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January 15, 2008

Robert Amato
Acting Executive Director
Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601

Re: Case No. 2007-00405

Dear Bob:

Attached is the copy of the Court of Appeals case referenced on page 4 of Parksville's Reply filed yesterday, which was not attached as indicated. A copy has been provided to counsel for Danville.

Very truly yours,

John N. Hughes

Attorney for Parksville Water District

Attachment

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City Of **Russellville** v. Public Service Com'n of Kentucky
Ky.App.,2005.
Only the Westlaw citation is currently available.
Unpublished opinions shall never be cited or used as authority in any other case in any court of this state. See KY ST RCP Rule 76.28(4).

Court of Appeals of Kentucky.
CITY OF **RUSSELLVILLE**, Kentucky, Appellant
v.
PUBLIC SERVICE COMMISSION OF KENTUCKY; East Logan **Water** District, Incorporated; and North Logan **Water** District, Appellees.
No. 2003-CA-002132-MR.

Feb. 18, 2005.
Discretionary Review DeniedMarch 15, 2006.

Appeal from Franklin Circuit Court, Action No. 02-CI-01177; William L. Graham, Judge.

Charles Robert Hedges, **Russellville**, KY, for appellant.
Deborah T. Eversole, John E.B. Pinney, Public Service Commission, Frankfort, KY, for appellee, Public Service Commission.
John N. Hughes, Frankfort, KY, for appellees, East Logan and North Logan **Water** Districts.

Before DYCHE, GUIDUGLI and McANULTY, Judges.

OPINION

GUIDUGLI, Judge.
*1 The City of **Russellville** appeals from an opinion and order of the Franklin Circuit Court affirming a final order of the Kentucky Public Service Commission. The Public Service Commission's order voided a rate increase on the sale of **water** by **Russellville** to various **water** districts. For the reasons stated herein, we affirm the opinion and order of the Franklin Circuit Court.

The City of **Russellville** provides **water** service to local retail customers and to several **water** districts. On May 24, 1999, the city council of **Russellville** passed an ordinance seeking to increase its **water** and sewer service rates. On March 20, 2001, it filed a cost-of-service study with the Public Service Commission ("PSC") for the purpose of justifying a rate increase from $1.55 to $2.45 per 1,000 gallons of **water** sold. The **water** districts to which **Russellville** sold **water** received a copy of the study and a letter advising them of the proposed change.

On April 23, 2001, the PSC sent to **Russellville** a letter acknowledging receipt of the study. The letter included a copy of the study stamped with language indicating that the rate increase had been approved. A subsequent e-mail from the PSC to **Russellville** confirmed that **Russellville** was authorized to implement the proposed rate increase on or after April 21, 2001.

On July 9, 2001, the **water** districts filed a complaint with the PSC alleging that **Russellville** failed to comply with PSC regulations for rate increases. They also alleged that the proposed rate was violative of the parties' contract and did not represent the actual cost of service. Pending resolution of the complaint, the **water** districts established an escrow account into which the proposed increase was paid. On October 5, 2001, the PSC rendered an order stating that "it appears that **Russellville's** April 21, 2001 rate increase is filed pursuant to KRS 278.180."

On July 3, 2002, the PSC rendered a final order voiding the $2.45 rate. As a basis for the order, the PSC opined that **Russellville** failed to comply with KRS 96.355(1)(a), which it interpreted as requiring **Russellville** to enact an ordinance or otherwise approve the rate before filing a rate change (the " ordinance theory").

Russellville appealed to the Franklin Circuit Court. Upon taking proof, the court concluded that the PSC improperly interpreted KRS 96.355(1)(a) as requiring a city to follow specific procedural guidelines before filing for a rate change. It went on to find unlawful the PSC's requirement that **Russellville** enact an ordinance precisely identifying the proposed rate increase before applying for the increase, since no PSC regulation exists which requires this action. However, the circuit court affirmed the final order of the PSC based upon several other legal reasons which will be addressed below. This appeal followed.

Russellville argues that the trial court erred in affirming the PSC's order voiding the rate increase. While noting that the trial court properly found the PSC's "ordinance theory" to be unsupported by the law, it argues that the court incorrectly concluded that the **water** districts were denied due process of law. **Russellville** also maintains that the new rate became effective on April 21, 2001, and cannot be changed retroactively by the PSC. In support of this argument, it points to the "filed rate doctrine", which precludes a collateral attack on rates filed with a regulatory agency. It seeks an order reversing the order of the Franklin Circuit Court and finding the April 21, 2001, rate to be effective until it was lawfully replaced by another rate on July 3, 2002.

***2** Having closely examined the record and the law, we find no basis for reversing the order of the Franklin Circuit Court. On **Russellville's** first claim of error, i.e., that the trial court erred in concluding that the **water** districts were denied due process of law, we find no error. The trial court found that **Russellville** failed to comply with the notice provisions of KRS 278.180 and 807 KAR 5:011(8), and that these violations resulted in harm to the **water** districts because they apparently did not believe that $2.45 per 1,000 gallons was the filed rate.

KRS 278.180 states,
(1) Except as provided in subsection (2) of this section, no change shall be made by any utility in any rate except upon thirty (30) days' notice to the commission, stating plainly the changes proposed to be made and the time when the changed rates will go into effect. However, the commission may, in its discretion, based upon a showing of good cause in any case, shorten the notice period from thirty (30) days to a period of not less than twenty (20) days. The commission may order a rate change only after giving an identical notice to the utility. The commission may order the utility to give notice of its proposed rate increase to that utility's customers in the manner set forth in its regulations.
(2) The commission, upon application of any utility, may prescribe a less time within which a reduction of rates may be made.

807 KAR 5:011 also sets forth a number of notice requirements, including the requirement that the districts receive notice of their right to intervene before the PSC to challenge the proposed rate.

The circuit court concluded that **Russellville's** notice to the **water** districts was not adequate and did not comport with the statutory and regulatory requirements. This conclusion is presumptively correct, and the burden rests with **Russellville** to overcome it. *City of Louisville v. Allen,* Ky., 385 S.W.2d 179 (1964). They have not met this burden. Though they cite to minutes of meetings indicating that the districts were aware of the possibility of a rate change, and contend that any statutory and regulatory violations were minor oversights, they do not direct out attention to anything in the record upon which we may conclude that the circuit court erred in determining that the statutory and regulatory notice requirements were not satisfied. And as the PSC properly notes, **Russellville** makes no claim that it filed the requisite information. As such, we find no error on this issue.

Russellville also argues that the rate approved by the PSC to be effective on April 21, 2001, was at all relevant times the "filed rate" and could not be changed retroactively by the PSC. It maintains that in June, 2001, the PSC accepted a formal tariff setting forth this rate, and that its October 5, 2001, order recognized that the rate was the filed rate for the service. **Russellville** relies on the filed rate doctrine, which precludes a collateral attack on rates filed with a regulatory agency. It argues that this doctrine requires a rate challenge to have effect, if at all, prospectively and not retroactively. It

argues that the PSC had no legal basis for its July 3, 2002, final order voiding the $2.45 rate, since the new rate already was final and therefore not subject to retroactive change.

***3** Having thoroughly reviewed this matter and especially, the oral arguments presented herein, it is obvious that the PSC and its employees are primarily responsible for the dilemma we find here. **Russellville** failed to comply with statutory and regulatory notice requirements. But the PSC erred in giving **Russellville** the perception that is proposed rate increase would be certified and would become the "filed rate." The PSC tariff review branch erred in issuing the April 21, 2001, letter which indicated "an accepted copy [of Contract filing No. C 62-6416 of wholesale rate increase to the districts] is enclosed for your files" because the letter also indicated that the "file tariff" pages setting out the rates to be charged to the districts were *not* attached. Without the "file tariff" pages enclosed, **Russellville** had failed to comply with the statutory and regulatory notice requirement and its proposed rate increase could not be approved. The PSC compounded it error by issuing the October 5, 2001, order which stated in relevant part:
Upon review of the record, it *appears* that **Russellville's** April 21, 2001 rate increase is the filed rate pursuant to KRS 278.160. Moreover, even if the technical notice requirements upon which [the **water** districts] rely apply to a city, failure to comply with them would not render a rate unfair, unjust, and unreasonable. Nevertheless, because [the **water** districts] object to the rate itself, as well as to the form of the notice they received, the disputed amounts should not at this time be paid directly to **Russellville**, particularly as it has suggested the creation of an escrow account. (Emphasis added).

Russellville maintains that once the PSC accepted and approved its request as the "filed rate", then nothing could be done to retroactively invalidate that rate. It relies heavily on *Chandler v. Anthem Ins. Companies, Inc.*, 8 S.W.3d 48 (Ky.App., 1999) , to argue that once a rate becomes the filed rate then that rate is not subject to collateral attack or retroactive change even if procured by unfair, false, misleading or deceptive practices. In the *Anthem* case, this Court defined filed rate and explained some of its history as follows:The insurance companies maintain that, even if the Attorney General's allegations are true, the "filed rate doctrine " shields them from liability. In general terms, the filed rate-or filed tariff-doctrine provides that tariffs duly adopted by a regulatory agency are not subject to collateral attack in court. This preclusion is said to ensure both that regulatory rates are nondiscriminatory (rate-payers who bring suit will not obtain rates more favorable than those who do not), and that the agency's "primary jurisdiction" in the area of its expertise is upheld. *Woodland Ltd. v. NYNEX Corp.*, [27 F.3d 17 (2nd Cir.1999)]. The doctrine received one of its earliest expressions in *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). In that case, a Minnesota manufacturer and shipper sought damages from an association of railroads for having collusively set excessive shipping fees in violation of the antitrust laws. The Supreme Court ruled that, even if the alleged conspiracy could be proved, the shipper had no cause of action for damages because the Interstate Commerce Commission had approved the allegedly excessive rates and had determined them to be reasonable and non-discriminatory. To recognize the plaintiff's claim, Justice Brandeis explained, would require a court to second-guess the Commission and would thus tend to undermine the regulatory scheme adopted by Congress.
***4** The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.
Keogh v. Chicago & Northwestern Ry., supra, at 163, 260 U.S. 156, 43 S.Ct. at 49, 67 L.Ed. 183 at (citation omitted). The purpose of the field rate doctrine, in other words,
Is to preserve the authority of the legislatively created agency to set reasonable and uniform rates and to insure that those rates are enforced, thereby preventing price discrimination.
Sun City Taxpayers' Association v. Citizens Utilities Company, 847 F.Supp. 281, 288 (1994) (citations omitted).
The filed rate doctrine, therefore,

Prohibits a ratepayer from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue.
Id. at 288.
...
We agree with the appellees that the filed rate doctrine although not heretofore applied in Kentucky by name, has nevertheless been recognized in Kentucky in principle. *See Boone County Sand and Gravel Company, Inc. v. Owen County Rural Electric Cooperative Corporation,* Ky.App., 779 S.W.2d 224 (1989) (holding that the appellant was liable for undercharges based upon the filed rate despite the appellee's apparent negligence in not charging the correct amount); *see also Big Rivers Electric Corporation v. Thorpe,* 932 F.Supp. 460, 464-65 (W.D.Ky.1996) (noting in the context of regulated utilities, that Kentucky's statutory and case law "clearly set[s] forth the underlying principles of the filed rate doctrine ...").

Anthem, 8 S.W.3d at 51-53. The *Anthem* Court concluded that the filed rate doctrine bars ratepayers from seeking damages for approved but allegedly improper rates.

We believe the real issue herein is whether or not **Russellville's** proposed rate increase became the filed rate. If it did, then the districts are bound by it even though it was improperly granted by the PSC. But our review does not lead us to the conclusion that the proposed rate actually became the filed rate.

The April 21, 2001, letter clearly states that the filed tariff pages setting out the rates to be charged was *not* attached. The statutory and regulatory scheme requires the tariff pages to be included for any increase request. Thus, we deem the April 21, 2001, letter as notice that the rate increase would be accepted *if and when***Russellville** complied with all mandatory regulations. Also, the October 5, 2001, order does not state that the April 21, 2001, rate increase *is* the filed rate pursuant to KRS 278.160, but only that it appears to be such. By using the word "appears" the order has no binding effect in effectuating the filed rate. We believe the use of the word "appears" clearly reflects the PSC admission of its mistake in issuing the letter prior to receiving the filed tariff pages and prior to **Russellville's** full compliance with the applicable laws and regulations. While we acknowledge that the PSC and not **Russellville** caused this regrettable situation in which either **Russellville** or the districts will suffer a substantial economic loss, we believe **Russellville's** failure to comply with its statutory and regulatory obligations and its failure to file the required tariff pages cannot be ignored. Had **Russellville** filed the necessary tariff pages with its application and then the PSC issued the April 21, 2001, letter without additional conditions to be fulfilled, the result would have been different.

***5** For the foregoing reasons, we affirm the opinion and order of the Franklin Circuit Court affirming the final order of the Kentucky Public Service Commission.

ALL CONCUR.
Ky.App.,2005.
City Of Russellville v. Public Service Com'n of Kentucky
Not Reported in S.W.3d, 2005 WL 385077 (Ky.App.)

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