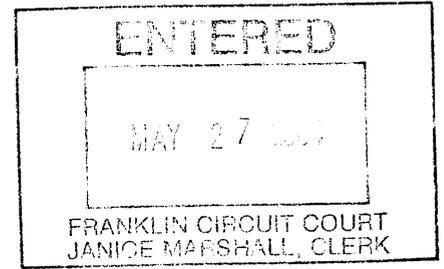


COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION II  
CIVIL ACTION NO. 01-CI-01385



**THE HARBOR AT HARRODS  
CREEK CONDOMINIUM ASSOCIATION**

**PLAINTIFF**

v. **OPINION AND ORDER**

**PUBLIC SERVICE COMMISSION  
and  
FOURTH AVENUE CORPORATION-LONG  
CORPORATION, JOINT VENTURE d/b/a  
SHADOW WOOD SUBDIVISION SEWER SERVICE**

**DEFENDANTS**

\* \* \* \* \*

This matter is before the Court on the Plaintiff's appeal from final order of the Defendant, the Public Service Commission ("the PSC"). The Court, having considered the arguments, and being otherwise sufficiently advised, makes the following findings.

**I. Background**

The Plaintiff is a non-profit, Kentucky corporation located in Jefferson County. The Plaintiff receives sewer services from Fourth Avenue, a utility regulated by the PSC. The Plaintiff filed a complaint against Fourth Avenue before the PSC, alleging that Fourth Avenue over-billed its sewer services for 13 years. Fourth Avenue based its rates on the number of bedrooms per unit. For instance, Fourth Avenue charged \$26.50 per month for a three-bedroom unit and \$19.90 per month for a two-bedroom unit. The Plaintiff complained that even though its facility contains 24 three-bedroom units and 144 two-bedroom units, Fourth Avenue billed the Plaintiff for 91 three-bedroom units and 77 two-bedroom units.

The PSC held a hearing on the matter in April 2001. At the hearing, the parties stipulated that they disputed the billing for 64 units, but they also agreed on the floor plans for these 64 units. Both parties presented additional evidence and called witnesses.

In an August 2001 Order, the PSC found that Fourth Avenue incorrectly billed three two-bedroom units as three-bedroom units and that the Plaintiff failed to meet its burden of proof regarding the remaining 61 units. The PSC further found that the Plaintiff could not recover all of the over-billed amounts for the three units because of the five-year statute of limitations period set forth in KRS 413.120(2).

The parties moved for a rehearing. Fourth Avenue's reasons for requesting the rehearing are not relevant here, but the Plaintiff wanted the rehearing because it disagreed with the burden of proof and statute of limitation findings. The PSC subsequently entered an order rejecting the Plaintiff's arguments. The PSC finalized the entire matter pursuant to a September 2002 final order.

After the final order was entered, the Plaintiff found new evidence that it believes is pertinent. The new evidence is the original building permits, which were found in the Jefferson County Archives. The Plaintiff subsequently appealed the PSC's final order to the Franklin Circuit Court, asking for additional evidentiary proceedings before the PSC and other relief. The Court upholds the final order.

## **II. Discussion**

### **A. Standard of Review**

A PSC order can be vacated or set aside only if it is unlawful or unreasonable. KRS 278.410(1). A PSC order is unlawful if it violates a state or federal statute or constitutional provision. *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, Ky.App., 785 S.W.2d

503, 510 (1990). A PSC order is unreasonable “only when it is determined that the evidence presented leaves no room for difference of opinion among reasonable minds.” *Energy Regulatory Comm’n v. Ky. Power Co.*, Ky.App., 605 S.W.2d 46, 50 (1980) (citing *Thurman v. Meridian Mut. Ins. Co.*, Ky., 345 S.W. 635 (1961)). The party challenging the order has the burden of proving unlawfulness or unreasonableness by “clear and satisfactory evidence.” KRS 278.430. This Court cannot “pass on the credibility of witnesses and the weight of the evidence” because those functions lie solely with the PSC. *Ky. Power*, 605 S.W.2d at 50. When dealing with issues of law, this Court may review them de novo without any deference to the agency. *Mill Street Church of Christ v. Hogan*, Ky.App., 785 S.W.2d 263, 266 (1990). Interpretation of a statute is a question of law and a reviewing Court is not bound by an agency’s interpretation of the statute. *See Halls Hardwood Floor Co. v. Stapleton*, Ky.App., 16 S.W.3d 327, 330 (1996).

## **B. PSC Jurisdiction**

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The Plaintiff believes it is entitled to relief for two reasons: 1) the newly discovered evidence and 2) the PSC’s misapplication of KRS 413.120(2). The Court disagrees.

### *1. The New Evidence*

The Plaintiff maintains that KRS 278.440 authorizes the Court to remand the case to the PSC. The statute states:

If any party satisfies the court that evidence has been discovered since the hearing before the commission that could not have been obtained for use at that hearing *by the exercise of reasonable diligence and will materially affect the merits of the case*, the court may remand the record and proceedings to the commission.

KRS 278.440 (emphasis added).

The problem with the Plaintiff’s argument is that it could have obtained the original building permits “by the exercise of reasonable diligence” for use at the hearing before the PSC. KRS 278.440. After the PSC entered the final order, a new board member for the Plaintiff

suggested that they search the official, public records for the building permits. Several members of the Plaintiff then visited some government offices, such as the Office of Deeds and Records. An employee at one of the offices suggested they check the Jefferson County Archives, where the permits were found. The parties do not contest that the permits are official, public records. Furthermore, the Court finds that looking for and obtaining such records constitutes the “exercise of reasonable diligence” under KRS 278.440. As such, the Plaintiff’s failure to search for and obtain the permits before the entry of the PSC’s final order prevents the Court from remanding the matter to the PSC.

The Plaintiff also argues that the PSC should have investigated and found the official records itself. Apparently the Plaintiff requested the PSC to investigate, and the Plaintiff claims that “it intended to rely” on the PSC’s investigation. Nevertheless, the Plaintiff does not argue that it relied on the PSC’s investigation. The PSC also retains the discretion to investigate. KRS 278.260(1) states that in complaints against utilities “the commission shall proceed . . . to make such investigation as it deems necessary or convenient.” The Plaintiff, furthermore, had the burden to prove its case before the PSC. *See Energy Regulatory Comm’n v. Ky. Power Co.*, Ky.App., 605 S.W.2d 46, 50 (1980). Hence, the Plaintiff’s argument fails.

2. *KRS 413.120(2)*

The Plaintiff argues that the PSC erred in limiting the Plaintiff’s ability to recover for Fourth Avenue’s over-billing to the five years before the date the Plaintiff brought its action. The PSC based this limitation on KRS 413.120(2), which states that “[t]he following actions shall be commenced within five (5) years after the cause of action accrued ... (2) [a]n action upon a liability created by statute, when no other time is fixed by the statute creating the

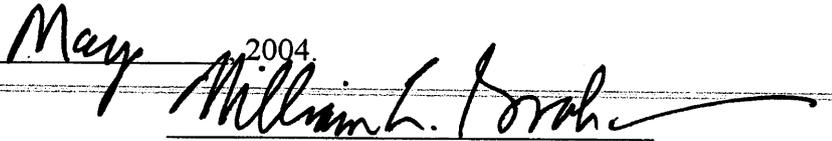
liability.” The PSC found that Fourth Avenue charged its rates pursuant to KRS 278.160.<sup>1</sup> Since the Plaintiff believed that Fourth Avenue charged its rates incorrectly, the PSC reasoned that “an action for violation of KRS 278.160 accrued when the utility allegedly improperly billed its customers.” PSC Order, August 14, 2001, at 7. The PSC concluded that because KRS 278.160 did not fix a time regarding liability, KRS 413.120(2) applied to fix the time to five years. The Court finds that the PSC applied the law correctly. Thus, the Court refuses to reverse or remand the matter to the PSC.

### III. Conclusion

ACCORDINGLY, the Court OVERRULES the Petitioner’s appeal and AFFIRMS the PSC’s final order.

This is a final and appealable Order and there is no just cause for delay.

SO ORDERED, this 21 day of May, 2004.

  
WILLIAM L. GRAHAM, JUDGE  
FRANKLIN CIRCUIT COURT  
DIVISION II

DISTRIBUTION:  
Hon. F. Larkin Fore  
Hon. Sarah M. Fore  
First Trust Centre  
Suite 700 North  
200 South Fifth Street  
Louisville, KY 40202

Hon. Deborah T. Eversole  
Hon. John E.B. Pinney  
P.O. Box 615  
Frankfort, KY 40601

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<sup>1</sup> KRS 178.160(2) states:

No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

Clay Long  
Fourth Avenue Corporation  
7420 Wycliffe Drive  
Prospect, KY 40059