

RENDERED: DECEMBER 14, 2007; 10:00 A.M.

**ORDERED PUBLISHED BY ORDER ENTERED APRIL 15, 2008**

**DISCRETIONARY REVIEW GRANTED BY SUPREME COURT:**

**APRIL 15, 2009**

**(FILE NO. 2008-SC-000354-DG)**

## **Commonwealth of Kentucky**

### **Court of Appeals**

NO. 2006-CA-002124-MR

and

NO. 2006-CA-002165-MR

and

NO. 2006-CA-002166-MR

HARDIN & MEADE COUNTY, PROPERTY OWNERS  
FOR CO-LOCATION; CDH PRESERVE, LLC; LISA  
HARRISON; JENNIFER HARDIN; CHARLES  
THOMPSON; GERALDINE THOMPSON; JAMES K.  
THOMPSON; SANDY THOMPSON; SAMUEL COYLE;  
EWONA COYLE; FLOYD DODSON; IRENE DODSON;  
MARY JENT; VIOLET MONROE; DIANE OWSLEY;  
KENNETH WIMP; DENNIS CUNNINGHAM; AND  
CATHY CUNNINGHAM

APPELLANTS/  
CROSS-APPELLEES

APPEAL AND CROSS-APPEALS FROM FRANKLIN CIRCUIT COURT  
v. HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 06-CI-01041

PUBLIC SERVICE COMMISSION OF KENTUCKY;  
LOUISVILLE GAS AND ELECTRIC COMPANY;  
KENTUCKY UTILITIES COMPANY; AND E.ON U.S.

APPELLEES/  
CROSS-  
APPELLANTS

OPINION  
VACATING AND REMANDING

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

COMBS, CHIEF JUDGE: CDH Preserve, LLC; Lisa Harrison; Jennifer Hardin; Charles Thompson; Geraldine Thompson; James K. Thompson; Sandy Thompson; Samuel Coyle; Ewona Coyle; Floyd Dodson; Irene Dodson; Mary Jent; Violet Monroe; Diane Owsley; Kenneth Wimp; Dennis Cunningham; and Cathy Cunningham (hereinafter referred to as the property owners) appeal from an order of the Franklin Circuit Court entered on August 28, 2006, that dismissed their action contesting a decision of the Public Service Commission (PSC or Commission).<sup>1</sup> They are the owners of property affected by proposed construction of a transmission line. Louisville Gas and Electric Company (LG&E), Kentucky Utilities Company (KU), and E.ON U.S. LLC, filed a cross-appeal; the Commission filed a separate cross-appeal.

The circuit court determined that counsel's failure timely to designate the record did not amount to excusable neglect pursuant to the provisions of Kentucky Revised Statutes (KRS) 278.420 and Kentucky Rules of Civil Procedure (CR) 6.02. We hold that the court erred and that excusable neglect did indeed result from that omission. Therefore, we vacate and remand for further proceedings. In addition, appellants contend that the circuit court erred by rejecting counsel's designation of the **entire** administrative record for its review. We agree with that assignment of error as well.

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<sup>1</sup> An entity known as "Hardin & Meade County Property Owners for Co-Location" also appears on the notices of appeal filed. However, there is no indication that the entity ever properly intervened in the administrative proceedings involving the PSC. As it did not participate as a party to the commission's proceedings, it was not authorized to bring an action against the PSC. Kentucky Revised Statutes 278.410(1).

On December 22, 2005, LG&E and KU submitted to the Commission a joint application for a Certificate of Public Convenience and Necessity. The utilities sought approval for their proposed construction of a 42.03-mile electric power transmission line to link LG&E's Mill Creek Generating Station in Jefferson County to KU's Hardin County Substation in Elizabethtown. As a second choice, the utilities also submitted a joint application for construction of the transmission line along an alternate route spanning nearly 44 miles through Jefferson, Bullitt, Meade, and Hardin Counties. The Commission consolidated the applications for consideration.

A public hearing was held on March 6, 2006, and an evidentiary hearing followed on March 28-30, 2006. The PSC granted the utility companies' joint application for their preferred route by order of May 26, 2006.

On June 16, 2006, several of the aggrieved property owners filed an application with the Commission seeking a rehearing or – in the alternative – a stay pending their appeal to the Franklin Circuit Court. The Commission refused their request for rehearing on substantive grounds. Deferring action to the circuit court, it denied the request for stay. That Commission order was dated July 6, 2006.

On July 26, 2006, the property owners filed an action in the Franklin Circuit Court seeking judicial review of the PSC's order granting the utilities' application and the Commission's order denying the property owners' request for rehearing. The property owners contended, in part, that the Commission's order granting the utilities' application was arbitrary as it was refuted and contradicted by the entire body of the evidence presented.

On August 14, 2006, LG&E, KU, and E.On U.S. LLC, filed a joint motion to dismiss the action pursuant to CR 12. The utilities argued that the property owners had failed to comply with the requirements of KRS 278.420 by failing to designate those select portions of the record necessary to resolve the issues raised in the action. Therefore, they argued that the circuit court lacked jurisdiction to review the action. The property owners promptly filed a motion requesting that they be permitted to designate belatedly the entire administrative record for the court's consideration. In support of the motion, counsel submitted affidavits attesting to a highly demanding schedule and reflecting that there had been some confusion as to whether local counsel would continue on the appeal. The affidavits were offered to show cause for the circuit court to extend the ten-day period for a designation of the record as provided by KRS 268.420.

On August 28, 2006, the Franklin Circuit Court dismissed the action. In its order, the court concluded that counsel had failed to show sufficient cause for the failure to designate the record within the statutory time frame. The court also rejected counsel's designation of the **entire** administrative record, concluding that this designation "is not an appropriate method" since "[i]t affords neither the Court nor the opposing parties any notice as to potential issues on appeal." The trial court denied the property owners' subsequent motion to alter, amend, or vacate. This appeal and the separate cross-appeals followed.

On appeal, the property owners argue that the circuit court abused its discretion by denying their motion to enlarge the time period during which the record could be designated. Additionally, they argue that the court erred by concluding that designating the administrative record in its **entirety** was improper.

The utilities and the Commission agree with that additional argument: that the circuit court erred in ruling that the property owners could not dispute the administrative record in its entirety. However, after conceding that point, they argue that a timely designation of the record is not only a procedural requirement but a jurisdictional prerequisite. Therefore, on this basis alone, they contend that the dismissal should be affirmed.

KRS 278.410 provides that any party to a PSC proceeding or any utility affected by an order of the Commission may, within 30 days of the order, bring an action in the Franklin Circuit court to vacate or to set aside the order or determination on the ground that it is unlawful or unreasonable. KRS 278.420 provides, in part, as follows:

- (1) In any action filed against the commission because of its order in a proceeding before it, the commission shall file a certified copy of the designated record and evidence with the court in which the action is pending.
- (2) Unless an agreed statement of the record is filed with the court, **the filing party shall designate, within ten (10) days after an action is filed, the portions of the record necessary to determine the issues raised in the action.** Within ten (10) days after the service of the designation or within ten (10) days after the court enters an order permitting any other party to intervene in the action, whichever occurs last, any other party to the action may designate additional portions for filing. **The court may enlarge the ten (10) day period where cause is shown.** Additionally, the court may require or permit subsequent corrections or additions to the record.

(Emphases added).

In *Forest Hills Developers, Inc., v. Public Service Comm'n.*, 936 S.W.2d 94 (Ky.App. 1996), we observed that KRS 278.420(2) required the party filing an action in circuit court pursuant to KRS 278.410 to designate in timely fashion those portions of

the record necessary to resolve the issues raised in the action. We upheld the court's conclusion that the failure of the party to designate the record deprived the court of subject-matter jurisdiction to adjudicate the action. In so reasoning, we relied on our earlier decision in *Frisby v. Bd. of Educ. of Boyle County*, 707 S.W.2d 359, 361 (Ky.App. 1986), for the proposition that:

where a statute prescribes the method for taking an appeal from an administrative action and the time in which the appeal must be taken, these requirements are mandatory and must be met in order for the circuit court to obtain jurisdiction to hear the case.

Without further discussion, we also rejected the contention that “the court abused its discretion by denying [the parties'] motion to enlarge the period during which the record could be designated.” 936 S.W.2d at 96.

In the action now before us, the circuit court correctly held that it could in its discretion enlarge the ten-day period prescribed for the designation of the record. KRS 278.420(2). It also correctly determined that its decision turned upon counsel's ability to show cause for the delay. The circuit court concluded that “neither a busy schedule nor human error” satisfied the requirement for “cause.” We disagree.

As the property owners have duly noted, the Kentucky Rules of Civil Procedure apply to this administrative appeal just as surely as they do to any other civil action. CR 6.02 provides as follows:

When by statute . . . an act is required or allowed to be done at or within a specified time, **the court for cause shown may, at any time in its discretion**, (a) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (b) **upon motion made after the expiration of the specified period**

**permit the act to be done where the failure to act was the result of excusable neglect.**

(Emphases added). The rule provides several enumerated exceptions where the period may not be enlarged under any circumstance – none of which is relevant in this case.

The Kentucky Rules of Civil Procedure govern “all actions of a civil nature in the Court of Justice.” CR 1; *Arlinghaus Builders, Inc. v. Kentucky Public Service Comm'n.*, 142 S.W.3d 693 (Ky.App. 2004). They “prescribe a practical pattern for the conduct of litigation and the effective administration of justice.” *Naive v. Jones*, 353 S.W.2d 365 (Ky. 1961). When a statute sets forth the procedure to be followed, it pre-empts our rules of procedure if they are in conflict or inconsistent with the statutory authority. CR 1(2). However, in this case, rather than conflicting with the statute, the civil rules are complementary as to the provisions of KRS 278.420(2) that authorize the circuit court to enlarge the ten-day time period based upon the reasons underlying the failure for timely designation of the administrative record.

We have reviewed our published and unpublished opinions and have found that motions to dismiss based upon a timely designation of the administrative record are routinely dispositive. However, the relationship between the provisions of KRS 278.420(2) and CR 6.02 has never been carefully considered. Consequently, this case places in issue the circuit court's interpretation of *cause* as used in KRS 278.420(2) in conjunction with the phrase *excusable neglect* as used in CR 6.02.

The leading case construing the meaning of *excusable neglect* in the context of the civil rules is *Pioneer Investment Services Co. v. Brunswick Associated Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). In *Pioneer*, the Supreme Court compared the meaning of *excusable neglect* as used in the rules

governing bankruptcy proceedings to the meaning of the same phrase as used in the federal rules of civil procedure. Since CR 6.02 mirrors its federal counterpart, Federal Rule of Civil Procedure 6(b), federal court decisions commenting on the latter rule may be accepted as persuasive authority when examining the provisions of CR 6.02. *See Taylor v. Morris*, 62 S.W.3d 377 (Ky. 2001).

The Supreme Court observed: “excusable neglect’ under Rule 6(b) is a somewhat elastic concept and is not limited strictly to omissions caused by circumstances beyond the control of the movant.” 507 U.S. at 392. (Citations omitted). Under the *Pioneer* analysis, *excusable neglect* is to be determined by a consideration of several factors: (1) whether there was any prejudice, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reasons for the delay, and (4) whether the moving party acted in good faith. *Id.* At 395.

However, our application of the civil rules cannot be merely perfunctory. Instead, it must be undertaken in such a manner as to facilitate rather than to frustrate an adjudication of the issues on the merits. In this case, the court's decision to deny the motion for enlargement of time caused the action to be dismissed and the statutory guarantee of judicial review of administrative actions to be lost. Consequently, we believe that we are compelled to apply the *Pioneer* criteria in order to determine whether *excusable neglect* under CR 6.02 occurred – resulting in *cause shown* under KRS 278.420(2).

First under *Pioneer* is the issue of prejudice to the parties. We note that the opposing parties did not suffer any prejudice as the result of appellants' delay in designating the administrative record. The delay was brief. Indeed, when analyzed in

light of the impact on appellants' interests and the weighty public policy at issue, the delay was essentially *de minimus* in nature.

Second, *Pioneer* asks us to assess the impact of the delay on the judicial proceedings. To reiterate, it was a brief delay – a matter of a few days rather than weeks or months. It was quite clear from the property owners' detailed petition that their central argument before the Franklin Circuit Court would be the allegedly vast discrepancy between the Commission's final order and the evidence presented at the administrative hearings. A review of the **entire** proceedings was manifestly necessary. The utilities candidly acknowledged the relevance of the entire record. Therefore, judicial economy suffered no discernible prejudice, and litigation has been impeded far more by the time consumed in recourse to this appeal than it was in the delay in designation of a record that all parties agreed had to be reviewed.

*Pioneer's* third criterion scrutinizes the reasons for the delay. They were neither willful nor contrived. Counsel admitted to human error and oversight. Upon discovery of the omission through the motion to dismiss, counsel acted **immediately** to remedy the mistake. No sharp practice, pretense, posturing, or tactical strategizing could be discerned. The reason for the delay was the very kind of mistake that haunts every attorney who has ever practiced law. It is the very reason that both KRS 278.420(2) and CR 6.02 provide latitude to the courts to cure such a default.

Finally under *Pioneer*, we are asked to determine whether the movants acted in good faith. There was absolutely no evidence that the omission at issue was a deliberate attempt to delay the litigation. The Commission had denied the stay that they

requested, and the property owners clearly had a compelling interest in keeping the litigation moving forward as expeditiously as possible.

Appellants have ably withstood all four of the *Pioneer* criteria construing *excusable neglect*. Under these circumstances, we believe that *excusable neglect* under CR 6.02 equates with *cause shown* under KRS 278.420(2) – again, bearing in mind the reasonable application of statutory and procedural rules that provide for a meaningful appeal. We believe that the unique circumstances of this case dictate that the court erred in dismissing these appellants. Excusable neglect occurred and cause was shown. We conclude that CR 6.02 and KRS 278.420(2) can best be reconciled by ordering that this appeal be reinstated.

Accordingly, we vacate the order of the Franklin Circuit Court and remand this case for further proceedings.

NICKELL, JUDGE CONCURS.

MOORE, JUDGE DISSENTS AND FILES SEPARATE OPINION.

MOORE, JUDGE: Respectfully, I dissent. The case of *Forest Hills Developers, Inc. v. Public Service Commission*, 936 S.W.2d 94 (Ky. App. 1996) is directly on point, having reviewed a failure to meet the ten-day deadline for filing the designation of record pursuant to KRS 278.420(2). *Forest Hills* is a well-reasoned decision, based on a long-held view of the nature of administrative appeals, and I conclude it is the correct foundation on which the matter at hand should be decided.

It is well settled that an appeal from an administrative agency's decision to the circuit court is a matter of legislative grace and strict compliance is mandatory.

*Frisby v. Bd. of Educ. of Boyle County*, 707 S.W.2d 359, 361 (Ky. App. 1986) (citing

*Board of Adjustments of the City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978)

(“There is no appeal to the courts from an action of an administrative agency as a matter of right. When grace to appeal is granted by statute, a strict compliance with its terms is required.”)). Based on long-held case law, Appellants' failure to meet the requirements of KRS 278.420(2) was fatal to their case.

Alternatively, even accepting the proposition that the circuit court retained jurisdiction over this matter after the ten-day deadline was missed to thereafter enlarge the time for designation of the record, good cause must be shown. A determination of good cause is properly within the province of the circuit court, and our Court does not disturb the circuit court's discretion unless we find abuse. Finding no abuse of discretion, I would affirm.

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ORAL ARGUMENT FOR  
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