FILED
JUL 14 2009
CLERK
SUPREME COURT

Supreme Court of Kentucky

DOCKET NO. 2008-SC-000348

COURT OF APPEALS CASE NOS. 2006-CA-002124-MR,
2006-CA-002164-MR, 2006-CA-002166-MR

LOUISVILLE GAS AND ELECTRIC COMPANY;
KENTUCKY UTILITIES COMPANY;
and E.ON U.S. LLC — APPELLANTS

v.

On Appeal from the Franklin Circuit Court
Civil Action No. 06-CI-1041, Division 2

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; CATHY CUNNINGHAM
and KENTUCKY PUBLIC SERVICE COMMISSION — APPELLEES

REPLY BRIEF FOR APPELLANTS

Respectfully submitted,

Sheryl G. Snyder
Griffin Terry Sumner
Frost Brown Todd LLC
400 W. Market St., 32nd Floor
Louisville, KY 40202
Phone: 502-589-5400

Robert M. Watt III
David T. Royse
Stoll Keenon Ogden PLLC
300 West Vine Street, Suite 2100
Lexington, KY 40507
Phone: 859-231-3000

Counsel for Louisville Gas and Electric Company, Kentucky Utilities Company and E.ON U.S. LLC

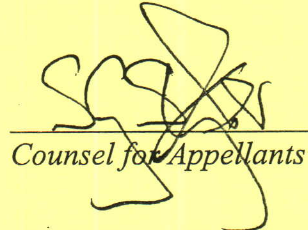
Allyson K. Sturgeon
J. Gregory Cornett
E.ON U.S. LLC
220 West Main Street
Louisville, KY 40202
Phone: 502-627-2088
Phone: 502-627-2756

Co-counsel for Louisville Gas and Electric Company, Kentucky Utilities Company and E.ON U.S. LLC

CERTIFICATE OF SERVICE ON BACK OF COVER

CERTIFICATE OF SERVICE

It is hereby certified pursuant to CR 76.12(6), that on this 13th day of July 2009, copies of this Reply Brief for Appellants were served via First Class Mail to Hon. Thomas D. Wingate, Franklin Circuit Court Judge, Division Two, 214 St. Clair Street, Frankfort, KY 40601; Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; W. Henry Graddy IV, W. H. Graddy & Associates, 103 Main Street, P.O. Box 4307, Midway, KY 40347; Robert Griffith, Stites & Harbison PLLC, 400 West Market St., Suite 1800, Louisville, KY 40202; and David Samford, Public Service Commission of Kentucky, 211 Sower Boulevard, Frankfort, KY 40601.



Counsel for Appellants

845417v1

TABLE OF POINTS AND AUTHORITIES

I. The Court of Appeals' decision must be reversed because Kentucky law is clear: strict compliance is required for perfecting administrative appeals. 1

Hutchins v. Gen. Elec. Co., 190 S.W.3d 333 (Ky. 2006) 1, 4

Bowen v. Commonwealth ex rel. Stidham, 887 S.W.2d 350 (Ky. 1994) 1, 2

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

Foremost Ins. Co. v. Shepard, 588 S.W.2d 468 (Ky. 1979) 2

Triad Development/Alta Glyne, Inc. v. Gellhaus, 150 S.W.3d 43 (Ky. 2004) 2

Civil Rule 11 2

Arlinghaus Builders, Inc. v. Ky. Pub. Serv. Comm'n, 142 S.W.3d 693 (Ky. App. 2003) 2, 3

Smith v. Goodyear Tire & Rubber Co., 772 S.W.2d 640 (Ky. App. 1989) 3

Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc., 37 S.W.3d 713 (Ky. 2000) 3

Williams v. Wal-Mart Stores, Inc., 184 S.W.3d 492 (Ky. 2005) 3

Montfort v. Archer, 477 S.W.2d 143 (Ky. 1970) 3

Yeoman v. Commonwealth Health Policy Bd., 983 S.W.2d 459 (Ky. 1998) 4

Schilling v. Schoenle, 782 S.W.2d 630 (Ky. 1990) 4

Energy Regulatory Comm'n v. Ky. Power Co., 605 S.W.2d 46 (Ky. App. 1980) 4

National-Southwire Aluminum Co. v. Big Rivers Elec. Corp., 785 S.W.2d 503 (Ky. App. 1990) 4

Boone County Water & Sewer Dist. v. Pub. Serv. Comm'n, 949 S.W.2d 588 (Ky. 1997) 4

II. Even if Appellees' failure to follow the statutory requirements were not a jurisdictional defect, the Court of Appeals' decision must be reversed because it misinterpreted Kentucky law and applied an erroneous standard of appellate review. 6

Civil Rule 6.02 .... 6, 7

KRS 278.420(2) 6, 7

Bd. of Adjustments v. Flood, 581 S.W.2d 1 (Ky. 1978) 6

Pollitt v. Ky. Unemployment Ins. Comm'n, 635 S.W.2d 485 (Ky. App. 1982) 6

Tennill v. Talai, 277 S.W.3d 248 (Ky. 2009) 6

AK Steel Corp. v. Carico, 122 S.W.3d 585 (Ky. 2003) 6

Motors Ins. Corp. v. Fields, 294 S.W.2d 518 (Ky. 1956) 6

Pioneer Inv. Servs. Co. v Brunswick Assoc. Ltd. P'ship, 507 U.S. 380 (1993) 7

Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982) 7

Moore v. Asente, 110 S.W.3d 336, 353-54 (Ky. 2003) 7

I. The Court of Appeals' decision must be reversed because Kentucky law is clear: strict compliance is required for perfecting administrative appeals.

It is well settled that the doctrine of substantial compliance is inapplicable to statutory prerequisites for perfecting appeals from administrative agencies. As this Court has squarely held:

> 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**.

Hutchins v. Gen. Elec. Co., 190 S.W.3d 333, 336-37 (Ky. 2006) (emphasis added);[1] *see also Bowen v. Commonwealth ex rel. Stidham*, 887 S.W.2d 350, 352 (Ky. 1994); *Bd. of Adjustments v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978) ("When grace to appeal is granted by statute, a strict compliance with its terms is required.").[2]

Appellees nevertheless contend that substantial compliance applies to their failure to designate the record on their statutory appeal within the time required by that statute.[3] Indeed, Appellants contend that they are constitutionally entitled to application of the substantial compliance standard to their administrative appeal of a PSC decision.[4] But that assertion is not supported by any decision of this Court. In fact, this Court held that

---

[1] The *Hutchins* case does not – as suggested by Appellees (at p. 8) – stand for the proposition that strict compliance is only applicable to the timely filing of a petition for review. *See* 190 S.W.3d at 337.

[2] Strict compliance, in this case, means compliance with the express statutory requirements to perfect the appeal – or at least to request an extension prior to expiration of the mandatory deadline and prior to facing a dispositive motion based on their failure.

[3] Brief for Appellees at 5 (the Franklin Circuit Court's dismissal of their appeal "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 . . . ." *Id.* at 10 ("...appellate practice in Kentucky has a clear division between when strict compliance applies and when substantial compliance applies, but it does not rest...upon whether the appeal is pursuant to the civil rules or is based upon the provisions of a statute.").

[4] Brief for Appellees at 28 (dismissal of Appellants' statutory appeal is "such [a] harsh penalty [that] unfairly deprives Appellants of their constitutional right to judicial review of agency action" by the PSC).

even a civil litigant was not constitutionally entitled to the substantial compliance standard. *Foremost Ins. Co. v. Shepard*, 588 S.W.2d 468, 469 (Ky. 1979). This Court instead adopted substantial compliance by amending the civil rules, and adopting CR 73.02(2). *Bowen, 887 S.W.2d at 352.*

Subsequently, this Court squarely held that a party appealing an administrative decision is not constitutionally entitled to the substantial compliance standard:

> **[I]t has been repeatedly held that an appeal from an administrative decision is a matter of legislative grace and not a right**. Thus, the failure to follow the statutory guidelines for such an appeal is fatal. A person seeking review of administrative decisions must strictly follow the applicable procedures.
>
> *American Beauty Homes Corp, supra*,. . . simply recognized that the courts of Kentucky have inherent jurisdiction to review decisions of administrative agencies and legislative bodies for arbitrariness. However, **when 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.**

Triad Development/Alta Glyne, Inc. v. Gellhaus, 150 S.W.3d 43, 47 (Ky. 2004) (emphasis added). Simply stated, Appellees' Brief egregiously misstates the controlling precedents. It is one thing to make "a good faith argument for the . . . modification or reversal of existing law." CR 11. It is quite another to misstate what the existing law is.

Indeed, there is not a single case cited in Appellees' Brief that supports Appellees' erroneous contention that Kentucky law permits substantial compliance with statutory prerequisites for perfecting administrative appeals. The reliance by Appellees (and by the Court of Appeals) on the *Arlinghaus Builders* case is misplaced. *Cf.* Brief for Appellees at 7, 11-13. The decision in *Arlinghaus Builders* does not – indeed, under this Court's controlling precedents, the Court of Appeals could not – hold that substantial compliance with statutory prerequisites is sufficient to perfect an administrative appeal.

Arlinghaus Builders, Inc. v. Ky. Pub. Serv. Comm'n, 142 S.W.3d 693 (Ky. App. 2003). In that case, the statute was silent concerning the manner in which an appellant should serve on other parties the pleading commencing the administrative appeal in circuit court. *Id.* at 695. There being no applicable statutory requirements, the court turned to the Civil Rules and held that service of process in compliance with the Civil Rules was sufficient. *Id.* The *Arlinghaus Builders* appellant did not fail to strictly comply with any statutory prerequisites for perfecting its appeal.

Appellees' reliance upon *Smith v. Goodyear Tire & Rubber Co.*, 772 S.W.2d 640 (Ky. App. 1989) is similarly unavailing. That decision addressed compliance with a requirement for a filing fee under the Civil Rules, not an express statutory jurisdictional prerequisite. *Id.* at 641. Moreover, after this Court's square holding in *Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc.*, 37 S.W.3d 713 (Ky. 2000) – that the failure to timely tender the filing fee with the notice of appeal is fatal even to an appeal from circuit court – the Court of Appeals' earlier decision in *Smith* has no precedential value for deciding this case.

The *Williams v. Wal-Mart* and *Montfort v. Archer* cases also do not support Appellees' contentions, because both cases involve compliance with the Civil Rules in non-statutory appeals. *Cf.* Brief for Appellees at 16-17 (citing *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492 (Ky. 2005) and *Montfort v. Archer,* 477 S.W.2d 143 (Ky. 1970).

Appellees chose to misstate controlling Kentucky law, rather than offer any valid reasons for this Court to depart from the well-settled precedents, perhaps because public policy considerations mandate that the rule of strict compliance with statutory

requirements be maintained. First, "*stare decisis* has real meaning to this Court." *Yeoman v. Commonwealth Health Policy Bd.*, 983 S.W.2d 459, 469 (Ky. 1998). There is no "compelling and urgent reason" to overrule the well-settled precedents. *See Schilling v. Schoenle*, 782 S.W.2d 630, 633 (Ky. 1990). Second, where the legislature has considered and implemented specific statutory procedures for perfecting administrative appeals, courts properly require strict compliance with those statutory procedures. *See, e.g., Hutchins,* 190 S.W.3d at 333-37.

Statutory requirements for perfecting administrative appeals are strictly enforced to insure that such appeals are expeditious, not dilatory. That is sound public policy. The law stringently limits judicial review of decisions of an agency with expertise, such as the Public Service Commission, and for good reason.[5] An appeal should not be a vehicle for delaying the implementation of decisions which the PSC has found as a fact are in the public interest.

This case serves as a perfect illustration. Through this appeal of the PSC's approval of the CPCN, Appellees have managed to delay completion of a forty-two mile electrical transmission line and full implementation of the associated new generating unit. Thus, even when PSC approval of the project is eventually upheld (as it surely will be), the transmission line designed to address the reliability of electrical service to many thousands of Kentucky residents will be years behind schedule.[6]

---

[5] The standard for judicial review of the reasonableness of PSC factual findings and policy determinations is extremely narrow; even more narrow than the standard for judicial review of decisions of other administrative agencies. *See Energy Regulatory Comm'n v. Ky. Power Co.*, 605 S.W.2d 46, 49 (Ky. App. 1980); *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 506, 510 (Ky. App. 1990); *see also Boone County Water & Sewer Dist. v. Pub. Serv. Comm'n*, 949 S.W.2d 588 (Ky. 1997).

[6] Appellees' Brief makes several outright misrepresentations about the air permit for the generating unit associated with this transmission line, falsely alleging that KU "does not have a

In fact, Appellees have used the mere pendency of this appeal of the CPCN to obtain a stay of enforcement of KU's judgment in an eminent domain action by which KU is acquiring easements for construction of the transmission line. The Court of Appeals' erroneous decision to stay that judgment based on this appeal is the subject of a Motion for Discretionary Review currently pending before this Court.[7]

The Court of Appeals' decision implicitly applies substantial compliance to statutory requirements for perfecting an administrative appeal. Contrary to Appellees' Brief, that is not the law in Kentucky. Well-settled controlling precedents mandate reversal of that decision.

---

valid [air] permit" for the plant, *see Brief for Appellees at 23*; because the EPA allegedly "disapproved, in part, the air quality permit . . ." *Id.* at 2. In fact, KU has a valid state air permit that authorizes construction and operation of the generating unit associated with this transmission line. Appellees, and other opponents of this project, did not appeal the issuance of that permit within the statutory timeframe and it is, therefore, final and nonappealable under state law. Opponents did seek to challenge the permit under federal law through the EPA. Of the objections raised by opponents, the EPA has considered eleven of them. The EPA dismissed nine outright and ordered the Commonwealth to address two minor issues through permit revisions. The EPA order did not hold the air permit invalid. While the EPA has yet to rule on all of the opponents' claim, nothing – other than wishful thinking and speculation – supports Appellees' contention that there is not a valid air permit for the power plant served by this project. And Appellees' *res judicata* argument addressing a prior application for the CPCN is clearly wrong. The prior denial of a proposed route for the transmission line does not preclude a utility from proposing a different route that satisfies the PSC's concerns with the prior proposed route.

Even if Appellees are successful in convincing this Court to depart from well-settled jurisprudence requiring strict compliance, the result would merely be to revive their attempted challenge to the PSC's CPCN decision – not to validate that appeal. That appeal challenges only the sufficiency of the evidence regarding the need for the transmission line and whether the line will unnecessarily duplicate existing lines. The PSC's findings on those issues were made after numerous public hearings and hundreds of pages of testimony. It is difficult to conceive that any court could find that there is not sufficient evidence in the record to support the PSC's findings of fact. *See* footnote 5, *supra*.

[7] *See* 2009-SC-000379. Appellees' appeal of Kentucky Utilities' right to take judgment is now pending in the Court of Appeals, also improperly delayed for months. *See* 2008-CA-001565.

II. Even if Appellees' failure to follow the statutory requirements were not a jurisdictional defect, the Court of Appeals' decision must be reversed because it misinterpreted Kentucky law and applied an erroneous standard of appellate review.

After ignoring controlling precedent expressly requiring strict compliance, the Court of Appeals mistakenly invoked CR 6.02 as the standard for determining whether Appellants had shown "cause," as required by KRS 278.420(2), for missing the statutory deadline. But this Court has squarely held that the Civil Rules are inapplicable to appeals from administrative agencies until **after the appeal has been perfected** in strict compliance with statutory requirements. *Bd. of Adjustments v. Flood*, 581 S.W.2d at 2. Here, Appellees failed to follow the express statutory procedures to perfect their appeal and, therefore, cannot claim refuge in more lenient standards under the civil rules. *Pollitt v. Ky. Unemployment Ins. Comm'n*, 635 S.W.2d 485, 487 (Ky. App. 1982)(CR 6.02 does not authorize enlargement of the statutory time period for perfecting an administrative appeal).

The statute itself requires good "cause" for any requested enlargement of time and, under this Court's precedents, counsel's admitted failure "to tickle the office calendar"[8] is not good cause for failing to timely perfect an appeal. *See, e.g.*, *Tennill v. Talai*, 277 S.W.3d 248, 250 (Ky. 2009) ("Good cause is not mere inattention on the part of the defendant ... [or] his attorney ... ."). Furthermore, even in the context of non-statutory appeals, this Court has squarely held that counsel's confusion or preoccupation is insufficient reason to expand jurisdictional deadlines for perfecting appeals. *AK Steel Corp. v. Carico*, 122 S.W.3d 585, 586 (Ky. 2003); *Motors Ins. Corp. v. Fields*, 294 S.W.2d 518 (Ky. 1956).

---

[8] Brief for Appellees at 4.

The Court of Appeals' application of CR 6.02 – and its reliance upon the standards for filing tardy proofs of claims in federal bankruptcy court to interpret that Civil Rule – is therefore inapt.[9] Here, the Circuit Court considered Appellees' excuses and found that no good "cause" had been shown for retroactively extending the deadline. That finding is consistent with prior precedents of this Court. Moreover, an enlargement after the deadline passed is not permissible in this statutory appeal. Unlike CR 6.02, KRS 278.420(2) does not permit a motion to extend the deadline after the deadline has expired. *CF*. Brief for Appellees at 9-13.

Moreover, it is black letter law that appellate review of the trial court's findings are limited to the abuse of discretion standard. *See, e.g.*, *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). But, as noted in Judge Moore's dissenting opinion, the abuse of discretion standard was ignored by the Court of Appeals.

Instead, the Court of Appeals decided *de novo* that "[e]xcusable neglect occurred and cause was shown." Opinion at 10. The Court of Appeals improperly substituted its judgment for the trial court's – a substitution that the law does not permit. Even Appellees' brief tellingly describes the many factual findings in the Opinion as "the Court of Appeals **determined**". *Cf.* Brief for Appellees at 19-20. But it is not the role of the appellate court to make factual findings. *Moore v. Asente*, 110 S.W.3d 336, 353-54 (Ky. 2003).

The Court of Appeals' proper role was to apply controlling precedent from this Court and, at most, to consider whether the Circuit Court abused its discretion by finding that no good "cause" had been shown for Appellees' failure to meet the statutory

---

[9] Opinion at 8, *citing Pioneer Inv. Servs. Co. v Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1993).

deadline. The Court of Appeals failed in both of these tasks. Reversal is therefore mandated.

CONCLUSION

The Court of Appeals' failure to follow controlling precedent, misinterpretation of Kentucky law, and misapplication of the standard of appellate review mandate reversal of the Court of Appeals' decision and reinstatement of the Circuit Court judgment dismissing Appellees' appeal from to the PSC decision.

Respectfully submitted,

Sheryl G. Snyder
Griffin Terry Sumner
Frost Brown Todd LLC
400 W. Market St., 32nd Floor
Louisville, KY 40202
Phone: 502-589-5400

Allyson K. Sturgeon
J. Gregory Cornett
E.ON U.S. LLC
220 West Main Street
Louisville, KY 40202
Phone: 502-627-2088
Phone: 502-627-2756

Co-counsel for Louisville Gas and Electric Company, Kentucky Utilities Company and E.ON U.S. LLC

Robert M. Watt III
David T. Royse
Stoll Keenon Ogden PLLC
300 West Vine St., Suite 2100
Lexington, KY 40507
Phone: 859-231-3000

Counsel for Louisville Gas and Electric Company, Kentucky Utilities Company and E.ON U.S. LLC