

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001925-MR

SPEARS WATER COMPANY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM GRAHAM, JUDGE  
ACTION NO. 97-CI-00669

KENTUCKY PUBLIC SERVICE COMMISSION  
and KENTUCKY-AMERICAN WATER COMPANY

APPELLEES

AND

NO. 1998-CA-001994-MR (CROSS)

KENTUCKY PUBLIC SERVICE COMMISSION

CROSS-APPELLANT

vs. CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM GRAHAM, JUDGE  
ACTION NO. 97-CI-00669

SPEARS WATER COMPANY and  
KENTUCKY-AMERICAN WATER COMPANY

CROSS-APPELLEES

OPINION  
REVERSING

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BEFORE: COMBS, EMBERTON, and GUIDUGLI, Judges.

COMBS, JUDGE: The appellant, Spears Water Company, appeals from the order of the Franklin Circuit Court affirming the decision of the Kentucky Public Service Commission (the Commission). The

Commission cross-appeals the circuit court's judgment. Having carefully reviewed the record, we reverse the judgment of the circuit court.

On September, 1991, the Kentucky-American Water Company (KAWC) filed an application for Certificate of Public Convenience and Necessity to construct a high service water line, commonly referred to as the "Jack's Creek Pipeline." The Jack's Creek Pipeline was to run from Jack's Creek road in southeast Fayette County, westerly into Jessamine County, and then northerly into Fayette County to an existing water line at U.S. Highway 27. KAWC contended that the proposed water line was necessary to relieve low pressure problems caused by customer growth in southern Fayette County. The proposed route of the Jack's Creek Pipeline was to run near the existing water lines of the Spears Water Company (Spears).

On November 4, 1991, Spears filed a motion before the Commission to intervene in the proceedings on KAWC's application for a certificate, alleging that the Jack's Creek Pipeline would result in wasteful duplication of services and would place KAWC in direct competition with it. Spears maintained that direct competition with KAWC would have an adverse financial impact on its businesses. On April 17, 1992, the Commission rendered an order granting KAWC's application for a certificate to construct the Jack's Creek Pipeline. As to Spears's contention that it would be unfair and illegal for it to have to compete for business with KAWC, the Commission stated that water companies did not have defined service areas and that it lacked the

authority to create defined service territories. Spears filed a motion for a rehearing, which the Commission granted for the purpose of clarifying its finding that the proposed Jack's Creek Pipeline did not constitute wasteful duplication of services. Spears appealed the Commission's decision to the Franklin Circuit Court. On May 9, 1993, the circuit court rendered an opinion affirming the Commission's decision to grant KAWC's application. Spears did not appeal.

Approximately three years later, after construction of the Jack's Creek Pipeline, Spears filed a complaint against KAWC with the Commission in September 1996 alleging duplication of services and adverse impact of competition with KAWC for customers. It also filed a motion for a cease-and-desist order to prohibit KAWC from contacting and offering services to existing customers of Spears. On February 19, 1997, the Commission dismissed Spears's complaint against KAWC and denied both its request for a hearing and its motion for a cease-and-desist order. The Commission held that utility companies in Kentucky were not entitled to protection from competition. Spears filed a motion for a rehearing, which the Commission denied by an order entered on April 2, 1997.

On April 23, 1997, pursuant to KRS 278.410, Spears filed an action in the Franklin Circuit Court for review of the Commission's decision. Subsequently, on May 19, 1997 (some twenty-five days later), the Commission filed a motion to dismiss the action for lack of subject matter jurisdiction on the ground that Spears had failed to comply with KRS 278.420(2). KRS

278.420(2) mandates that "[u]nless 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." (Emphasis added.) As of the time of filing of the Commission's motion to dismiss, Spears had not filed an agreed statement of the record nor had it designated any portions of the record.

On June 5, 1997 (more than forty days having elapsed), Spears filed a motion for an enlargement of time in which to designate the record. In response to the Commission's motion to dismiss, Spears argued that its failure to designate the record did not deprive the circuit court of jurisdiction. On July 17, 1997, the court entered an order denying the Commission's motion to dismiss the action and granting Spears's motion for an enlargement of time to designate the administrative record.

On July 10, 1998, the court affirmed the decision of the Commission. The Court found that issues raised by Spears in its complaint before the Commission had previously been litigated and addressed in the proceeding for KAWC's Certificate of Public Need and Convenience to construct the Jack's Creek Pipeline. Spears appeals from the judgment of the Franklin circuit court, contending that it erred in affirming the Commission's decision. The Commission cross-appeals on the ground that the court erred in granting Spears's motion for an enlargement of time to designate the record.

We will first address the issue raised by the Commission on cross-appeal: whether the court had jurisdiction over the case. The Commission argues on appeal that Spears failed to designate the record within the time period set forth at KRS 278.420(2); therefore, the Franklin Circuit Court lacked jurisdiction over the action. It also contends that the court erred in granting Spears an enlargement of time to designate the record and that the court should have simply dismissed the action. Conversely, Spears maintains that the circuit court obtained jurisdiction over the action when it timely filed its appeal pursuant to KRS 278.410. As Spears's appeal was timely filed, it contends that jurisdiction had vested with the circuit court. Thus, the court had the ongoing authority and discretion to grant Spears an enlargement of time to designate the record.

"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." Board of Adjustments of City of Richmond v. Flood, Ky., 581 S.W.2d 1, 2 (1978). (Emphasis added.) The procedure for appealing an order by the Commission is set forth at KRS 278.410 and KRS 278.420.

KRS 278.410(1) provides:

Any party to a commission proceeding or any utility affected by an order of the commission may, within thirty (30) days after service of the order, or within twenty (20) days after its application for rehearing has been denied by failure of the commission to act, or within twenty (20) days after service of the final order on rehearing, when a rehearing has been granted, 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. Service of a commission order is complete three (3) days after the date the order is mailed. Notice of the institution of such action shall be given to all parties of record before the commission.

KRS 278.420, in pertinent part, requires that:

(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. (Emphasis added.)

In Forest Hills Developers, Inc. v. Public Service Commission, Ky. App., 936 S.W.2d 94 (1996), this court addressed the issue of whether failure to designate the record within the specified ten-day period mandated at KRS 278.420(2) was jurisdictional. The circuit court dismissed an appeal from an order of the Commission on the basis that it lacked jurisdiction due to the failure of the appellant, Forest Hills, to prosecute its claim in conformity with KRS 278.420(2). The circuit court found that Forest Hills's failure to abide by the statutory

scheme for seeking review of the Commission's order deprived it of jurisdiction. This court upheld the circuit court decision, finding no error in its reasoning. However, we recognized that:

[a]ccepting, arguendo, that Forest Hills is correct in its assertion that jurisdiction is found in KRS 278.410 rather than KRS 278.420, the fact remains that Forest Hills could not satisfy its burden of proof without reference to the record. Thus, even if the trial court erroneously framed the issue as jurisdictional in nature, dismissal would be appropriate. Kentucky Rule of Civil Procedure (CR) 56.02.

In the case before us, Spears filed a timely appeal in compliance with KRS 278.410 but failed to designate the record or any portion of the record within ten days of that filing as required by KRS 278.420. Approximately forty-three days after seeking review of the Commission's order by the circuit court, Spears filed a motion for an enlargement of time to designate the record. However, at this belated juncture, the circuit court no longer had jurisdiction over the action as the statutory requirements of KRS 278.420 had not been met. "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." Frisby v. Board of Education of Boyle County, Ky. App., 707 S.W.2d 359, 361 (1986). (Emphasis added.)

KRS 278.410 and KRS 278.420 both set out the requirements for seeking review of a decision by the Commission. The procedures outlined by both statutes must be met in order for the circuit court to obtain (and retain) jurisdiction over the

action. Furthermore, although KRS 278.420(2) authorizes the court to grant enlargements of the ten-day period for cause shown, some action must be taken within the specified ten-day period. "Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy." Flood, 581 S.W.2d at 2.

We find that the circuit court erred in granting Spears's motion for an enlargement of time to designate the record. The court had already lost jurisdiction over the action due to Spears's failure to comply with KRS 278.420(2); dismissal was the only option that remained. As to the substantive issues raised by Spears on appeal, we deem them moot.

Accordingly, we reverse the judgment of the Franklin Circuit Court.

EMBERTON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS AND FURNISHES SEPARATE  
OPINION.

GUIDUGLI, JUDGE, DISSENTING. I respectfully dissent. I agree with the Franklin Circuit Court that the trial court has discretion under KRS 278.420(2) to enlarge the ten (10) day period in which to designate portions of the record necessary to determine the issues raised in the action. The statute specifically states that the court may enlarge the ten (10) day period where cause is shown. Judge Graham granted Spears's



motion for enlargement in this case. Thus, it can be presumed that he found Spears had shown cause. I also believe the facts of this case are clearly distinguishable from Forest Hills Developers v. Public Service Commission, Ky. App., 936 S.W.2d 94 (1996). In that case Forest Hills never filed a motion for enlargement to designate the record and instead argued the court did not need the record to decide the case. I would affirm the trial court on the cross-appeal filed by the Kentucky Public Service Commission and then address the real issues of the case raised by Spears Water Company on direct appeal.

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