

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE UNION LIGHT, HEAT AND POWER)	
COMPANY'S MOTION FOR EXTENSION)	CASE NO. 2004-00403
OF FILING DATE AND CONTINUATION)	
OF ITS CURRENT RIDER AMRP RATES)	

O R D E R

This proceeding arises out of the motion filed by The Union Light, Heat and Power Company ("ULH&P") on October 4, 2004 in Case No. 2001-00092.¹ The Attorney General, by and through his Office of Rate Intervention ("Attorney General"), was granted intervention on October 27, 2004. ULH&P requests that the Commission extend the date for filing its next gas rate case up to 6 months and continue the current Accelerated Mains Replacement Program Rider ("AMRP Rider") rates through the effective date of such new rates.

The parties have filed briefs supporting their respective positions. Both presented oral arguments to the Commission in which they addressed: (a) the merits of ULH&P's motion to amend the filing date of its next general rate case; (b) the Commission's authority to amend the required date since the Order directing the filing date is the subject of an action for review before the Franklin Circuit Court; and (c) the

¹ Case No. 2001-00092, Adjustment of Gas Rates of The Union Light, Heat and Power Company, is closed and is presently on appeal in the Franklin Circuit Court. Since that case is on appeal, this case was opened to address ULH&P's motion.

Commission's authority to amend, by our Order of May 24, 2002 in Case No. 2002-00107, the stated deadline for filing an application.

BACKGROUND

In Case No. 2001-00092, ULH&P indicated that it had begun an accelerated 10-year construction program designed to replace all the bare steel and cast iron pipe on its system. Due to the financial impact this system improvement would have on ULH&P, it proposed a tracking mechanism, the AMRP Rider, to recover the costs of the improvement on a timelier basis than that permitted by traditional rate-making. Finding that the system improvement was in the public interest and that a tracking mechanism was appropriate, we approved an AMRP Rider for a 3-year period. We ordered ULH&P to file an application to adjust the AMRP Rider rates by March 31 of each of the 3 years. While we stated that we would attempt to process the AMRP Rider applications within 60 days so that the rates would be effective by June 1 of each year, we acknowledged that our review could extend beyond 60 days.² We instructed ULH&P that continuance of the Rider beyond the approved 3 years would require the filing of a general rate application for rates effective by June 1, 2005.³ We stated that this date would "allow ULH&P the opportunity to submit three AMRP Rider filings and allow the mechanism to operate for 3 years."⁴

² Case No. 2001-00092, The Adjustment of Gas Rates of The Union Light, Heat and Power Company (Ky. PSC Jan. 21, 2002) at 79.

³ Case No. 2001-00092, The Adjustment of Gas Rates of The Union Light, Heat and Power Company (Ky. PSC Mar. 13, 2002) at 24.

⁴ Id. at 25.

On April 5, 2002, the Attorney General brought an action for review of our Order approving the AMRP Rider. This action for review is pending before the Franklin Circuit Court.⁵ He argued that the Commission lacks the statutory authority to approve such a Rider. He did not seek an injunction and ULH&P filed its first AMRP proceeding as required in March 2002.

In the first AMRP proceeding, the Commission's review extended beyond 60 days. To ensure that the AMRP Rider would remain in effect for the approved 3-year period, we granted a motion by ULH&P to extend the filing date of the next general rate case.⁶

DISCUSSION

In its present motion, ULH&P requests that the Commission extend the time for filing its next gas rate case up to 6 months and continue the current AMRP Rider rates through the effective date of such new rates. In support of its request, it states that it is considering the filing of a forecasted test period and that an extension in the filing date would enable it to utilize Cinergy Services, Inc.'s new software; incorporate company-wide changes in its budgeting, forecasting, and financial reporting processes; present budgeted data based on a current budget; and present forecasted data that contains the same assumptions and methodologies used in the forecast prepared by management, as the Commission requires. It also states that allowing it to continue the current AMRP

⁵ A.B. Chandler v. Pub. Serv. Comm'n, No. 02-CI-00499 (Franklin Cir. Ct. Ky. filed April 5, 2002).

⁶ Case No. 2002-00107, An Adjustment of Rider AMRP of The Union Light, Heat and Power Company (Ky. PSC May 24, 2002) at 2.

Rider rates through the requested period would avoid possible customer confusion that could arise if the charge that has already been approved by the Commission is removed from bills and then later rolled into rates and charged to customers again.

The Attorney General opposes the request. He argues that the AMRP Rider is illegal and should not be extended. He further argues that ULH&P has had ample time to prepare for its next rate case and that the circumstances presented by ULH&P do not justify granting an extension of time.

As to whether the Commission has the authority to amend the Order on appeal, both parties agree that the Commission had the requisite authority to grant, in Case No. 2002-00107, the motion to extend the filing date, but disagree on the Commission's authority to extend that filing date in this case. ULH&P argues that KRS 278.390 authorizes the Commission to modify its Orders even when such Orders have been properly appealed.⁷ It further argues that granting its requested relief constitutes a ministerial act and that the Commission has "inherent ability to issue ministerial type Orders modifying its previous Orders even when an appeal has been taken."⁸

The Attorney General contends that the Commission has "ongoing jurisdiction over the utilities that is required to address the changing circumstances of the utilities as substantial changes occur."⁹ He states that the Commission's decision to extend the filing date in Case No. 2002-00107 specifically addressed a change in circumstances

⁷ Transcript of Evidence at 10.

⁸ Id. at 12.

⁹ Id. at 17.

and was appropriate under our “ongoing jurisdiction.”¹⁰ He disagrees that the situation presented by ULH&P in this application is a change in circumstances that warrants an extension. He further disagrees that ULH&P’s request qualifies as a ministerial change. He states that “ministerial changes are . . . nunc pro tunc types of Orders correcting clerical errors.”¹¹

We have reviewed the arguments regarding jurisdiction and disagree with ULH&P’s argument that the Commission continues to have jurisdiction over its Orders unless the Order is suspended or vacated in whole or in part by an order or decree of a court of competent jurisdiction. Generally a lower tribunal loses jurisdiction to amend or modify a decision once that decision is appealed. Johnson Bonding Co. v. Ashcroft, Ky., 483 S.W.2d 118 (1972) (“[t]he general rule, with certain exceptions, is that the trial court loses jurisdiction over matters that have been appealed until mandate has issued.”); City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990) (“[a] notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court”).

We also disagree that ULH&P’s request involves a “ministerial act.” Ministerial acts are by definition acts that involve “obedience to instructions or laws instead of discretion, judgment, or skill.” Black’s Law Dictionary 1011 (7th ed. 1999). 2 Am.Jur. 2d Administrative Law § 64 (1994), A ministerial duty is defined as “one in respect to which nothing is left to discretion.” 2 Am.Jur. 2d Administrative Law § 60 (May, 2004), ULH&P is requesting that the Commission modify its previous Order. It requests that

¹⁰ Id. at 18.

¹¹ Id. at 17.

the Commission extend the operation of the AMRP Rider beyond the period of time previously found reasonable and that the Commission change its directive regarding the filing of the next rate case. Clearly these actions involve judgment and discretion.

With regard to our decision in Case No. 2002-00107, we find our decision to grant the extension of time distinguishable from the extension of time ULH&P requests herein, and further find that our action was within our jurisdiction. The court in Garnet v. Oliver, 252 Ky. 25, 45 S.W.2d 815 (1931) held:

[A]n appeal does not necessarily deprive a lower court of all jurisdiction, so as to prevent absolutely any action . . . on the contrary, the case is often regarded as pending in the court of original jurisdiction for the purposes of proceedings . . . concerning collateral or incidental matters necessary for the preservation of the fruits of the ultimate judgment, or affecting the status in quo of the parties.

(emphasis added).

The Commission specifically stated in its January 31, 2002 Order in Case No. 2001-00092 that we would:

[N]eed at a "minimum a 60-day review period . . . for each annual revision of the AMRP Rider. . . . However, because a hearing will be necessary, and because the time needed for review of the filing may be extensive, the Commission will reserve the option of extending the review period.

Order at 78-79. Case No. 2002-00107 was the first of the three approved AMRP Rider proceedings. As contemplated by the Commission, it was necessary for us to extend our review beyond 60 days. As a result of our extended review, the AMRP Rider rates would not have gone into effect as of June 1, 2002 and ULH&P would not have had the opportunity to operate the AMRP Rider for 3 full years as approved by the Commission. Our decision granting the extension of the filing date in that case allowed ULH&P the

opportunity to operate the AMRP Rider for the approved period of time and maintained the Commission's directive that, if ULH&P wished to continue the AMRP Rider, it would have to file a new general rate case at the end of the 3-year period. Unlike ULH&P's present request, which would modify our previous Order by extending the Rider beyond the previously authorized period, our decision in Case No. 2002-00107 did not modify a decision on appeal; it merely preserved the fruits of the ultimate judgment and maintained the status quo of the parties.

CONCLUSION

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that the Attorney General's action for review of our decision in Case No. 2001-00092 deprives this Commission of jurisdiction to entertain ULH&P's motion. Therefore, we find that the case should be dismissed.

IT IS THEREFORE ORDERED that this case is dismissed for lack of jurisdiction and is removed from the Commission's docket.

Done at Frankfort, Kentucky, this 27th day of January, 2005.

By the Commission

ATTEST:



Executive Director