

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001760-MR

BLUEGRASS FLOW, INC.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA R. ISAAC, JUDGE  
ACTION NO. 02-CI-01759

KENTUCKY-AMERICAN WATER COMPANY  
AND  
LEXINGTON-FAYETTE URBAN COUNTY  
GOVERNMENT

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Bluegrass FLOW, Inc., appeals from an order of the Fayette Circuit Court dismissing its Petition for Declaration of Rights challenging the water franchise awarded by the Lexington-Fayette Urban County Government (LFUCG) to Kentucky-American Water Company. The circuit court granted Kentucky-American's motion to dismiss the petition pursuant to

CR<sup>1</sup> 12.02(f) for failure to state a claim upon which relief can be granted. We affirm the court's order.

Kentucky-American is a water utility that provides service to Fayette County and nine surrounding counties. It is regulated by the Public Service Commission. LFUCG is an urban county government organized and existing under KRS<sup>2</sup> Chapter 67A. In May 1995 LFUCG awarded a water franchise to Kentucky-American. LFUCG awarded the 20-year water franchise to Kentucky-American pursuant to its authority under Sections 163 and 164 of the Kentucky Constitution.

The appellant is a non-profit Kentucky corporation. It states in its brief that "its members and directors are taxpayers, and consumers, customers and ratepayers of the water franchise awarded to the Respondent Kentucky-American Water Co."

On April 29, 2002, the appellant filed a Petition for Declaration of Rights challenging the issuance of the water franchise nearly seven years earlier. Both LFUCG and Kentucky-American filed motions to dismiss the petition for failure to state a claim upon which relief can be granted. LFUCG and Kentucky-American asserted in their motions that the appellant's petition should be dismissed because the appellant lacked

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<sup>1</sup> Kentucky Rules of Civil Procedure.

<sup>2</sup> Kentucky Revised Statutes.

standing to file the petition and because the petition was barred by the applicable statute of limitations.

In an order entered by the circuit court on June 26, 2002, the court agreed with the assertions of LFUCG and Kentucky-American and dismissed the petition. The appellant then filed a motion to vacate the judgment pursuant to CR 59.05 and a motion for leave to file an amended petition. The stated purpose of the appellant's motion to amend its petition was to "clarify and refine the issues of standing and the applicable statutes of limitation in such a fashion that the court may reconsider its judgment with respect thereto." The court denied the motions, and this appeal followed.

The appellant's first argument is that the court erred in determining that the appellant lacked standing to challenge the award of the franchise. The appellant claims that it has standing to challenge the franchise because its membership is composed of "taxpayers, and consumers, customers and ratepayers" of the water franchise. However, we conclude that the appellant was unable to properly file its petition for this very reason.

"The Supreme Court of Kentucky has consistently held that naked municipal citizenship is not sufficient to confer standing to challenge an official act of municipality." Fish v. Elliott, Ky. App., 554 S.W.2d 94, 96 (1977). Further, in

Carrico v. City of Owensboro, Ky., 511 S.W.2d 677 (1974), the court adopted the following rule:

To have standing, a party must have a sufficient interest in the controversy to assure an adversary presentation (this requirement stemming from the 'case' or 'controversy' limitation of Article 3 of the United States Constitution); a party must have an interest in the alleged wrong other than that of a member of the general public; and a party must show that his legal rights or privileges have been invaded.

Id. at 679, citing 8 A.L.R. Fed. 415. Also, absent fraud, collusion, or dishonesty, a court will not set aside a legislative act performed by a municipality in awarding a franchise. Communication Sys., Inc. v. Danville, 880 F.2d 887, 891 (6<sup>th</sup> Cir. 1989). Generally, "the right to question the validity of a franchise belongs to the sovereign authority that granted the franchise. Persons other than the public authority granting the franchise may not assail its validity, in the absence of a showing that they have peculiar or particular interest in the matter distinct from that of the citizens generally." 36 Am.Jur.2d Franchises from Public Entities § 17 (2001).

Citing Griggs v. Dolan, Ky., 759 S.W.2d 593 (1988), and Bischoff v. City of Newport, Ky. App., 733 S.W.2d 762 (1987), the appellant argues that it is entitled to pursue declaratory relief as a taxpayer class. It argues that the

franchise fee imposed by LFUCG on Kentucky-American was "sufficiently in the character of a tax as to confer standing on appellant." We disagree.

The facts are that the LFUCG created the water franchise and authorized it to be sold at public auction after proper advertising. The resolution creating the franchise provided that LFUCG had the right to impose upon the successful bidder a franchise fee of up to three percent of the gross revenues. Kentucky-American submitted its bid, including a \$100 check as required by the advertisement. Its bid was the only one submitted, and it was accepted. LFUCG and Kentucky-American then entered into a 20-year franchise agreement which included the authority of LFUCG to impose a franchise fee. LFUCG then imposed a two percent franchise fee on Kentucky-American.<sup>3</sup> Between the time the franchise was awarded and the filing of the appellant's petition, Kentucky-American paid LFUCG an average of approximately \$650,000 per year in franchise fees.

The appellant argues that Kentucky-American does not pay the franchise fee out of its income, but that it charges the fee to its consumers, including the appellant and its members. The appellant argues that "if a government demands payment of

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<sup>3</sup> LFUCG has since increased the franchise fee to 2.289%.

money from its citizens, it is a tax by any commonly understood definition."

To defeat the appellant's argument, LFUCG and Kentucky-American rely on Berea College Util. v. City of Berea, Ky. App., 691 S.W.2d 235 (1985). That case involved franchises for the distribution of electricity and water within the City of Berea. In that case this court held that a franchise fee similar to the one imposed in this case was not a tax but was "instead a charge bargained for in exchange for a specific property right." Id. at 237. Although the facts in that case are somewhat different regarding how the fee was imposed, we conclude that the principle cited therein is applicable to this case. Therefore, we agree with LFUCG and Kentucky-American that the franchise fee imposed on Kentucky-American was not a tax. Thus, the appellant had no standing to challenge the awarding of the franchise.

Although our ruling on the standing issue renders the second issue raised by the appellant moot, we will nonetheless address it. The appellant's second argument is that the circuit court erred in determining that its action was barred by the applicable statute of limitation. The appellant argues that a franchise is a real property right and that KRS 413.050 or other statutes of limitation are applicable. We disagree.

KRS 96.010 vests Kentucky municipalities with the authority to sell public utility franchises. The statute also outlines, in part, how such a sale should proceed. We know of no specific statute of limitation which would govern an action alleging a violation of KRS 96.010.

We conclude that, assuming the appellant had standing, KRS 413.120(7) was applicable. Therein, it is stated that "[a]n action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated" shall be commenced "within five (5) years after the cause of action accrued." Id. Because the petition filed by the appellant herein was filed nearly seven years after the franchise was awarded, the petition was untimely.

Finally, the appellant argues that the circuit court erred in denying its motion for leave to file an amended petition. CR 15.01, as it applies to the facts of this case, provides in relevant part that "a party may amend its pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The circuit court is vested with "wide discretion" in determining whether to allow a party to amend its pleadings. Commonwealth v. Kentucky Central Life Ins. Co., Ky. App., 746 S.W.2d 565, 566 (1987). Because the appellant waited until after an adverse judgment had been rendered against it before

filing its motion, we conclude that the circuit court did not err in denying the motion.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Lexington, Kentucky

BRIEF FOR APPELLEE, KENTUCKY-  
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BRIEF FOR APPELLEE, LEXINGTON-  
FAYETTE URBAN COUNTY  
GOVERNMENT:

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