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**DISCRETIONARY REVIEW GRANTED BY SUPREME COURT:
APRIL 15, 2009
(FILE NO. 2008-SC-0483-D & 2008-SC-0489-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001652-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 05-CI-00648

THE PUBLIC SERVICE COMMISSION OF KENTUCKY; AND THE UNION LIGHT, HEAT AND POWER COMPANY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: The Commonwealth of Kentucky, by and through its Attorney General, has appealed the June 15, 2006, Opinion and Order of the Franklin Circuit Court which affirmed the April 19, 2005, order of the Public Service Commission of Kentucky ("PSC") authorizing the establishment of two economic development riders to the general

tariff[1] of The Union Light, Heat and Power Company ("ULH&P"). For the following reasons, we reverse and remand the matter to the Franklin Circuit Court for further proceedings.

On June 18, 2004, ULH&P filed an application with the PSC for authorization to establish three new economic development riders to its general tariffs, a Brownfield Redevelopment Rider, an Economic Development Rider, and an Urban Redevelopment Rider. The purpose of these proposed tariff provisions was to create a discount rate or reduced rate service to certain nonresidential customers who located their operations within designated brownfield[2] or urban redevelopment sites in ULH&P's northern Kentucky service area. It would be incumbent on the customer to seek the discounted rate from ULH&P, and the PSC would have to give its approval before a customer could actually begin receiving the lower rate.

Customers qualifying for the Economic Development or Urban Redevelopment discounted rates would be eligible to have their total bill for electric service reduced by up to fifty percent for a period of twelve months upon entering into a special contract with ULH&P and agreeing to continue to take service for a minimum of two years following the incentive period. Customers who qualified for the Brownfield Redevelopment discount rate would be eligible to receive a reduction in their demand

[1] In the context of utility companies, a tariff is a schedule of prices and terms upon which the utility's product is sold. This would typically include the prices or rates for the various services or components such as the service charge, time of energy use charges (i.e. kWh—kilowatt hours) and demand charges (i.e. kW—kilowatts). A rider typically alters some term or terms of the tariff possibly including the particular rate a customer must pay for the service.

[2] Brownfields are abandoned, idled, or under-used commercial and industrial facilities where expansion and redevelopment is complicated by real or perceived environmental contamination.

charges in a declining percentage over a period of five years. These customers would also be required to enter into a special contract with ULH&P and agree to continue receiving service from it for a minimum of three years following the incentive period.

On April 19, 2005, the PSC entered an order approving the tariffs with certain modifications.[3] Pursuant to Kentucky Revised Statutes (KRS) 278.410, the Attorney General brought an action in the Franklin Circuit Court to vacate or set aside the PSC's order on the grounds that it was unlawful and unreasonable. The Attorney General again argued the specific provisions of KRS 278.170 prohibited the PSC from granting ULH&P's application.

On June 15, 2006, the circuit court entered its opinion and order affirming the decision of the PSC. The circuit court specifically found KRS 278.170(2) and (3) were not intended to contain "an exclusive list for free or reduced rate services. The plain and permissive language of those sections does not lend itself to such an interpretation." The circuit court went on to hold the PSC's decision had statutory support under KRS 278.030(3),[4] stating the PSC has determined brownfield redevelopment and economic

[3] The modifications required by the PSC are not at issue in this appeal.

[4] KRS 278.030 states:

> **Rates, classifications and service of utilities to be just and reasonable; service to be adequate**
>
> (1) Every utility may demand, collect and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person.
>
> (2) Every utility shall furnish adequate, efficient and reasonable service, and may establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service.
>
> (3) Every utility may employ in the conduct of its business suitable and reasonable classifications of its service, patrons and rates. The classifications may, in any proper case, take into account the nature of the use, the quality used,

development are reasonable considerations for reduced rate service, and therefore "[t]he Court cannot declare that consideration unlawful or unreasonable in light of that language." Although the Attorney General argued the use of KRS 278.030(3) rendered KRS 278.010 a nullity, the circuit court specifically found to the contrary, holding the PSC's interpretation gave meaning to both statutes. This appeal followed.

STANDARD OF REVIEW

The Attorney General timely filed a request to intervene in the matter which was granted by the PSC. Following the discovery phase, an informal conference was held on November 19, 2004, wherein the Attorney General raised numerous concerns regarding certain provisions of the proposed riders. On December 10, 2004, ULH&P filed an amended application which combined the Economic Development Rider and Urban Redevelopment Rider into a single Development Incentive Rider, and amended certain other provisions of the original application. The parties filed written comments with the PSC and the matter was submitted for a decision. The Attorney General objected to the proposed tariffs on the basis that KRS 278.170[5] sets forth specific guidelines for

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> the quantity used, the time when used, the purpose for which used, and any other reasonable consideration.

[5] KRS 278.170 states:

> **Discrimination as to rates or service; free or reduced rate services**
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> (1) No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions.
>
> (2) Any utility may grant free or reduced rate service to its officers, agents, or employees, and may exchange free or reduced rate service with other utilities for the benefit of the officers, agents, and employees of both

providing reduced rate service, and brownfield development and urban redevelopment were not included in the statutory scheme.

The facts, as set forth above, are not in dispute. Thus, we shall deem them to be conclusive for purposes of this appeal. The sole issue is the proper interpretation of KRS 278.030 and KRS 278.170. In making this determination, we are mindful of the limited scope of appellate review of orders of the PSC.

> utilities. Any utility may grant free or reduced rate service to the United States, to charitable and eleemosynary institutions, and to persons engaged in charitable and eleemosynary work, and may grant free or reduced rate service for the purpose of providing relief in case of flood, epidemic, pestilence, or other calamity. The terms "officers" and "employees," as used in this subsection, include furloughed, pensioned, and superannuated officers and employees, and persons who have become disabled or infirm in the service of the utility. Notice must be given to the commission and its agreement obtained for such reduced rate service except in case of an emergency, in which case the commission shall be notified at least five (5) days after the service is rendered.
>
> (3) Upon obtaining commission approval of a tariff setting forth terms and conditions of service the commission deems necessary, a utility as defined in KRS 278.010(3)(d) may grant free or reduced rate service for the purpose of fighting fires or training firefighters to any city, county, urban-county, charter county, fire protection district, or volunteer fire protection district. Any tariff under this section shall require the water user to maintain estimates of the amount of water used for fire protection and training, and to report this water usage to the utility on a regular basis.
>
> (4) The commission may determine any question of fact arising under this section.

KRS 278.410(1)[6] provides that an order of the PSC can be vacated or set aside only if it is unlawful or unreasonable. Further, under KRS 278.430,[7] the party challenging the determination has the burden of proof to show by clear and satisfactory evidence that the order is unlawful or unreasonable. Our review of PSC decisions is different from decisions of other administrative or quasi-judicial agencies. *See Lexington Tel. Co. v. Public Service Commission*, 311 Ky. 584, 224 S.W.2d 423 (1949). Further, in *Energy Regulatory Commission v. Kentucky Power Co.*, 605 S.W.2d 46, 49 (Ky.App. 1980), we held:

> [w]hile *Kentucky State Racing Comm'n v. Fuller*, Ky., 481 S.W.2d 298 (1972), stated that where an agency acts as a trier of fact the findings are conclusive if supported by substantial evidence, Lexington Tel. Co. [sic] and KRS 278.430 state that in a public utility regulatory case the complaining party must show by clear and convincing proof that the ruling was

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[6] KRS 278.410(1) states in pertinent part:

> **Action to review order of commission; institution; answer; injunction**
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> Any party to a commission proceeding or any utility affected by an order of the commission may . . . 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. . . .

[7] KRS 278.430 states:

> **Burden of proof**
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> In all trials, actions or proceedings arising under the preceding provisions of this chapter or growing out of the commission's exercise of the authority or powers granted to it, the party seeking to set aside any determination, requirement, direction or order of the commission shall have the burden of proof to show by clear and satisfactory evidence that the determination, requirement, direction or order is unreasonable or unlawful.

> unlawful or unreasonable. Hence, the scope of judicial review of administrative action here is very limited.

To be unlawful, an order must violate a state or federal statute or a constitutional provision. To be unreasonable, an order must be unsupported by substantial evidence and it must be "determined that the evidence presented leaves no room for difference of opinion among reasonable minds." *Energy Regulatory Comm'n, supra,* at 50 (citing *Thurman v. Meridian Mutual Insurance Co.*, 345 S.W.2d 635 (Ky. 1961)). Substantial evidence has been described as evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky.App. 1995). To determine whether evidence is substantial, we must take into account anything in the record that fairly detracts from its weight. *Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 643 (Ky.App. 1994). We afford great deference to the trier of fact in evaluating the evidence presented and the credibility of any witnesses who may appear before it, as that function lies within the exclusive province of the administrative trier of fact. *Energy Regulatory Comm'n, supra,* at 50; *Bowling, supra,* at 409-410. However, interpretation of the law lies within the "peculiar province of the judiciary." *Traynor v. Beckham*, 116 Ky. 13, 74 S.W. 1105, 1106 (1903).

ANALYSIS

The Attorney General first argues the circuit court erred in affirming the decision of the PSC, as the April 19, 2005, order violates KRS 278.170 in that it authorizes ULH&P to provide reduced rate service to customers who are ineligible to receive such discounts. Second, the Attorney General argues the circuit court erred in

affirming the decision as the PSC unlawfully enlarged the scope of its jurisdiction or otherwise acted outside the scope of its jurisdiction by doing indirectly what it could not do directly, and the alternative theory of jurisdictional authority under KRS 278.030 as set out by the PSC and accepted by the circuit court is erroneous. After a careful review of the record, we agree with the Attorney General's arguments.

The PSC is a statutorily created body and the General Assembly, through the enacting and enabling statutes, determines the powers granted to the PSC. *Boone County Water v. Public Service Comm'n*, 949 S.W.2d 588, 591 (Ky. 1997). "As a statutory agency of limited authority, the PSC cannot add to its enumerated powers." *Id.* (citing *South Central Bell Telephone Co. v. Utility Regulatory Comm'n*, 637 S.W.2d 649 (Ky. 1982)). We are required to interpret the statutes in such a way as to carry out the intent of the legislature, while ensuring no part of the statutes are made meaningless and ineffectual. KRS 446.010. *See also Commonwealth v. Phon*, 17 S.W.3d 106 (Ky. 2000), *Hardin Co. Fiscal Court v. Hardin Co. Bd. of Health*, 899 S.W.2d 859 (Ky.App. 1995).

"When a statute prescribes the procedures that an administrative agency must follow, the agency may not add or subtract from those requirements." *Public Service Commission of Kentucky v. Attorney General of the Commonwealth*, 860 S.W.2d 296, 298 (Ky.App. 1993) (citing *Union Light, Heat and Power Co. v. Public Service Comm'n*, 271 S.W.2d 361 (Ky. 1954)). Throughout KRS 278.170, which sets forth the conditions for granting free or reduced rate services, explicit language describes the entities which may receive such discounts. Noticeably absent from that statute is any reference to economic development as a basis for free or reduced rate services. The PSC does not argue to the contrary. Instead, the PSC argues the statutory language is

permissive and not exclusive, as found by the circuit court. However, as the Attorney General correctly notes, "[i]t is a primary rule of statutory construction that the enumeration of particular things excludes ideas of something else not mentioned." *Lewis v. Jackson Energy Cooperative Corporation*, 189 S.W.3d 87, 91 (Ky. 2005).

The General Assembly chose not to include economic development or brownfield redevelopment as permissible considerations for free or reduced rate services. Although the PSC's intentions may be admirable, we cannot agree with the circuit court that the provisions of KRS 278.170(2) and (3) are permissive. The plain language of the statute clearly indicates otherwise, and we cannot construe a statute contrary to its plain meaning. *City of Louisville v. Fidelity & Columbia Trust Co.*, 254 Ky. 704, 54 S.W.2d 40 (1932). Nothing in ULH&P's application indicates the entities intended to receive reduced rate services are its officers, agents or employees, utilities, agencies of the United States, or charitable or eleemosynary institutions, or that the reduced rates are intended to provide relief from flood, epidemic, pestilence, or other calamity. The Attorney General has shown by clear and satisfactory proof from the record that the PSC lacked authority to grant ULH&P's request. The PSC's order is clearly unlawful as it violates the specific mandates of KRS 278.170, and the circuit court erred in affirming the order.

Finally, we are unpersuaded by the circuit court's reliance on the PSC's assertion of alternative jurisdictional authority under KRS 278.030(3). ULH&P sought approval of rate incentives and discounts to encourage development or expansion in otherwise blighted areas of Northern Kentucky. It did not seek to establish or create new customer classifications, and the PSC did not approve such creation. Those customers seeking the benefit of the new riders would not have their underlying customer

classifications altered. Instead, the incentives would simply reduce by a set percentage the rate a customer would pay for the services it received. Upon expiration of the incentive period, the rate would revert to the then-prevailing level, based upon the customer's original classification.

Contrary to the finding of the circuit court, there is no interplay between KRS 278.170 and KRS 278.030. KRS 278.170 addresses free or reduced rate services. KRS 278.030 addresses customer classifications, but does not deal with the rates those customers pay. The subject matter of these two statutes is wholly unrelated. As previously stated, KRS 278.170 contains exclusive language regarding discounted rates, and the PSC may not utilize another statute to render the plain language of that statute a nullity. *See South Central Bell, supra*. "[W]hat the utility is forbidden to do directly, it may not accomplish by indirection by way of resort to any device or subterfuge leading to the same result." *Southeastern Land Co. v. Louisville Gas and Electric Co.*, 262 Ky. 215, 90 S.W.2d 1, 3 (1936). Because the General Assembly provided specific instructions regarding free or reduced rate services in KRS 278.170, the interpretation of KRS 278.030(3) espoused by the PSC and adopted by the circuit court is clearly contrary to the letter of the law. These two statutes do not provide alternative methods for establishing free or reduced rates. The circuit court was in error in so finding.

In making our decision, we are well-aware of the recent decision of *Commonwealth ex rel. Stumbo v. Kentucky Public Service Commission*, 243 S.W.3d 374 (Ky.App. 2007) ("*Kentucky Power")*. At first blush, the holding in *Kentucky Power* may appear contrary to our opinion rendered here. However, a careful reading of that case reveals any conflict is merely facial, not substantive.

In *Kentucky Power*, another panel of this Court held the PSC's interpretation of KRS 278.183 was entitled to deference under the principles espoused in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), as the meaning of that statute was not plain and was open to alternative interpretations. The PSC's interpretation of the statute permitted utility companies to impose environmental surcharges to recover certain environmental compliance costs incurred in related facilities located in other states and passed on to the local companies. The Court held the PSC's interpretation of the ambiguous statute was reasonable and entitled to deference under *Chevron*.

The *Chevron* doctrine mandates deference to administrative agencies only where there are alternative reasonable interpretations of relevant statutes. The statutes at issue in this appeal are clear and unambiguous. The holding in *Kentucky Power* is not particularly relevant to the issues presented in the case *sub judice*, nor does it create a conflict. The two opinions of this Court are not substantially contradictory despite the initial superficial appearance of a conflict.

Having held the order of the PSC, which was subsequently upheld by the opinion and order of the circuit court, to be unlawful pursuant to KRS 278.410(1), we need not address whether they are also unreasonable. However, our review of the record indicates the two orders were not supported by substantial evidence. Thus, were we not reversing on the basis of the unlawfulness of the PSC order, we would be compelled to reverse the matter for unreasonableness.

For the foregoing reasons, the opinion and order of the Franklin Circuit Court is reversed and this cause is remanded for further proceedings not inconsistent with this opinion.

ALL CONCUR.

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