffered no discernible prejudice, and the litigation has been impeded far more by the time consumed to recourse to this appeal than it was in the delay in designation of a record that all parties agreed had to be reviewed." Id. Third, the Court of Appeals determined that "the delay was neither willful or contrived", that "counsel acted immediately to remedy the mistake", that "the reason for delay was the very kind of mistake that haunts every attorney who has ever practiced law", and that this "is the very reason that both KRS 278.420(2) and CR 6.02 provide latitude to the courts to cure such a default." Id. page 11. Finally, the Court of Appeals determined that "[t]here was absolutely no evidence that the omission at issue was a deliberate attempt to delay the litigation." Id.

These conclusions can be easily reconciled with the test articulated in Ready. The penalty the Franklin Circuit Court imposed on Property Owners thwarts the goals of "deciding cases on the merits" and "seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal."

First, because judicial economy suffered no discernible prejudice, the Property Owners have achieved and maintained an orderly appellate process.

Second, this is a very important case warranting a decision on the merits. This case represents one of the first opportunities for affected property owners to seek the

protections the General Assemble extended in 2004. In 2004, the General Assembly enacted Senate bill 246, modifying KRS 278.020(2) and (8). These amendments represented a legislative mandate to override or modify prior decisions by the Kentucky Court of Appeals in Satterwhite v. Public Service Commission, 474 S.W.2d 387 (Ky. 1971), and Duerson v. East Kentucky Power Cooperative, 843 S.W.2d 340 (Ky. App. 1992). These decisions greatly restricted the rights of property owners to object to the location of new electrical transmission lines to seek to protect against "a cluttering of the land with poles and wires." Kentucky Utilities, Co. v. Public Service Com'n, 252 S.W.2d 885, 892 (Ky. 1952). The 2004 amendments restored the rights of property owners to seek to prevent such "cluttering" and afforded new protections and public participation provisions. This case is significant for the many Hardin and Meade County property owners who will be adversely affected by this transmission line location – and for others who will likewise seek to require more co-location with existing transmission lines to reduce the impact on open lands across Kentucky.

Third, the Property Owners should not needlessly suffer the loss of their constitutional right to appeal. "[T]he court's decision to deny the motion for enlargement of time caused the action to be dismissed and the statutory guarantee of judicial review of administrative actions be lost." Opinion Vacating and Remanding, page 10; PSC Brief, Appendix 2. Where the delay was "*de minimus* in nature" and "judicial economy suffered no discernible prejudice," the Supreme Court should affirm the decision of the Court of Appeals, and let this important case be decided on the merits.

See Crossley, *supra*. Tellingly, a failure to follow a requirement to file a pre-hearing statement which lasted three and a half months was not judged in Crossley to require the penalty that the Franklin Circuit Court imposed below.

See Montfort, *supra*, where the facts revealed an oversight by the attorney that was found to be excusable neglect. The affidavit filed by the undersigned counsel for Property Owners established that his error in this case was no more prejudicial than the attorney error in Montfort, and should likewise be found to be excusable neglect.

See also Foxworthy v. Norstam Veneers, Inc., 816 S.W.2d 907 (Ky. 1991), applying Crossley, *supra*, and Ready, *supra*, to conclude that the mandatory requirement of paying the filing fee with a notice of appeal was not jurisdictional (or that the failure to pay such fee, from attorney inadvertence, was not the type of action that "shall result in dismissal.") That court referred to dismissal, "Most certainly automatic dismissal, cutting off the right to appeal guaranteed by Section 115 of our Kentucky Constitution, qualifies as a Draconian measure."

Property Owners' counsel tendered an affidavit to the Franklin Circuit Court that explained that the undersigned was attempting to carefully track the statutory requirements for a timely appeal, and filed the complaint and appeal by calculating the time without counting the three day for mail provision in KRS 278.410, filed defensively, and was planning to file a second amended complaint and appeal in the event clients or co-counsel determined the need to make corrections, prior to the expiration of that three day calculation; that client and co-counsel determined that no amended complaint and appeal was needed, but that this attempt at being extra cautious contributed to cause the undersigned to fail to tickle the date for designation of the record within his office

calendar. As the Court of Appeals determined, this constituted excusable neglect and was sufficient cause to enlarge the time to designate the record.

The Kentucky Supreme Court and the Court of Appeals have made clear over the past two decades that dismissal of an appeal is disfavored, and that the consequences of missing a deadline are to be commensurate with the magnitude of the delay and are to be mindful that, in general, the party seeking judicial review should be afforded that due process right. See Crossley.

These authorities required the Courts to consider the rights of the Property Owners to judicial review on the merits, the orderly conduct of the appellate process, prejudice, if any to other parties, and the magnitude of the delay. These authorities do not support the 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. In considering the rights of the Property Owners to judicial review, the Franklin Circuit Court should have taken into consideration their diligence in seeking to protect their legal rights based upon the record before the PSC.

The Property Owners urge the Supreme Court to affirm the Opinion of the Court of Appeals vacating the August 28, 2006 Order, and remanding to decide this case on the merits.

IV. THERE ARE SERIOUS ISSUES ON THE MERITS OF THIS APPEAL.

The PSC claims that the Property Owners "have failed to demonstrate any equitable basis to proceed." PSC Brief, page 30. However, for what it is worth, in fact, whatever the state of the power plant's construction, this plant still does not have a valid

Clean Air Act air quality permit, and will not until serious air quality issues are resolved – a resolution which may or may not ever take place.

The Property Owners have demonstrated an equitable basis to proceed which is actually based on the record. In their appeal from the Orders of the PSC, Property Owners complained that the PSC orders were unlawful and unreasonable because they were contrary to the testimony and evidence presented; that the evidence before the PSC required the PSC to find and conclude that (1) LG&E/KU failed to demonstrate a sufficient basis of present "need" for the construction of its proposed transmission line; (2) that LG&E/KU failed to properly consider existing co-location opportunities in the design of its transmission line route as required by law; (3) that LG&E/KU failed to consider the public interest at the appropriate stage and in the appropriate manner as required by law in the planning and design of transmission facilities; and (4) that LG&E/KU failed to satisfy federal environmental laws in conjunction with the design of its project. Property Owners complained that the PSC orders were unlawful and unreasonable because they violated the standards required under KRS 278.020. Property Owners complained that the PSC orders were unlawful and unreasonable where the PSC failed to find and conclude that Appellants were protected from re-litigating claims they previously litigated and prevailed, by operation of the bar of *res judicata*. Property Owners properly asserted the bar of *res judicata* before the PSC and in the Franklin Circuit Court where LG&E/KU previously filed an application for a certificate of need and convenience for virtually the same transmission line route in PSC Case Number 2005-00142, where an number of these Property Owners intervened and were successful in demonstrating that LG&E/KU failed to meet their burden of proof that they were

entitled to a certificate, and their application was denied in PSC Order in that case dated September 8, 2005, which order was not appealed by LG&E/KU. See PSC September 8, 2005 Order, Case No. 2005-00142; LG&E/KU Brief, Appendix A. Such serious issues deserve to be heard on the merits.

V. PROPERTY OWNERS HAVE BEEN DILIGENT IN PROTECTING THEIR RIGHTS IN THIS MATTER.

In response to the August 28, 2006 Order, Property Owners moved the Circuit Court to alter, amend or vacate that order pursuant to CR 59, and attached to the memorandum supporting the following documentation from the proceedings before the PSC:

1. Transcript of the proceeding before the PSC on LG&E/KU application at Case Number 2005-00142.
2. The posthearing memorandum filed by the Cunninghams as intervenors in Case Number 2005-00142.
3. The PSC Opinion in Case Number 2005-00142.
4. The transcript of the proceeding before the PSC in consolidated Case Number 2005-00467 and Case Number 2005-00472.
5. The posthearing recommended order submitted by several of the Property Owners as intervenors in Case Numbers 2005-00467 and 2005-00472.
6. The memorandum of the local public hearing, which includes comments from many of the Property Owners in Case Numbers 2005-00467 and 2005-00472.
7. The PSC Opinion in Case Numbers 2005-00467 and 2005-00472.

8. Intervenors' application for rehearing, and the PSC Order denying Intervenors' application for rehearing in Case Number 2005-00467 and 2005-00472.

9. Intervenors' Exhibit #11, introduced at the hearing before the PSC, showing Table 3.2.3, showing top 50 routes for co-location, which does not include the route approved by the PSC.

10. Intervenors' Exhibit #3, introduced to show the route with 97.79% co-location, which was not selected by LG&E/KU, and, as revealed in the hearing transcript, was not even seriously considered.

These documents from the record of the proceedings before the PSC are submitted to demonstrate the very substantial effort made by the Property Owners, and in particular by the Cunninghams, to demonstrate that the proposed transmission line from Jefferson County to Hardin County was not needed and would cause unnecessary duplication of services. This documentation demonstrates clearly that these Property Owners did not "sit on their rights" but instead made a determined and persistent effort to make their case before the PSC. These documents demonstrate that the Cunninghams initially prevailed on their claim that the LG&E/KU failed to meet their burden of proof that their route across the Cunninghams' nature preserve would not cause unnecessary duplication of services in Case 2005-00142, and that application by LG&E/KU was denied.

These documents also demonstrate that the transmission line approved by the PSC and the subject of this appeal and complaint is virtually identical to the transmission line

route that was disapproved in Case Number 2005-00142, which disapproval was not appealed and is now *res judicata* between the Cunninghams and LG&E/KU.

This demonstration also sought to distinguish these Property Owners from the Forest Hills Developers. See Forest Hills, *supra*, at page 95. Where those developers established a record of failure to comply with procedural orders before the PSC, the record in this case is the opposite. Property Owners have been diligent and that record should be part of the Ready and Crossley analysis.

The Court of Appeals found that the Circuit Court 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:

> Appellants have ably withstood all four of the *Pioneer* criteria construing *excusable neglect*. Under these circumstances, we believe that *excusable neglect* under CR 6.02 equates with cause shown under KRS 278.420(2) – again, bearing in mind the reasonable application of statutory and procedural rules that provide for a meaningful appeal. We believe that the unique circumstances of this case dictate that the court erred in dismissing these appellants. Excusable neglect occurred and cause was shown. We conclude that CR 6.02 and KRS 278.420(2) can best be reconciled by ordering that this appeal be reinstated.

Opinion Vacating and Remanding, page 11; PSC Brief, Appendix 2. As such the Court of Appeals found an abuse of discretion and reversed.[7]

The Supreme Court should affirm, and make clear that all prior opinions of the Court of Appeals that state or suggest that KRS 278.420 is a jurisdictional statute are in error. The Supreme Court should apply the reasoning in Arlinghaus, Hutchins, Ready, Crossley, and Pioneer, *supra,* to affirm that dismissal of the Property Owners complaint

[7] The PSC claims that the Court of Appeals never found that the Circuit Court abused its discretion. PSC Brief, page 32. Yet, it is clear from the Court of Appeals Opinion and Order that the decision of the Franklin Circuit Court was unsupported by sound legal principles and, as a result, the Franklin Circuit Court committed clear error when dismissing this action. See Officeware v. Jackson, 247 S.W.3d 887, 892 (Ky. 2008) and Miller v. Swift, 42 S.W.3d 599, 601 (Ky. 2001).

is too draconian a sanction for the late filing of the designation of the administrative record for judicial review of agency action. See Foxworthy, *supra*.

Where Property Owners have been diligent seeking to protect their legal rights and seeking to protect their property, and where they have been successful with the earlier application by LG&E/KU before the PSC, that diligence deserves consideration from this Court. These Property Owners do not deserve to lose their constitutional rights, where they have worked so hard to protect them, based upon a brief delay in filing the designation of the record.

CONCLUSION

The Supreme Court should affirm the Opinion of the Court of Appeals and conclude that the dismissal of the Appellants' complaint and appeal based upon a nine-day delay in filing a designation of the record for appeal is not warranted; that such harsh penalty unfairly deprives Appellants of their constitutional right to judicial review of agency action that will adversely impact their property; that such penalty ignores the decisions of the Kentucky Supreme Court and the Court of Appeals that instruct trial courts concerning requests for enlargement of time, including Crossley and Ready, *supra*. The Supreme Court should affirm the decision of the Court of Appeals to vacate the Order of the Franklin Circuit Court and to remand this case to be heard on the merits.

Respectfully submitted,

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