RENDERED: DECEMBER 5, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001227-MR

WALTER CALLIHAN[1]

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 07-CI-00402

GRAYSON RURAL ELECTRIC
COOPERATIVE CORPORATION; AND
KENTUCKY PUBLIC SERVICE
COMMISSION

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND VANMETER, JUDGES; BUCKINGHAM,[2]
SENIOR JUDGE.

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[1] Although the appellant's brief lists both Walter Callihan and his wife Goldie Callihan as appellants, the notice of appeal reflects that Walter Callihan is the only named appellant.

[2] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

CAPERTON JUDGE: The primary issue in this appeal is whether the Franklin Circuit Court properly dismissed an administrative appeal for failure to comply with the statutory requirement concerning designation of the record. Finding no error in the decision of the trial court, we affirm.

The facts underlying this appeal are not in serious dispute. In April, 2003, appellee Grayson RECC discontinued service to Walter Callihan's property for non-payment of his electric bill. Callihan then sought relief by lodging a complaint with the Kentucky Public Service Commission ("Commission") alleging, among other things, that Grayson RECC, several officials of that utility company, and several current and former employees of the Commission had conspired to deprive Callihan and his wife of their civil rights and their electric service. After filing a number of procedural motions, including a motion for recusal of the Commission members and the members of the Commission's legal staff, on December 1, 2005, the Callihans filed a notice of intent to withdraw their complaint.

The Commission thereafter disposed of all outstanding motions, treating the Callihans notice of intent to withdraw as a motion to withdraw their complaint. The Commission granted that motion but directed that the investigation to continue into the Grayson RECC's provision of electric service to the Callihans. In the course of that investigation, Commission staff issued interrogatories and requests for production of documents and deposed several officials and employees of Grayson RECC who the Callihans had previously indicated had unique

knowledge of the facts surrounding the termination of their electric service and the Callihans subsequent efforts to have their service restored. Callihan apparently refused to give testimony.

In an order based upon the following rationale, the Commission ultimately concluded that Grayson RECC's refusal to provide service to the Callihans was neither unlawful nor unreasonable:

> The Commission is not unmindful of the living conditions that the Callihans must endure as a result of the termination of electric service. These living conditions, however, are of their own choosing and their own conduct. They may have service restored at any time by paying the entire balance of the indebtedness and meeting the other conditions set forth in Grayson RECC's rules. Moreover, they may enter into a partial payment plan with Grayson RECC and have electric service restored while they pay the outstanding indebtedness over an agreed period. Their refusal to take these actions does not entitle them to treatment more favorable than that to which other customers are entitled.

The Commission's order further stated that the investigation was closed and that it would be removed from the Commission's docket.

Pursuant to the procedure provided in KRS 278.410, Callihan then appealed the Commission's order to the Franklin Circuit Court. The Commission thereafter filed a motion to dismiss the appeal on the basis that Callihan had failed to comply with KRS 278.420(2) which requires the appealing party to file a designation of the administrative record. That subsection provides:

> Unless an agreed statement of the record is filed with the court, the filing party shall designate, within ten (10) days after an action is filed, the portions of the record

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

Rather than asking the circuit court to grant him an enlargement of time to designate the record as is provided for in the statute, Callihans response to the motion to dismiss included the following verbatim statement with respect to the record:

> 2. In response to KSPC argument for designation of records was not made within 10 days is erroneous and without merit. Callihan did not only designate said record by filing two orders from K.P.S.C. The rest of the record is incomplete, and the important part of the record that the K.S.P.C. relies upon has been deleted and destroyed by the K.S.P.C. The said record was filed timely along with the complaint.

The circuit court subsequently granted the Commission's motion and dismissed Callihan's complaint.

Although in his brief to this Court Callihan argues, among other things, that he "has designated all the record hopefully Gerald Whoucher [Gerald E. Wuetcher, counsel for the Commission] was not telling the truth and that the record is still there intact, the records will speak loud and clear," nothing in the record before us indicates that Callihan complied with his statutory duty or even requested additional time from the trial court to do so.

In *Forest Hills Developers, Inc. v. Pub. Serv. Comm.*, 936 S.W.2d 94, 96 (Ky.App. 1996), 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:

> KRS 278.420(2) states in clear and unambiguous terms that the party filing the complaint shall designate the portions of the record necessary to resolve the issues raised in its complaint. It is uncontested in the matter at bar, however, that Forest Hills did not designate any portion of the record within ten days of filing the complaint. Forest Hills maintained in its complaint that the Commission's dismissal of its application was unlawful and unreasonable, and further set forth its argument that the Commission's orders preceding the dismissal were inconsistent and contradictory. Accordingly, it appears that at a minimum the designation of those orders would be necessary in order for the trial court to resolve the issue raised. Irrespective of the mandatory language of KRS 278.420(2), the party challenging the Commission's order "[s]hall have the burden of proof to show by clear and satisfactory evidence that the determination, requirement, direction or order is unreasonable and unlawful." KRS 278.430. Without presenting to the trial court the orders which Forest Hills maintained were inconsistent, contradictory, unlawful and unreasonable, there existed no evidence, much less clear and satisfactory evidence, that the Commission had exceeded its authority.

Despite Callihans assertion that he appended the orders in question to his complaint, a review of the circuit court record dispels that contention. As was the case in *Forest Hills*, without designation of the evidence adduced in the administrative proceeding—including the Commission's orders—it would have been impossible for Callihan to have prevailed before the circuit court. We are

thus convinced that there was no error in dismissing Callihans appeal on the basis of that deficiency.

Because the failure to comply with KRS 278.420(2) is, in and of itself, a sufficient basis for affirming the decision of the circuit court, we need not address the failure to properly serve the Attorney General or the limitations issue. Similarly, because the remainder of the issues Callihan raises in his brief necessarily were not addressed by the trial court, we cannot consider them for the first time on appeal.

Accordingly, the order of the Franklin Circuit Court dismissing Callihans complaint is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Walter Callihan, *Pro Se*
Arglitte, Kentucky

BRIEF FOR APPELLEE KENTUCKY PUBLIC SERVICE COMMISSION:

Gerald E. Wuetcher
David S. Samford
Frankfort, Kentucky

BRIEF FOR APPELLEE GRAYSON RURAL ELECTRIC COOPERATIVE CORPORATION:

W. Jeffrey Scott
Grayson, Kentucky