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Michael J. Schmitt  
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Robert Cicero  
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Talina R. Mathews  
Commissioner

August 10, 2017

PARTIES OF RECORD

Re: Case No. 2017-00120

Attached is a copy of an Order entered August 7, 2017, in the Franklin Circuit Court Case No. 01-CI-581, which is being filed in the record of the above-referenced case. If you have any comments you would like to make regarding the contents of this Order please do so within five days of receipt of this letter.

If you have any questions, please contact Nancy Vinsel, Commission Staff Attorney, at 502-782-2582.

Sincerely,

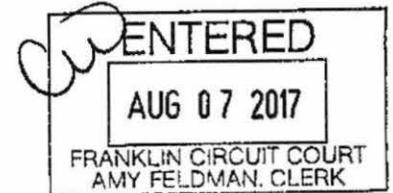
A handwritten signature in blue ink, appearing to read "John S. Lyons".

John S. Lyons  
Acting Executive Director

NJV/ph

Attachments

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 01-CI-581



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COMMONWEALTH OF KENTUCKY  
PUBLIC SERVICE COMMISSION

PLAINTIFF

V.

ORDER

BASIL C. POLLITT, INDIVIDUALLY  
and THE GAS GROUP, LLC

DEFENDANTS

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This matter is before the Court on the Plaintiff's Motion for an Order to Hold the Defendant in Contempt and Impose Sanctions. Having heard the arguments of the parties, reviewed the record, and otherwise being sufficiently advised, the Court hereby **DENIES** Defendants' and Defendant/Intervenors' Motions, and likewise **DENIES** Plaintiff's Motion for Contempt.

**FACTUAL BACKGROUND**

Given the nature of this case and its long history, the Court finds a brief factual recitation to be necessary. Initially, the Public Service Commission (PSC) initiated this case in this Court in 2001, seeking enforcement of a September 2, 1999 Commission Order that assessed a civil penalty of \$25,750, and requested the Court to issue a permanent injunction terminating the operation of a natural gas pipeline (Pollitt System) owned by The Gas Group, Inc., for which Basil Pollitt was the Officer. Pollitt installed natural gas lines transporting gas from wells in Richardsville to a location near Caneyville in 1993. Because the Pollitt System served a commercial wholesale end-user (not retail customers), the system was properly classified as a gathering system. Gathering systems and utilities are subject to different regulations and standards. Kentucky law requires gas pipeline companies that obtain gas from producing wells to furnish gas service to individuals who request service and live within 1/2 air mile of the pipeline. KRS 278.585. This type of access

provided to homeowners is commonly referred to as a “farm tap” system. Due to the volatile nature of the natural gas industry, sometime between 1994 and 1995 Pollitt’s original wholesale customer went bankrupt, thus leaving property owners connected to the Pollitt System under the “farm tap” program as Pollitt’s only end users. Accordingly, although the pipeline system was not built to service retail customers, the “farm tap” customers were the only ones left after the bankruptcy of the original wholesale customer for whom the pipeline was built.

There are no specific regulations or statutes that spell out the regulatory impact of this situation. The PSC argued that the Pollitt System, by default, was converted to a regulated utility. On April 14, 1999, the PSC ordered Pollitt to show cause as to why he should not be subject to penalties pursuant to applicable utility laws and regulations. Unfortunately, Pollitt did not attend the administrative proceeding, for reasons that are unclear in the record (after the passage of 18 years).

The PSC issued its Final Order on September 2, 1999, finding that the Pollitt System constituted a utility. The Order found that Pollitt did not apply for a Certificate of Convenience and Necessity from the PSC; that Pollitt had not filed a valid schedule of rates and conditions of service; and that the Pollitt System was in violation of five state and federal regulations. The administrative order assessed civil penalties and ordered Pollitt to file a tariff within fifteen (15) days of service. Pollitt did not file a petition for judicial review, nor did he comply with the PSC’s order. Mr. Pollitt testified that he did hire legal counsel, who corresponded with the counsel for the PSC, and it appears there was some confusion about the status of the PSC’s directives.

The PSC filed a complaint with this Court to enforce its orders and for an injunction on May 14, 2001. Pollitt responded to the PSC’s complaint by seemingly arguing that the PSC’s jurisdiction was confined to utilities and that gathering systems were not within the PSC’s

purview.<sup>1</sup> During the pendency of the administrative proceedings and subsequent filing with this Court, the Pollitt System was only serving individual consumers hooked on through the “farm tap” program. This Court then signed a tendered Order from the PSC granting summary judgment in favor of the PSC and issuing a permanent injunction against Pollitt on March 2, 2004. The Order assessed civil penalties of \$25,750; ordered Pollitt and the Gas Group, Inc. to terminate the flow of gas through any and all pipelines; ordered Pollitt to publish a copy of the Court’s Order one time each week for three (3) consecutive weeks in local newspapers; ordered Pollitt to disconnect and seal any valves or other devices at the wellhead of all natural gas wells connected to the distribution system; ordered Pollitt to remove all customer gas meters within ninety (90) days from May 1, 2004; ordered Pollitt to file an affidavit within ten (10) days of the ninety (90) day period stating that all steps had been completed; and finally ordered Pollitt to pay the PSC’s costs and attorneys’ fees. This Order was appealed to the Court of Appeals and affirmed. No further action was taken in that case, by the PSC or by Pollitt.

In January 2017, over a decade after the Court entered its original Order, PSC inspectors inspected whether the Pollitt System was currently in operation. Inspector Bill Aitken found that the system was operating and providing gas utility service to customers. The Commission responded by opening a show cause action to determine, inter alia, Defendants’ compliance with the permanent injunction entered. The PSC filed a Motion for Contempt on June 21, 2017 with this Court. In its motion, the PSC seeks for this Court to hold Defendants in contempt for their failure to comply with this Court’s March 2, 2004 Order.

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<sup>1</sup> Pollitt relied on a letter dated April 28, 2000, from PSC staff attorney Dale Wright to Pollitt’s then Counsel, former Governor Julian Carroll, which stated that a CPCN was not required for the Pollitt System. The letter is attached as Exhibit A to Defendants’ Response to Summary Judgment filed November 21, 2001.

## DISCUSSION

### I. Contempt is Inappropriate Under the Circumstances

A trial court has broad authority to enforce its orders, and contempt actions fall within that authority. *Lewis v. Lewis*, 875 S.W.2d 862, (Ky. 1993). In a civil contempt proceeding, the initial burden is on the party seeking sanctions to show by clear and convincing evidence that the alleged contemnor has violated a valid court order. *See, e.g., Roper v. Roper*, 47 S.W.2d 517 (1932). The Court finds that this burden is frustrated by the Commission's delay in seeking to enforce this Court's Order. In light of the facts brought out during the hearing, the Commission's delay is fatal to its motion.

This Court's March 2004 Order ordered Defendants to act within a specified time. Pollitt was required to file a tariff within fifteen (15) days of the Court's order entered March 2, 2004, and to disconnect the pipeline and meters within ninety (90) days from May 1, 2004. At the latest, the Commission would have known whether Pollitt was in compliance with the Order by August 2004. Instead, the Commission failed to investigate Defendants' compliance for nearly thirteen (13) years before filing a motion for contempt in June 2017. At the show cause hearing before this Court, Basil Pollitt's testimony raised many factual questions concerning the use of the Pollitt System.

Specifically, Pollitt testified to the Court that the pipeline system has been supplying a commercial wholesale entity for the previous six (6) months. This testimony established that the *status quo* prior to the filing of the original enforcement action in 1999 has been restored: Pollitt now has a wholesale customer as end user, and is allowing "farm taps" along the pipeline route as required by statute. This factual evidence is significant because, at the time the Court initially entered its Order in 2004, the Pollitt System was only serving retail consumers. Thus, Defendant

has argued that the services provided are best characterized as a “gathering line” instead of a “utility.” This classification is paramount, because a gathering line system is subject to different standards and regulations. Therefore, the Court declines to enforce a thirteen (13) year old Order where, through the passage of time, the parties’ legal positions have substantially changed.

It was also brought to the Court’s attention that the Commission has initiated new administrative proceedings aimed at determining whether Pollitt Enterprises, Inc. has a relationship with the Pollitt System. In response, Defendants have filed a series of motions: Defendant Basil Pollitt and The Gas Group, Inc. have moved to stay the administrative proceedings; and Whitney Clark Pollitt and Amanda Dean Pollitt, officers of Pollitt Enterprises, Inc., have moved to intervene and to stay/quash.

After reviewing the record, the Court finds that Whitney Clark Pollitt and Amanda Dean Pollitt’s motions are precluded under failure to exhaust administrative remedies. Exhaustion of administrative remedies is a prerequisite to judicial relief. “[W]here an administrative remedy is provided by the statute, relief must be sought from the administrative body and this remedy exhausted before the courts will take hold.” *Goodwin v. City of Louisville*, 215 S.W.2d 557, 559 (Ky. 1948). The Commission has represented that the parties have not moved to be dismissed from the administrative proceedings, and that the administrative proceedings are still pending. Thus, this Court does not have jurisdiction with which to consider their motions at this time.

#### CONCLUSION

Accordingly, the Court hereby **DENIES** the Defendant’s Motion to Hold the Defendant in Contempt and Impose Sanctions. Likewise, the Court **DENIES** Whitney Clark Pollitt and Amanda Deann Pollitt’s Motions before the Court. After reviewing the record, and hearing the arguments presented during the show cause hearing, the Court finds it necessary to address a threshold

question concerning the pipeline's classification at the administrative level. The findings in this Order do not negate the Commission's authority to require Defendants to comply with tariff filings and applicable standards. In the administrative proceedings scheduled to take place on August 9, 2017, the Court directs the Commission to address the status of the Pollitt System and evaluate whether the gas company's system is functioning as a gathering system or a utility under the applicable laws and regulations.

Within the next 30 days, the parties are directed to set this case for a status review at a regular motion hour of this Court. The Court will address any remaining issues concerning the application of this Court's prior rulings, and will determine if the issues currently pending before the Commission, and the issues involved in this action, could be consolidated for purposes of mediation (or settlement negotiations).

So **ORDERED** this the 7 day of August, 2017.

  
PHILLIP J. SHEPHERD, JUDGE  
Franklin Circuit Court, Division I

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