

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BIG RIVERS ELECTRIC)	CASE NO.
CORPORATION FOR A GENERAL)	2011-00036
ADJUSTMENT IN RATES)	

O R D E R

By Order entered December 8, 2011, the Commission granted a petition filed by Big Rivers Electric Corporation ("Big Rivers"), pursuant to KRS 278.400, for a rehearing on four issues set forth in our November 17, 2011 Order ("Rate Order") granting in part Big Rivers' application for a rate increase. The December 8, 2011 Order ("Rehearing Order") directed Big Rivers to file testimony by January 5, 2012, and stated that an informal conference should be convened within 10 days thereafter to establish a procedural schedule for processing the rehearing. On December 14, 2011, the Commission on its own motion issued an Order amending nunc pro tunc the Rate Order by changing the effective date of the new rates set forth in the Rate Order.

Also on December 14, 2011, Kentucky Industrial Utility Customers, Inc. ("KIUC") filed a motion and supporting memorandum requesting the Commission to dismiss the rehearing and vacate its Rehearing Order for lack of jurisdiction. KIUC states that it filed an appeal with the Franklin Circuit Court prior to Big Rivers filing a petition for rehearing here, and that KIUC's earlier filed appeal divests the Commission of jurisdiction to consider any issue raised on rehearing by Big Rivers.

On December 20, 2011, the Commission issued an Order establishing a briefing schedule for the parties to file response memoranda of law on the issue of jurisdiction raised by KIUC, and providing KIUC an opportunity to file a reply memorandum. Responses were filed by Big Rivers and by one of the intervenors, the Attorney General's Office of Rate Intervention ("AG"), and a reply was filed by KIUC. On January 13, 2012, the Commission issued an Order stating that all briefs had been filed, that KIUC's motion to dismiss for lack of jurisdiction now stands submitted to the Commission for a decision, and that no informal conference would be convened regarding a procedural schedule for processing this rehearing until the Commission adjudicates the motion to dismiss.

POSITION OF THE PARTIES

KIUC's motion to dismiss argues that the Commission lost jurisdiction to grant Big Rivers a rehearing once KIUC filed its appeal to the Franklin Circuit Court on December 1, 2011. KIUC cites in support of its position a 2005 Order of the Commission in Case No. 2004-00403 involving a motion by The Union Light, Heat and Power Company ("ULHP") to extend a filing date relating to its Accelerated Main Replacement Program Rider ("AMRP").¹ In finding no jurisdiction to grant the motion in that ULHP case, the Commission stated that, "[g]enerally a lower tribunal loses jurisdiction to amend or modify a decision once that decision is appealed." KIUC also cites to two other Orders where the Commission declined to act on an issue that was

¹ Case No. 2004-00403, *The Union Light, Heat and Power Company's Motion for Extension of Filing Date and Continuation of its Current Rider AMRP Rates* (Ky. PSC Jan. 27, 2005) at 5. (Although KIUC cites to this Order as being dated December 7, 2005, the Commission's records indicate that the cited Order was dated January 27, 2005).

pending judicial review: (1) one entered in 1996 in a review of Kentucky Utilities Company's ("KU") environmental surcharge, Case No. 1995-00445;² and (2) the other entered in 2009 in a formal complaint filed against Kentucky-American Water Company ("Kentucky-American") in 2009-00096.³

In response to KIUC's motion to dismiss, Big Rivers argues that it has a statutory right under KRS 278.400 to request a rehearing within 20 days after service of the Rate Order, and that neither its right to request a rehearing nor the Commission's authority to grant a rehearing is conditioned on the absence of an appeal by another party. Big Rivers asserts that under rules of statutory construction, a party's right under KRS 278.410 to file an appeal of a Commission Order must not be read as to extinguish another party's right under KRS 278.400 to timely request rehearing of that same Order. Due to KIUC's outstanding challenge to the Commission's jurisdiction to adjudicate Big Rivers' issues on rehearing, Big Rivers states that it filed at the Franklin Circuit Court what it calls a "protective appeal" raising the same issues in that forum that are pending rehearing in this case. Finally, Big Rivers discusses the authorities cited by KIUC and the reasons why they do not support the lack of jurisdiction position asserted by KIUC.

The AG filed a response which he characterizes as "comments regarding the Commission's continuing jurisdiction in this matter."⁴ In that filing, the AG stated that he neither filed a motion for rehearing with the Commission nor filed an appeal in the

² Case No. 95-445, *An Examination By The Public Service Commission Of The Environmental Surcharge Mechanism Of Kentucky Utilities Company As Billed From February 1, 1995 to July 31, 1995* (Ky. PSC Mar. 6, 1996) at 3.

³ Case No. 2009-00096, *Chris Schimmoeller and Connie Lemley v. Kentucky-American Water Company* (Ky. PSC Nov. 24, 2009).

⁴ AG Response at 1.

Franklin Circuit Court. He has, however, filed Answers in the Franklin Circuit Court in the appeals filed by KIUC (Civil Action No. 11-CI-1700) and by Big Rivers (Civil Action No. 11-CI-1757). The AG further stated that he believes the substantive issues underlying the Rate Order are complex, and since appeals have already been filed in Franklin Circuit Court, the interests of judicial economy would be best served by allowing Franklin Circuit Court to immediately hear all contested issues arising from the Rate Order, rather than proceeding with a rehearing at the Commission. He further stated that he believes both appeals at Franklin Circuit Court should be consolidated into one division.⁵

KIUC filed a reply in support of its motion to dismiss. KIUC asserts that under the plain language of KRS 278.410, a party affected by a Commission Order is authorized to challenge that Order in the Franklin Circuit Court at any of three different times: (1) within 30 days after service of the order; (2) within 20 days after an application for rehearing has been denied by operation of law; or (3) within 20 days after service of a final order on rehearing when the Commission has granted rehearing. KIUC argues that, under the principles of statutory construction as set forth in KRS 446.080(4), “[a]ll words and phrases shall be construed according to the common and approved usage of language” KIUC further argues that the plain meaning of statutes controls when interpreting statutory language and that only when there is ambiguity on the face of a statute may the Commission look to extrinsic references to aid in the construction of a statute.

⁵ The Franklin Circuit Court assigned KIUC’s appeal, Civil Action No. 11-CI-1700, to Division I; while it assigned Big Rivers’ appeal, Civil Action No. 11-CI-1757, to Division II.

COMMISSION FINDINGS

Based on a review of the motion to dismiss, the positions of the parties, and being otherwise sufficiently advised, the Commission finds that the real issue before us is whether Big Rivers' statutory right under KRS 278.400 to request a Commission rehearing of the Rate Order was extinguished once KIUC exercised its statutory right under KRS 278.410(1) to file an appeal in the Franklin Circuit Court. Thus, if KIUC's first filed appeal of the Rate Order did extinguish Big River's right to request a rehearing, KIUC is correct in its assertion that the Commission now has no jurisdiction to rehear the Rate Order.

The Commission will begin its analysis by reviewing the controlling provisions of KRS Chapter 278. KRS 278.040(2) sets out the scope of the Commission's jurisdiction, which "shall extend to all utilities in this state." The legislative mandate set forth in KRS 278.040(1) is that the Commission "shall regulate utilities and enforce the provisions of this chapter." Any findings of the Commission "shall be in writing and shall be entered on the records of the commission." KRS 278.370. Once the Commission has made a final determination, any party to the proceeding has a statutory right to ask the Commission for a rehearing. That right, set forth in KRS 278.400, provides as follows:

After a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty (20) days after the service of the order, apply for a hearing with respect to any of the matters determined. Service of a commission order is complete three (3) days after the date the order is mailed. The application shall specify the matters on which a rehearing is sought. The commission shall either grant or deny the application for rehearing within twenty (20) days after it is filed, and failure of the commission to act upon the application within that period shall be deemed a denial of the application. Notice of the hearing shall be given in the same manner as notice of an original hearing. Upon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the

former hearing. Upon the rehearing, the commission may change, modify, vacate or affirm its former orders, and make and enter such order as it deems necessary.

In addition, once the Commission has made a final determination, any party to the proceeding has a statutory right under KRS 278.410(1) to challenge the Commission's Order in court:

Any party to a commission proceeding or any utility affected by an order of the commission may, within thirty (30) days after service of the order, or within twenty (20) days after its application for rehearing has been denied by failure of the commission to act, or within twenty (20) days after service of the final order on rehearing, when a rehearing has been granted, bring an action against the commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable. Service of a commission order is complete three (3) days after the date the order is mailed. Notice of the institution of such action shall be given to all parties of record before the commission.

Subsequent sections of KRS Chapter 278 specify the manner of designating the Commission's record for use by the court (KRS 278.420), the burden of proof before the court (KRS 278.430), the limitations on the evidence to be heard by the court (KRS 278.440), and the scope of the court's authority with respect to a Commission Order and the right to a further appeal (KRS 278.450).

It is upon the basis of this statutory scheme in general, and KRS 278.410(1) in particular, that KIUC claims its appeal to the Franklin Circuit Court extinguished Big Rivers' right under KRS 278.400 to request a rehearing by the Commission. KIUC asserts that both Commission precedent and rules of statutory construction clearly show that Big Rivers' request for rehearing was filed too late for the Commission to have acquired jurisdiction over the rehearing request.

The precedent cited by KIUC includes our 2005 Order in the ULHP AMRP Case No. 2004-00403. In that case, on October 4, 2004, ULHP filed a motion to modify a

Commission Order that had been entered over two and a half years earlier, on March 13, 2002. The March 13, 2002 Order had been appealed in 2002 by the AG within the time limits set forth in KRS 278.410(1), and that appeal was still pending when the motion to modify was filed in late 2004. The Commission declined to rule on ULHP's motion, stating that the Commission had no jurisdiction to modify an Order that had been entered over two years earlier and was still on appeal to the Franklin Circuit Court. Thus, that case did not address the issue of whether a party's right to request rehearing within the 20-day window set forth in KRS 278.400 must yield to another party's earlier filed appeal of that same Order.

In Case No. 95-455, KIUC was an intervenor and it argued that KU should immediately begin refunding certain environmental revenues that KU had collected in accordance with the terms of a Commission Order entered in a prior case, Case No. 93-465. That prior case had been appealed to the Franklin Circuit Court, and that Court reversed the Commission's Order and remanded Case No. 93-465 back to the Commission for further proceedings. However, the Franklin Circuit Court decision in Case No. 93-465 was pending appellate review at the time KIUC argued in Case No. 95-455 that refunds should be made. The Commission declined KIUC's request to require refunds in Case No. 95-455, finding that due to the appellate review, the Franklin Circuit Court decision was not final and Case No. 93-465 had not yet been remanded back to the Commission for further proceedings. Thus, the issue addressed in the KU environmental surcharge case was whether the Commission should implement the holding of a non-final judicial decision by immediately requiring refunds or await the issuance of a final judicial decision at the conclusion of the appellate process. The Commission did not address the issue of whether the pending judicial appeal deprived the Commission of jurisdiction to exercise any of its statutory authority under KRS Chapter 278.

The issue addressed in the Kentucky-American case is also very different from that raised by KIUC in the instant case. There, the Commission had granted Kentucky-American authority to construct a new water treatment plant and water transmission line by Order entered April 25, 2008 in Case No. 2007-00134. Thereafter, a rehearing before the Commission was requested and denied, and an appeal to the Franklin Circuit Court was subsequently filed after the Commission denied rehearing. Over eight months after the appeal was filed, two individuals requested in writing that the Commission re-examine its earlier decision to approve the construction. The Commission treated the requests of these two individuals as one complaint, which was docketed as Case No. 2009-00096. Kentucky-American then filed a motion to dismiss the complaint based on two grounds, one of which was that the Commission lacked jurisdiction to reopen Case No. 2007-00134 to amend or modify that prior Order because the Order was then pending review by the Franklin Circuit Court.

In granting Kentucky-American's motion to dismiss, the Commission's November 24, 2009 Order stated that to the extent that the complainants were requesting to reopen Case No. 2007-00134, the Commission had no jurisdiction to do so:

"While an action for review of the Commission's Order of April 25, 2008 is pending before a court of competent jurisdiction, the Commission is without jurisdiction to reopen Case No. 2007-00134 to reconsider arguments made in that proceeding or otherwise modify its Order of April 25, 2008."⁶

However, the issue in the instant case is not whether the Commission has jurisdiction to reopen a case months after it was closed and appealed to the Franklin Circuit Court. Rather, the issue here is whether the Commission has jurisdiction to grant a rehearing that was timely filed in accordance with the statutory scheme set forth in KRS 278.400.

⁶ Case No. 2009-00096, *Chris Schimmoeller and Connie Lemley v. Kentucky-American Water Company* (Ky. PSC Nov. 24, 2009) at 8.

While KIUC argues that the statute authorizing its appeal to the Franklin Circuit Court, KRS 278.410(1), should be read in isolation from all other provisions of KRS Chapter 278, the Commission finds no merit in that argument. While it is true that, when read on a stand-alone basis, the plain language of KRS 278.410(1) is clear and unambiguous, it is equally true that the plain language of the rehearing statute, KRS 278.400, is just as clear and unambiguous. For the Commission to accept KIUC's argument, we would have to find that the General Assembly did not mean what it said when it granted a party 20 days to request rehearing under KRS 278.400. While both KIUC and Big Rivers have cited to numerous court decisions in support of their respective positions on whether an appeal by one party terminates the right to a rehearing by another party, none of those cases involve a statutory right to a rehearing before an administrative agency. Rather, those cases involve the issue of whether an appeal to a higher court by one party terminates another party's right to invoke a court-created rule providing for a rehearing by the lower court. In the cited cases, the right under the Kentucky Constitution to one appeal from a judicial decision has always been held to supersede a court rule creating a right to a rehearing. The situation in the instant case is not analogous.

As our highest court stated in *Commonwealth ex rel. Stephens v. South Central Bell*, 545 S.W.2d 927, 931 (Ky. 1976), "Chapter [278] presents a unified and symmetrical scheme for the exercise of the legislative power of ratemaking." Under the facts now before us, there is a clear conflict between KRS 278.400 and KRS 278.410(1) which must be resolved by application of rules of statutory construction.

In *County of Harlan v. Appalachian Healthcare*, Ky. 85 S.W.3d 607 (Ky. 2002), the Court stated as follows:

General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must

look to the provisions of the whole statute and its object and policy. The power granted by a statute is not limited to that which is expressly conferred but also includes that which is necessary to accomplish the things which are expressly authorized. In interpreting a statute, this court must be guided by the intent of the legislature in enacting the law. No single word or sentence is determinative, but the statute as a whole must be considered. In order to effectuate the legislative intent, words may be supplied, omitted, substituted or modified. The purpose is to give effect to the intent of the legislature. KRS 446.080 provides that all statutes shall be liberally construed to carry out the intent of the legislature.

(*Id.* at 611).

As our Supreme Court recently stated when reviewing a Commission statute in conjunction with a planning and zoning statute in KRS Chapter 100, "Courts must try to harmonize and give effect to all sections of a statute" *Public Service Comm'n v. Shadoan*, 325 S.W.3d 360, 365 (Ky. 2010) (internal citation omitted). In granting parties to Commission proceedings both a statutory right to a rehearing (KRS 278.400) and a statutory right to appeal (KRS 278.410(1)), the General Assembly must be presumed to have intended that parties could choose which right to exercise without having that right extinguished by the actions of another party. Only by reading KRS 278.400 as granting a party the full 20 days to request a rehearing, followed by a full 20 days for the Commission to act on that request, can the statutes be read as intended by the General Assembly. This is particularly so in light of the fact that the General Assembly afforded a longer time period of 30 days for a party to file an appeal under KRS 278.410(1). Only this reading preserves the statutory right for Big Rivers to request rehearing, while also preserving the statutory right for KIUC to file an appeal at the conclusion of the rehearing, if it so chooses.

The issue of when an administrative agency loses jurisdiction over its orders is one that can only be answered by a detailed review of the agency's statutory authority. In

discussing the general issue of agency authority to modify its orders, the Kentucky Court of Appeals stated that:

The confusing factor that intertwines the power of the court with that of an administrative agency is the fact that courts lose jurisdiction over cases after the lapse of certain periods of time or the occurrence of certain events, most of which are covered either by statute or by rules of the court. Such is not true of many administrative agencies, and it is almost impossible to ascertain with any degree of certainty the time when an administrative order becomes so final that the agency involved no longer has jurisdiction over the question involved.

Phelps v. Sallee, 529 SW2d 361, 365 (Ky. App. 1975).

Despite what might be confusing with respect to the authority of other administrative agencies, the General Assembly has very clearly and explicitly authorized the Commission to have continuing jurisdiction over its orders. That authority, set forth in KRS 278.390, provides that:

Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in the order, or until revoked or modified by the commission, unless the order is suspended, or vacated in whole or in part, by order or decree of a court of competent jurisdiction.

The plain meaning of this statute was acknowledged by our judiciary when it stated that, "KRS 278.390 clearly provides that the appellee commission retains authority to modify its orders until they are suspended or vacated by a court of competent jurisdiction." *Mike Little Gas Co. v. Public Service Comm'n.*, 574 SW2d 926, 927 (Ky. App. 1978).

Here, the Rate Order has not been suspended or vacated by a court. Only by allowing the full 20 days for requesting rehearing can KRS 278.400 and KRS 278.410(1) be construed in harmony. As the Court stated in *Spencer v. Estate of Spencer*, 313 S.W. 3d 534, 541 (Ky. 2010), "We presume, of course, that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to

harmonize with related statutes.” Further, in *Commonwealth of Kentucky v. Phon*, 17 S.W.3d 106, 107-108 (Ky. 2000), the Court stated:

When there appears to be a conflict between two statutes, as here, a general rule of statutory construction mandates that the specific provision take precedence over the general. Moreover, it is the Court’s duty to harmonize the law so as to give effect to both statutes. Finally, statutes should be construed in such a way that they do not become meaningless or ineffectual. [Footnotes omitted].⁷

When these rules are applied to the statutes at issue, we are unable to find, as KIUC urges, that the General Assembly intended to create a “race to the courthouse,” whereby one party has the unrestricted right to extinguish another party’s right to request rehearing. The more logical reading of KRS 278.400 is that a party has a right to request rehearing within 20 days, and the Commission may grant that rehearing, independent of the actions of another party to file an appeal under KRS 278.410(1).

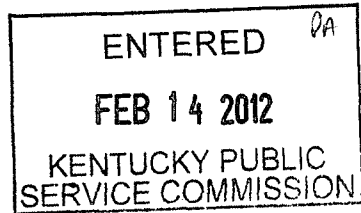
Finally, the Commission agrees with the AG’s assertion that the issues underlying the Rate Order are complex, as are the issues raised by KIUC’s pending motion to dismiss. However, KRS 278.040(1) states in clear and unambiguous terms a mandate by the General Assembly that “[t]he Public Service Commission shall regulate utilities and enforce the provisions of this chapter.” While it may be inevitable that all of these issues will be reviewed at some point in time by the Franklin Circuit Court, the Commission would be in violation of its statutory mandate to “enforce the provisions of this chapter [KRS 278]” if we now decline to address any of the issues before us simply to achieve “judicial economy” as recommended by the AG.

⁷ *Id.* at p. 5.

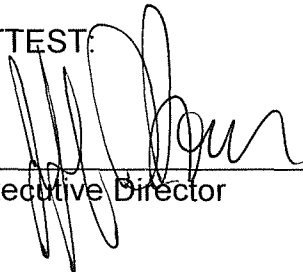
IT IS THEREFORE ORDERED that:

1. KIUC's motion to dismiss is denied.
2. Within ten days of the date of this Order, Commission Staff shall issue a notice scheduling an informal telephonic conference to discuss a procedural schedule for processing this rehearing.

By the Commission



ATTEST:



Executive Director

Case No. 2011-00036

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