

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

POLLITT ENTERPRISES, INC.,)	
WHITNEY CLARK POLLITT, INDIVIDUALLY,)	
AMANDA DEEANN POLLITT, INDIVIDUALLY,)	
AND)	CASE NO.
BASIL C. POLLITT, INDIVIDUALLY,)	2017-00120
D/B/A THE GAS GROUP, INC.)	
A/K/A THE GAS GROUP)	
<hr/>		
ALLEGED VIOLATIONS OF)	
KRS 278.020, KRS 278.160, KRS 278.140,)	
AND 807 KAR 5:006, Section 4(2))	

ORDER

Pollitt Enterprises, Inc. ("Pollitt Enterprises"), a Kentucky corporation that was administratively dissolved on November 2, 2010, by the Kentucky Secretary of State, is a natural gas distribution system operating a 22-mile natural gas pipeline in an area north of Richardsville, Warren County, Kentucky, ("Pollitt System"). Whitney Clark Pollitt ("Clark Pollitt") is the president and registered agent of Pollitt Enterprises, Inc. Amanda Deeann Pollitt ("Amanda Pollitt") is the vice-president of Pollitt Enterprises, Inc. Basil C. Pollitt d/b/a The Gas Group, Inc. a/k/a The Gas Group ("Basil Pollitt") was the former owner and operator of the Pollitt System. The Pollitt System, and its owners and operators, are subject to the regulatory and safety jurisdiction of the Commission pursuant to KRS 278.010(3)(b), KRS 278.040(2), KRS 278.990(1), and KRS 278.992(1).

Pursuant to KRS 278.040(2), the Commission has exclusive jurisdiction over the regulation of rates and service of utilities in this state. KRS 278.010(3)(b) defines a “utility” as:

The production, manufacture, storage, distribution, sale, or furnishing of natural or manufactured gas, or a mixture of the same, to or for the public, for compensation, for light, heat, power, or other uses.

The Commission regulates natural gas facilities pursuant to Title 807, Chapter 5 of the Kentucky Administrative Regulations, including 807 KAR 5:022, which prescribes the rules for performing gas utility service, and 807 KAR 5:023, which prescribes the rules for drug testing of gas utility employees. In addition, pursuant to KRS 278.495(2) and KRS 278.992(1), the Commission enforces the minimum safety standards adopted by the United States Department of Transportation pursuant to the federal pipeline safety laws, 49 U.S.C. Section 60101 et seq., and amendments thereto.

A person, partnership, or corporation cannot provide utility service to or for the public, or begin the construction of any facility for furnishing utility service to the public, until that person, partnership, or corporation has obtained a certificate of public convenience and necessity (“CPCN”) from the Commission.¹ Pursuant to KRS 278.020(6), no person or corporation can acquire or transfer ownership of or control any jurisdictional utility by asset sale, stock transfer, or otherwise, without prior approval of the Commission. Similarly, under KRS 278.020(7), no person or entity can acquire direct or indirect control of a jurisdictional utility without Commission approval. Further, any acquisition of control without prior authorization “shall be void and of no effect.”²

¹ KRS 278.020(1).

² KRS 278.020(7).

Under KRS 278.160(1), a utility is required to file with the Commission a schedule of rates collected by the utility and conditions of service enforced by the utility (“Tariff”). Additionally, pursuant to KRS 278.140 and 807 KAR 5:006, Section 4, each utility is required to file certain reports (“Reports”), which include annual reports of the utility’s gross earnings derived from intrastate business; gross annual operating revenue reports; annual financial and statistical reports; annual financial statement audit reports; quarterly reports of meter tests, number of customers, and amount of refunds; and annual reports of terminations for nonpayment of bills.

On April 14, 1999, the Commission opened an investigation into the Pollitt System that was then owned and operated by Basil Pollitt.³ In an Order dated September 2, 1999 (“September 2, 1999 Order”), the Commission found that Basil Pollitt violated KRS 278.020 by operating the Pollitt System without applying for or obtaining a CPCN, violated KRS 278.160 by failing to file a Tariff for the Pollitt System with the Commission, and violated several safety provisions in 807 KAR 5:022 and 807 KAR 5:023.⁴ The September 2, 1999 Order is attached as Appendix B. The Commission assessed a civil penalty against Basil Pollitt in the amount of \$25,750, and ordered Basil Pollitt to file with the Commission an application for a CPCN and a Tariff.⁵ Basil Pollitt failed to pay the civil penalty, apply for a CPCN, or file a Tariff as he was directed in the September 2, 1999 Order. On May 14, 2001, the Commission filed an

³ Case No. 99-130, *Basil C. Pollitt, Individually, d/b/a The Gas Group, Inc. a/k/a The Gas Group Alleged Violations of KRS 278.020, KRS 278.160, 807 KAR 5:022, Sections 14(5)(a), 14(5)(c)(2), 13(9), and 807 KAR 5:023, and 49 CFR 192.707(a), 192.707(d)(2), 192.615, and 49 CFR 199* (“Gas Group Alleged Violations”) (Ky. PSC April 14, 1999).

⁴ *Id.* at 3–4

⁵ *Id.* at ordering paragraphs 1–5.

action in Franklin Circuit Court to enforce the September 2, 1999 Order and for an injunction to terminate the operation of the Pollitt System and remove all customer gas meters.⁶ In an Order entered on March 2, 2004 ("March 2, 2004 Order"), Franklin Circuit Court awarded the Commission a judgment against Basis Pollitt in the amount of \$25,750, along with post-judgment interest at the rate of twelve percent per annum from date of judgment until paid, and issued a permanent injunction that required Basil Pollitt to terminate the flow and distribution of gas on the Pollitt System, and remove all customer meters on or before May 1, 2004. Franklin Circuit Court's March 2, 2004 Order is attached as Appendix C. Basil Pollitt subsequently appealed the matter. On October 14, 2005, the Kentucky Court of Appeals affirmed the lower court's ruling. The Court of Appeals Order is attached as Appendix D. To date, Basil Pollitt has not paid the civil penalty. Upon information and belief, Basil Pollitt never terminated the flow and distribution of gas on the Pollitt System.

On November 14, 2013, Commission Staff conducted an inspection to determine if the Pollitt System was in operation. Commission Staff confirmed that the Pollitt System was in operation and that several residential gas meters were turned on and active. Commission Staff spoke with a customer who stated that he was a customer and obtained natural gas from the Pollitt System. At that time, Commission Staff observed and photographed pipeline markers that identified Pollitt Enterprises as operator of the Pollitt System.

On January 11, 2017, Commission Staff again conducted an inspection to verify that the Pollitt System was in operation. Commission Staff verified that there were

⁶ *Public Service Comm'n v. Basil C. Pollitt*, Franklin Circuit Court, Civil Action No. 01-CI-00581 (filed May 14, 2001).

active customers from an inspection of meters, which were turned on and active, at eight locations. Commission Staff again observed several pipeline markers, which identified the operator of the Pollitt System as Pollitt Enterprises and provided a telephone number to call in case of emergency. On January 19, 2017, Commission Staff submitted to the Commission an Inspection Report, which is attached as Appendix E.

An examination of the Commission's records establishes that Basil Pollitt, Pollitt Enterprises, Clark Pollitt, and Amanda Pollitt have not filed an application to transfer or acquire ownership or control of the Pollitt System pursuant to KRS 278.020(6) or KRS 278.020(7). Further Basil Pollitt, Pollitt Enterprises, Clark Pollitt, and Amanda Pollitt have not filed an application or obtained a CPCN to operate the Pollitt System, have not filed a Tariff with the Commission, and have not filed the required Reports. According to the Inspection Report, it is highly probable that Pollitt Enterprises, Clark Pollitt, Amanda Pollitt, and Basil Pollitt are in violation of federal and state pipeline safety regulations. Due to the failure to obtain a CPCN or to request Commission approval of a transfer of ownership, the Commission was unaware of the continued operation of the Pollitt System and therefore has been unable to conduct safety inspections to ascertain whether the Pollitt System is operated in compliance with state and federal pipeline safety laws.

Based upon its review of the 2017 Inspection Report and being otherwise sufficiently advised, the Commission finds that *prima facie* evidence exists that Pollitt Enterprises, Clark Pollitt, Amanda Pollitt, and Basil Pollitt have failed to comply with KRS 278.020(1), KRS 278.020(6), KRS 278.020(7), KRS 278.160, KRS 278.140, and 807 KAR 5:006, Section 4(2). The Commission further finds that a formal investigation

should be conducted into the compliance of Pollitt Enterprises, Clark Pollitt, Amanda Pollitt, and Basil Pollitt with Franklin Circuit Court's March 2, 2004 Order to terminate gas service on the Pollitt System, and their compliance with state and federal pipeline safety laws.

The Commission, on its own motion, HEREBY ORDERS that:

1. Pollitt Enterprises, Clark Pollitt, Amanda Pollitt, and Basil Pollitt shall submit to the Commission, within 20 days of the date of this Order, a written response to the allegations contained in this Order and in the Inspection Report.

2. Pollitt Enterprises, Clark Pollitt, Amanda Pollitt, and Basil Pollitt shall appear on Wednesday, May 31, 2017, at 9:00 a.m. Eastern Daylight Time in Hearing Room 1 of the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky, for the purpose of presenting evidence concerning the alleged violations of KRS 278.020(1), KRS 278.020(6), KRS 278.020(7), KRS 278.160, KRS 278.140, and 807 KAR 5:006, Section 4(2), and Franklin Circuit Court's March 2, 2004 Order, and showing cause why they should not be subject to the penalties prescribed in KRS 278.990 and KRS 278.992 for these alleged violations.

3. The May 31, 2017 hearing shall be recorded by digital video recording only.

4. a. Pollitt Enterprises, Clark Pollitt, Amanda Pollitt, and Basil Pollitt pursuant to 807 KAR 5:001, are to file with the Commission the original and ten copies of the information requested in Appendix A to this Order. The information requested is due within 20 days of the date of this order.

b. Responses to requests for information shall be appropriately bound, tabbed and indexed, and shall include the name of the witness responsible for

responding to the questions related to the information provided, with a copy to all parties of record.

c. Each response shall be answered under oath or, for representatives of a public or private corporation or a partnership or association or a governmental agency, be accompanied by a signed certification of the preparer or person supervising the preparation of the response on behalf of the entity that the response is true and accurate to the best of that person's knowledge, information, and belief formed after a reasonable inquiry.

d. Any party shall make timely amendment to any prior response if it obtains information which indicates that the response was incorrect when made or, though correct when made, is now incorrect in any material respect.

e. For any request to which a party fails or refuses to furnish all or part of the requested information, that party shall provide a written explanation of the specific grounds for its failure to completely and precisely respond.

f. Any party filing a paper containing personal information shall, in accordance with 807 KAR 5:001, Section 4(10), encrypt or redact the paper so that the personal information cannot be read.

5. The Inspection Report in Appendix E to this Order is made a part of the record in this case.

By the Commission

ENTERED
MAR 15 2017
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Executive Director

Case No. 2017-00120

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2017-00120 DATED **MAR 15 2017**

1. Explain whether Basil Pollitt terminated the Pollitt System in compliance with the March 2, 2004 Order entered by Franklin Circuit Court.

2. Explain whether Basil Pollitt transferred assets related to the Pollitt System to Pollitt Enterprises, Clark Pollitt, or Amanda Pollitt. If the assets were transferred, provide documentation of the transaction.

3. Explain whether and how Pollitt Enterprises, Clark Pollitt, and Amanda Pollitt acquired ownership of the Pollitt System. If they acquired ownership of the Pollitt System, provide documentation of the transaction.

4. Explain whether Pollitt Enterprises, Clark Pollitt, and Amanda Pollitt operate the Pollitt System in compliance with the minimum safety standard adopted by the United States Department of Transportation pursuant to the federal pipeline safety laws, 49 U.S.C. Section 60101 et seq., and amendments thereto. If yes, provide copies of records dated January 1, 2012, to the current date prepared and retained in compliance with the minimum safety standard adopted by the United States Department of Transportation pursuant to the federal pipeline safety laws, 49 U.S.C. Section 60101 et seq., and amendments thereto.

5. Explain whether Pollitt Enterprises, Clark Pollitt, and Amanda Pollitt operate the Pollitt System in compliance with Commission regulations set forth in 807 KAR 5:022, 807 KAR 5:023, and 807 KAR 5:027. If yes, provide copies of records dated January 1, 2012, to the current date prepared and retained in compliance with the minimum safety standard adopted by the United States Department of Transportation

pursuant to the federal pipeline safety laws, 49 U.S.C. Section 60101 et seq., and amendments thereto.

6. Describe in specific detail what duties and functions, if any, Basil Pollitt has carried out for and with Pollitt Enterprises since October 2005.

APPENDIX B

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2017-00120 DATED **MAR 15 2017**

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BASIL C. POLLITT, INDIVIDUALLY,)
D/B/A THE GAS GROUP, INC.)
A/K/A THE GAS GROUP)

CASE NO. 99-130

_____)
ALLEGED VIOLATIONS OF)
KRS 278.020, KRS 278.160,)
807 KAR 5:022, SECTIONS 14(5)(a),)
14(5)(c)(2), 13(9), 807 KAR 5:023)
AND 49 CFR 192.707(a), 192.707(e)(2),)
192.165, AND 49 CFR 199)

O R D E R

On April 14, 1999, the Commission entered an Order that directed Basil C. Pollitt d/b/a The Gas Group, Inc. a/k/a The Gas Group ("Gas Group") to answer and to appear at a hearing on May 18, 1999 to show cause why it should not be penalized pursuant to KRS 278.990(1) and KRS 278.992(1) for its alleged violations of the above named sub-sections of KRS Chapter 278, sections of 807 KAR and 49 U.S.C. 4, Section 60101, et seq., and amendments thereto.

On April 22, 1999, Basil C. Pollitt, owner and operator of Gas Group, was personally served with a copy of a show cause Order and notice of the date, time and place of the hearing. Personal service was accomplished by a deputy from the Office of the Jefferson County Sheriff. Neither Mr. Pollitt nor anyone on his behalf filed a response or answer to the show cause Order.

Hearing in this matter was conducted on May 18, 1999. Mr. Pollitt failed to appear at the hearing, either personally or by a representative. Appearing on behalf of the Commission was Dale Wright, Staff Attorney. Members of the Commission Staff appearing and testifying were: Jordan Neel, custodian of the records and schedules of rates and conditions of service (tariffs); Susan Hutcherson, custodian of the records of show cause Orders and other permanent records; William Feldman, custodian of the records of annual reports of utilities; David Kinman, gas pipeline safety investigator; and Allen Gregory, hazardous material inspector for the Kentucky State Fire Marshal's Office.

FINDINGS OF FACT

The record, including the transcript of evidence with exhibits, taken at hearing on May 18, 1999 and the "Tour of Gas Group Lines" report prepared by David Kinman on June 18, 1999 established undisputed facts.

On February 15, 1999, Commission Staff was contacted about an unmarked natural gas line discovered by highway workers. The line was located north of Richardsville, Warren County, Kentucky near State Highway 185. On February 16, 1999, David Kinman investigated with the assistance of Allen Gregory, hazardous material inspector of the Kentucky Fire Marshal's Office. Initially, the extent of the gas line and facilities could not be determined. The situation could be potentially dangerous because the gas could be contaminated by the presence of hydrogen sulfide, producing "sour gas." This has occurred in some instances in this particular area of Kentucky. Basil C. Pollitt was and is the owner and operator of the natural gas distribution facility doing business as The Gas Group a/k/a The Gas Group, Inc. The system consisted of

22 miles of three and four-inch plastic pipe which extends northward along Kentucky Highway 185. The system is pressurized and valves are located at 4-mile intervals. The gas distribution system services natural gas to approximately 50 customers. The utility facility is connected to 5 natural gas wells, although, as of June 17, 1999 (the date of the second inspection), only one well was providing natural gas. The presence of hydrogen sulfide was not detected by David Kinman upon testing on June 17, 1999.

It is further found, as undisputed facts, the following:

1. Basil C. Pollitt is and was operating a natural gas distribution system near Richlandville, Kentucky. Commission records show that Mr. Pollitt has never applied for nor received a certificate of convenience and necessity to construct this natural gas distribution facility or provide natural gas service. KRS 278.020 provides in part: "No person ... shall commence providing utility service ... or begin construction of any ... facility ... until that person has obtained ... a certificate that public convenience and necessity require the service or construction" Mr. Pollitt was advised that it was necessary for him to secure a certificate to continue to operate his facility. The records of the Commission reflect that, as of the date of this Order, Mr. Pollitt has failed to make application for or receive a certificate. Mr. Pollitt is in violation of KRS 278.020, and therefore is operating a natural gas distribution system unlawfully.

2. Basil C. Pollitt has never filed with the Commission a schedule of rates and conditions of service (tariff) relating to the above-named natural gas distribution facility. KRS 278.160 provides in part: "... such utility (person) shall file with the Commission ... schedules showing all rates and conditions of service" Mr. Pollitt is

in violation of KRS 278.160, and therefore is operating a natural gas distribution system unlawfully.

3. The initial inspection of the natural gas distribution system that was discovered by highway workers was conducted on February 16, 1999. David Kinman, assisted by Allen Gregory, inspected the facility to the extent possible at that time. Since they did not know the extent of the system, their inspection was limited, but the following violations were discovered.

a. Violation of 807 KAR 5:022, Section 14(5)(a), and 49 CFR 192.707(a) for failure to display line markers or signs to indicate the presence of a natural gas pipeline.

b. Violation of 807 KAR 5:022, Section 14(5)(c)(2) and 49 CFR 192.707(e)(2) for failure to have line markers on above-ground pipeline, which include a telephone number to call in case of emergency.

c. Violation of 807 KAR 5:022, Section 14(5)(e)(2) and 49 CFR 192.707(e)(2) for failure to provide a phone number to call in the event of emergency.

d. Violation of 807 KAR 5:022, Section 13(9) and 49 CFR 192.615 for failure to establish contact with local police, fire, and other officials regarding actions to be taken during an emergency.

e. Violation of 807 KAR 5:023 and 49 CFR 199 for failure to adopt and provide an anti-drug and alcohol plan.

Since receiving a copy of the show cause Order, Mr. Pollitt has placed line markers and signs showing the location of the natural gas pipeline, but the markers and signs provide a long-distance telephone number, not a local one.

CONCLUSIONS OF LAW

The Commission has jurisdiction of the subject matter herein and has personal jurisdiction on Basil C. Pollitt for purposes of notice of hearing and hearing. Basil C. Pollitt has been and is now the owner and operator of a natural gas distribution utility. The Commission concludes that Basil C. Pollitt has violated the statutes and regulations as set out hereinabove in the Findings of Fact.

The Commission, having reviewed the evidence of record and having been otherwise sufficiently advised, HEREBY ORDERS that:

1. Gas Group is assessed a civil penalty in the amount of Five Hundred Dollars (\$500) for violating KRS 278.020.

2. Gas Group is assessed a civil penalty in the amount of Two Hundred Fifty Dollars (\$250) for violating KRS 278.160.

3. Gas Group is assessed a civil penalty in the amount of Five Thousand Dollars (\$5,000) each for violating 49 CFR 192.707(a), 49 CFR 192.707(e)(2) (two violations), 49 CFR 192.615, and 49 CFR 199, or a total of Twenty-five Thousand Dollars (\$25,000) for violations of pipeline safety regulations.

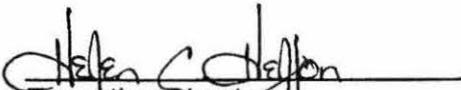
4. Within 15 days of receipt of this Order, Gas Group shall file with the Commission, pursuant to KRS 278.020, its application for a certificate of convenience and necessity to operate a natural gas distribution system, and shall file, pursuant to KRS 278.160, its schedule of rates and conditions of service (tariff). If Gas Group fails to make the above filings within the time provided, the Commission shall take the necessary judicial steps to enforce this Order and to terminate operation of the natural gas distribution system.

5. Within 10 days of receipt of this Order, Gas Group shall pay to the Commonwealth of Kentucky the total sum of Twenty-five Thousand Seven Hundred Fifty Dollars (\$25,750). This payment shall be made in the form of a cashier's check payable to "Treasurer, Commonwealth of Kentucky," and shall be mailed or delivered to Office of General Counsel, Public Service Commission, 730 Schenkel Lane, Post Office Box 615, Frankfort, Kentucky 40602.

Done at Frankfort, Kentucky, this 2nd day of September, 1999.

By the Commission

ATTEST:


Executive Director

APPENDIX C

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2017-00120 DATED **MAR 15 2017**

COMMONWEALTH OF KENTUCKY.
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 01-CI-00581
DIVISION I

ENTERED
MAR 2 2001
FRANKLIN CIRCUIT COURT
CLERK

COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

PLAINTIFF

VS. SUMMARY JUDGMENT AND PERMANENT INJUNCTION

BASIL. C. POLLITT, Individually,
and THE GAS GROUP, INC.
also known as GAS GROUP

DEFENDANTS

This Court has examined the record in this matter and, having considered the arguments of counsel, and being otherwise sufficiently advised, **FINDS** that there is no genuine issue as to any material fact and the Plaintiff is entitled to a judgment as a matter of law against the Defendants, Basil C. Pollitt, Individually, The Gas Group, Inc., also known as Gas Group, jointly and severally.

IT IS ORDERED that the Plaintiff shall recover from the Defendants Twenty-five Thousand Seven Hundred Fifty Dollars (\$25,750) for its failure to comply with the Commission's Order, along with post judgment interest at the rate of twelve percent (12%) per annum from date of judgment until paid.

IT IS FURTHER ORDERED that a Permanent Injunction is issued requiring the Defendants, Basil C. Pollitt and The Gas Group, Inc., also known as Gas Group, to take or to immediately cause to be taken the following actions:

To terminate the flow and distribution of natural gas in and through any and all pipelines from any and all sources, specifically including the Dallas Runner Well, that are a part, directly or indirectly, of the natural gas distribution system known as The Gas

Group, Inc., also known as Gas Group, on or before **May 1, 2004**.

2. To publish one time each week for three consecutive weeks in the local newspapers in Warren, Butler, Edmonson, and Grayson Counties a verbatim copy of this Summary Judgment and Permanent Injunction. An affidavit of publication from each newspaper shall be filed in the record of this case within 10 days after the third and last date of publication.

3. To disconnect and seal any valves or other devices at the wellhead of all natural gas wells connected for the use of this natural gas distribution system within fifteen days of terminating service.

4. To remove all customer gas meters and any connector valves and seal the service lines of all customers within **ninety (90) days** after the termination of gas service on May 1, 2004.

5. To file in the record within ten (10) days of the expiration of the ninety (90) day period provided for in Paragraph 4 affidavits that all steps ordered in this Summary Judgment and Permanent Injunction have been completed. Upon completion of the requirements set out in this order, the Defendant's shall notify the Commission Staff in the Gas Branch of the Commission in order that a schedule shall be set for a major inspection of the entire distribution system to determine whether all requirements have been completed. The Commission shall certify and place in the Court record a report addressing the requirements of this order.

6. The Public Service Commission is awarded its costs relative to Public Service Commission Cas No. 99-130 and this action, in addition to its certified attorneys' fees.

There being no just reason for delay, this is a final and appealable order.

SO ORDERED this 27 day of February, 2004.



ROGER L. CRITTENDEN
JUDGE, FRANKLIN CIRCUIT COURT

DISTRIBUTION:

Hon. Deborah T. Eversole
Hon. C. Dale Wright
Public Service Commission of Kentucky
P. O. Box 615
Frankfort, KY 40602

Hon. Kirk Hoskins
310 West Liberty St.
P. O. Box 70065
Louisville, KY 40270

APPENDIX D

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2017-00120 DATED **MAR 15 2017**

RENDERED: OCTOBER 14, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

OCT 14 2005
GENERAL COUNSEL

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001516-MR

BASIL C. POLLITT AND
THE GAS GROUP, INC.

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 01-CI-00581

COMMONWEALTH OF KENTUCKY,
PUBLIC SERVICE COMMISSION

APPELLEE

OPINION
AFFIRMING

** ** * ** **

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Basil C. Pollitt and the Gas Group, Inc. appeal from a March 2, 2004, order of the Franklin Circuit Court granting summary judgment and a permanent injunction in favor of the Public Service Commission (PSC). We affirm.

In February 1999, an unmarked natural gas line was discovered in Warren County, Kentucky. PSC was alerted to the

line's existence and initiated an investigation. During the investigation, PSC discovered numerous safety violations and ascertained the owner of the line was the Gas Group. The Gas Group was owned and operated by Pollitt.

Consequently, PSC ordered the Gas Group and Pollitt to show cause why they should not be subject to penalties for violations of Kentucky Revised Statutes (KRS) 278.020; KRS 278.160; 807 Ky. Admin. Regs. (KAR) 5:022, §§ 14(5)(a), 14(5)(c)(2), 14(5)(e)(2), 13(9); 807 KAR 5:023; 49 C.F.R. 192.707(a); 49 C.F.R. 192.707(e)(2); 49 C.F.R. 192.615 and 49 C.F.R. 199. A summons was issued advising Pollitt that he had twenty (20) days to respond. The summons further provided notice of the date, time and place of an evidentiary hearing before PSC. The summons was personally served upon Pollitt on April 22, 1999. Pollitt never responded.

On May 18, 1999, PSC conducted an evidentiary hearing. Pollitt did not appear at the hearing. On September 2, 1999, PSC issued an order finding that Pollitt was the owner and operator of a natural gas distribution facility known as the Gas Group. It further found the unmarked natural gas line:

[C]onsisted of 22 miles of three and four-inch plastic pipe which extends northward along Kentucky Highway 185. The system is pressurized and valves are located at 4-mile intervals. The gas distribution system services natural gas to approximately 50 customers. . . .

PSC concluded that the Gas Group violated KRS 278.020, KRS 278.160; 49 C.F.R. 192.707(a); 49 C.F.R. 192.707(e)(2); 49 C.F.R. 192.615; and 49 C.F.R. 199. PSC assessed civil penalties of \$25,750.00 and directed the Gas Group to file an application for a certificate of convenience and necessity, as well as a schedule of rates. Neither Pollitt nor the Gas Group filed an appeal in the circuit court from PSC's September 1999 order within thirty (30) days as provided by KRS 278.410(1).

Some two years later, on May 14, 2001, PSC filed a complaint in the Franklin Circuit Court seeking enforcement of its September 1999 order and an injunction terminating the distribution of natural gas by the Gas Group. On November 1, 2001, PSC filed a motion for summary judgment and for a permanent injunction. On March 2, 2004, the circuit court granted summary judgment in favor of PSC and issued a permanent injunction terminating the flow and distribution of natural gas through the gas line. This appeal follows.

The Gas Group claims that the circuit court erred by entering summary judgment in favor of PSC to enforce its September 1999 order and issuing a permanent injunction. The proper standard of review to be applied on appeal from a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the

moving party was entitled to judgment as a matter of law." Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. 1996). The record is viewed in the light most favorable to the nonmoving party and any doubts shall be resolved in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). As resolution of this appeal centers upon issues of law, we review the circuit court's decision *de novo*.

Initially, we observe that the exhaustion of administrative remedies doctrine requires a party to exhaust "all administrative remedies available within the agency whose action is being challenged" Popplewell's Alligator Dock No. 1 v. Revenue Cabinet, 133 S.W.3d 456, 471 (Ky. 2004) (citation omitted). An exception to the exhaustion doctrine is recognized where the issue of jurisdiction of the agency is raised and resolution is a question of law, not dependent upon controverted facts. Dep't of Conservation v. Sowders, 244 S.W.2d 464 (Ky. 1951); Goodwin v. City of Louisville, 309 Ky. 11, 215 S.W.2d 557 (1948).

In this case, it is clear that Pollitt and the Gas Group did not exhaust their administrative remedies. However, Pollitt and the Gas Group argue PSC lacked jurisdiction; thus, the exception to the exhaustion of administrative remedies doctrine would apply. The facts relevant to decide the jurisdiction of PSC are not in dispute. Therefore, we believe

the exception to the exhaustion doctrine is applicable to this case. As such, we shall analyze whether PSC possessed jurisdiction.

KRS 278.040 provides that "[t]he Public Service Commission shall regulate utilities and enforce the provision of this chapter." To resolve the issue of whether PSC possessed jurisdiction to enter the September 1999 order, it is necessary to determine whether the Gas Group was a "utility" within the meaning of KRS 278.010(3)(b), which defines utility as follows:

The production, manufacture, storage, distribution, sale, or furnishing of natural or manufactured gas, or a mixture of same, to or for the public, for compensation, for light, heat, power, or other uses.

PSC argues that the Gas Group was a utility because the natural gas line provided "farm tap" gas services to some fifty property owners along the gas line's route. The property owners paid for the gas utilized. Thus, PSC concluded the Gas Group clearly distributed natural gas to the public for compensation and met the requirements of a utility under KRS 278.010(3)(b).

Conversely, Pollitt and the Gas Group argue that the natural gas line originally only supplied gas to an end user, Midwestern Pipelines, Inc., and not to the public. Although the Gas Group's contract with Midwestern terminated in 1997 and the gas line no longer supplied gas to an end user, Pollitt and the

Gas Group maintain that the character of the natural gas line should be determined at the time of its creation. Moreover, Pollitt and the Gas Group point out that the farm taps were provided to the fifty property owners by mandate of the PSC. See KRS 278.485 (requiring a gas pipe line company to furnish gas service to the owner of any property over which its gas gathering line is located.) Thus, Pollitt and the Gas Group maintain that the Gas Group should not be considered a utility because the gas line only distributed natural gas to the public pursuant to the PSC's mandate and because the gas line was originally a pure gathering line to transport gas to Midwestern.

The language of KRS 278.010(3)(b) is clear that any person who operates a facility which produces or distributes natural gas to the public for compensation is a utility. In the case at hand, the undisputed facts reveal that the Gas Group distributed natural gas through its line to some fifty property owners. Further, the Gas Group's contract with its end user terminated in 1997; thereafter, the gas line was utilized for a time solely as a distribution line supplying natural gas to the fifty property owners.¹

Pollitt and the Gas Group, however, urge this Court to create an exception to KRS 278.010(3)(b) because the Gas Group was mandated to furnish the farm taps. KRS 278.010(3)(b)

¹ It appears that sometime in September 2003, the Gas Group acquired a contract with another end user, Viking Energy, LLC.

recognizes no such exception, and we are not at liberty to add language to a statute. See City of Covington v. Kenton County, 149 S.W.3d 358 (Ky. 2004).

We also reject the assertion of Pollitt and the Gas Group that the natural gas line was originally a gathering which could not be "transformed" into a distribution line. As is evidenced by this case, the character of a natural gas line is not static, but rather changes with the needs of its owner and the public. To recognize otherwise would be untenable. Accordingly, we hold that the Gas Group was a utility within the meaning of KRS 278.010(3)(b), and PSC possessed jurisdiction in this matter.

We view the remaining contention of Pollitt and the Gas Group to be without merit.

In sum, we are of the opinion the circuit court properly entered summary judgment in favor of PSC upholding the \$25,750.00 in civil penalties and issuing the permanent injunction terminating the distribution of natural gas through the line.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kirk Hoskins
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jason R. Bentley
C. Dale Wright
Frankfort, Kentucky

APPENDIX E

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2017-00120 DATED **MAR 15 2017**

INSPECTION REPORT

INSPECTION INFORMATION

KY PSC Inspector(s):	Bill Aitken and Steve Samples	Report Number	Pollitt 1
Inspection Dates	1/11/2017	Report Date:	1/19/2017
Inspection Type:	SPECIALIZED- VERIFICATION		

OPERATOR INFORMATION

Name of Operator:	Pollitt Enterprises	OP ID No.: (If no OP ID No., explain if an application has been submitted.)	unknown
Type of Facility:	Natural Gas Distribution	Location of Facility:	Louisville headquarters
Area of Operation:	Hwy 185 Warren & Edmonson Counties		
Official Operator Contact and Address: (Contact for Inspection Letter)		Unit Name and Address	
Phone # and Email:	270-303-9236		
Records Location:	Louisville		
<u>Persons Interviewed</u>	<u>Title</u>	<u>Phone No.</u>	<u>Email</u>
n/a			
Has the Operator provided an updated Emergency Contact List? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
Number of Customers:	50+		
Number of Gas Employees:	unknown		
Gas Supplier:	Pollitt gas well		
Unaccounted for Gas:	unknown		
Services:	Residential	Commercial	Industrial
	50	1	Other
Operating Pressure(s):	MAOP (within last year)	Actual Operating Pressure (at time of inspection)	
	Feeder:		
	Town:		
	Other:		
Does the Operator have any transmission pipeline (above 20% SMYS):		no	
Additional Operator Information:			
<p>The pipeline system was installed in the early 1990's and constructed of 3 and 4 inch plastic. In the past this system served over 50 customers.</p>			

Date of Last Inspection:	Verification 11/14/2013: Comprehensive 4/9/2002		
Number of Deficiencies:	n/a	Deficiencies not Cleared:	n/a

Summary of Areas Inspected

<u>PHMSA Question Set</u> <input checked="" type="checkbox"/> Pipeline Markers <input checked="" type="checkbox"/> Field Inspection <u>Other:</u>
--

<u>State Question Set</u> <input checked="" type="checkbox"/> Cybersecurity <input type="checkbox"/> Other <u>Other:</u>
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Summary

On January 11, 2017 Inspectors Bill Aitken and Steve Samples conducted an inspection to verify that Mr. Basil Pollitt was presently operating a gas distribution north of Bowling Green, KY. The system begins at a gas well on a farm near Richardsville, KY runs through farmland, crosses Pruett Road, serves several homes on Pruett, extends to Highway 185 and then runs approximately 22 mile on Hwy 185 to the Grayson County line. The pipeline was installed in the early 1990's and constructed of 3 and 4-inch plastic. In the past this system served over 50 customers.

During the January visit it was verified that there were active customers (meter sets turned on) at the following locations:

1. Home at the intersection of Hwy 185 and Hwy 70.
2. Home at 2278 Hwy 185
3. Home at 3501 Hwy 185
4. Home at 7707 Hwy 185----occupied by James S. Cardwell, phone # 270-777-1672
5. Home at 500 Pruett Rd. Martin residence
6. Three additional services on Pruett Rd, no address found.

Several pipeline markers were observed during this visit/inspection. All had the operator of the system identified as Pollitt Enterprises, Inc., phone number 270-303-9236. (See attachment A)

The last documented system verification was done on November 14, 2013 (See attachment B). A comprehensive inspection was completed on April 9, 2002. Five deficiencies were noted.

Probable Violations

This system has not been under PSC enforcement therefore it is highly probable that Pollitt Enterprises in violation of the major portion of the federal and state pipeline safety regulations as well as the applicable regulations in 807 Chapters 5:001- 50012.

Areas of Concern/ Recommendations

At present Mr. Pollitt is operating this system with no regulatory oversight. This is a major safety concern. He has been ordered to terminate operations and has obviously not complied.

Submitted by: Bill Aitken

Bill Aitken (Date) Jan. 23, 2017
Utility Inspector
Regulatory and Safety Investigator

Attachments: A. Photograph of Pipeline Marker
 B. 2013 Inspection Report

ATTACHMENT A.

Photograph of Pipeline Marker

GAS PIPELINE

Before Excavation

or in EMERGENCY

Call:

Fellini Enterprises, Inc.

1-270-303-9236

Day or Night

ATTACHMENT B.

2013 Inspection Report

On November 14, 2013 while enroute to the city of Richardsville, Mark McCullough and I confirmed along Hwy 185 between Caneyville and Richardsville several active meters on the Gas Group or Pollitt system. A customer on the system at 2501 Hwy 185 in Reedyville , Ky. was verified as receiving gas with an active meter on this system.

On March 2, 2004 this utility was granted summary judgment favor of the PSC and issued a permanent injunction terminating the flow and distribution of natural gas through the line.

This utility is operating and serving customers along 22 miles of 3 and 4 inch plastic pipe. The system at one time served around 50 customers.

The Commonwealth of Kentucky Court of Appeals No. for reference is 2004-CA-001516-MR.

This utility serving customers should be notified and scheduled to be inspected for pipeline safety regulations pertaining to their system.

Submitted by

WA

Steve Samples

Utility Regulatory and Safety Investigator III

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Lutz, FLORIDA 33559

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Reg. Agent Whitney Clark Pollitt
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