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**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 11-CI-01700  
CIVIL ACTION NO. 11-CI-01757  
CIVIL ACTION NO. 12-CI-00037  
(CONSOLIDATED)**

**ENTERED**  
MAR 08 2012  
FRANKLIN CIRCUIT COURT  
SALLY JUMP, CLERK

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**KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.**

**PETITIONER**

**V.**

**ORDER**

**KENTUCKY PUBLIC SERVICE COMMISSION  
(Real Parties in interest: ATTORNEY GENERAL OF  
THE COMMONWEALTH OF KENTUCKY,  
KENERGY CORPORATION  
JACKSON PURCHASE ENERGY CORPORATION, and  
BIG RIVERS ELECTRIC CORPORATION)**

**RESPONDENT**

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These actions all involve challenges to the ruling of the Public Service Commission (hereafter "PSC" or "the Commission") regarding electricity rates approved for various utility companies (Big Rivers Electric Corporation, Energy Corporation and Jackson Purchase Energy Corporation). Kentucky Industrial Utility Customers, Inc. (KUIC) has challenged the rates requested by the utility companies, and the Attorney General has intervened at the Commission to protect the interests of consumers. KUIC filed this original action (No. 11-CR-1700) for judicial review of the ruling of the PSC under KRS 278.410, seeking to set aside the partial rate increase granted by the PSC. Big Rivers Electric Corporation ("Big Rivers") filed an action for judicial review of the PSC's original ruling (No. 11-CR-1757)<sup>1</sup>, seeking approval of the full amount of the rate increase requested under KRS 278.410. Finally, KUIC has also filed an original action (12-CR-37) seeking a writ of mandamus to prohibit the PSC from taking further action in the underlying case, in which a timely petition for rehearing was filed under KRS

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<sup>1</sup> 11-CR-0057 was assigned to Division II, but is re-assigned to Division I, pursuant to Local Rule 5 of the Franklin Circuit Court.

278.400. The PSC granted the petition for rehearing on December 8, 2011, and has set the matter for further proceedings at the Commission.

The procedural posture of these cases, and the underlying rate case at the PSC, requires some explanation. In the underlying rate case, the Commission, after a full hearing, granted in part and denied in part the rate increases sought by the utility companies. Within a week of the entry of the Commission's order, KUIC filed this action for judicial review under KRS 278.410. The statute provides that any party to administrative proceeding at the PSC may file a petition for rehearing within 20 days of the Commission's final order. Big Rivers timely filed such a petition for rehearing, but the petition for rehearing at the PSC was filed *after* KUIC had filed its action for judicial review in this Court.

KUIC argues that the filing of the Franklin Circuit Court action divested the Commission of jurisdiction to take action on the petition for rehearing. The Court finds a timely petition for rehearing before the Commission is analogous to a motion for relief from a judgment or order under the Rules of Civil Procedure. *See* CR 59. The Kentucky Supreme Court has held that, under CR 59.04 and 59.05, the Circuit Court has control, and thus jurisdiction, over its judgment including the right to amend a judgment for ten days after entry. *Johnson v. Smith*, 885 S.W.2d 944 (Ky. 1994). The time to amend is extended by a CR 59.01 motion filed within the ten-day time limit. In a case where a party files a notice of appeal and then another party files a timely motion to amend, still within the ten-day limit for filing a CR 59 motion, the notice of appeal will "relate forward to the time when the final judgment is entered disposing of all post-trial motions." *Id.* at 950. The fact that the notice of appeal was filed before the CR 59 motion does not divest the Circuit Court of *jurisdiction* to amend its own judgment within the ten-day limit because the filing of a notice of appeal is "not a matter of jurisdiction." *Id.* at 949. In this case,

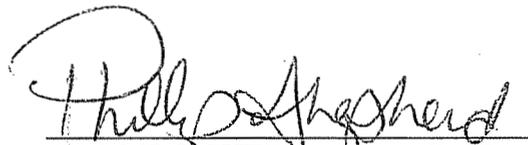
the filing of the action for judicial review did not divest the PSC of jurisdiction to rule on the petition for rehearing. In other words, one party, by filing an original action for judicial review under KRS 278.410, cannot pre-empt the right of other parties to seek a rehearing before the PSC under KRS 278.400.

The timely filing of the petition for rehearing at the Commission, as a practical matter, and as a matter of law, converted the Commission's order from a final to a non-final order. Accordingly, the appeal of the Commission's ruling in the underlying case is premature. This Court should not attempt to wade into a dispute which has not been finally resolved by the administrative agency with primary jurisdiction in this matter.

Accordingly, for the reasons stated above, IT IS ORDERED:

1. These three related civil actions (11-CI-1700, 11-CI-1757, and 12-CI-0037) are hereby CONSOLIDATED under Local Rule 5 of the Franklin Circuit Court, and No. 11-CI-001757 is TRANSFERRED from Division 2 to Division 1.
2. These actions are DISMISSED WITHOUT PREJUDICE and REMANDED to the Public Service Commission for final adjudication under its statutory and regulatory authority to consider and rule on the petition for rehearing under KRS 278.400.

So ORDERED this the 7th day of March, 2012.

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

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