

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ruben Collazo, :  
Petitioner :  
 :  
v. :  
 :  
Public Utility Commission, : No. 725 C.D. 2010  
Respondent : Submitted: September 24, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: October 21, 2010

Ruben Collazo (Petitioner) appeals *pro se* from an order of the Pennsylvania Public Utility Commission (Commission) adopting the initial decision upon remand of the Administrative Law Judge (ALJ) and dismissing Petitioner's complaint because Stillwater Lakes Civic Association, Inc. (Association) meets all of the requirements of a *bona fide* cooperative association and is, therefore, exempt from the Commission's jurisdiction pursuant to Section 102 of the Public Utility Code (Code).<sup>1</sup>

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<sup>1</sup> 66 Pa.C.S. §102.

The underlying facts of this case are not in dispute. Petitioner owns property within Stillwater Lake Estates, Inc. (Community), a planned residential and resort community located in Monroe County, Pennsylvania. The Community has been in existence since 1968, and Petitioner has owned the subject property since 1971. The Association is a planned community which functions to own, operate, manage, repair and replace the common facilities located within the Community. Stillwater Sewer Corporation (Stillwater), a wholly-owned subsidiary of the Association, currently furnishes wastewater sewer service to 512 full-time and 268 standby customers, all of whom reside within the Community and all of whom, except Petitioner, are members of the Association.<sup>2</sup> As a result of the parties' November 4, 2002 settlement of a civil action brought by Petitioner in the Federal District Court for the Middle District of Pennsylvania, Petitioner is no longer a member of the Association. The practical result of this settlement is that Petitioner receives wastewater sewer services from Stillwater, he pays Stillwater its regular wastewater service charge on the same basis and in the same amount charged to every other property owner, and he pays the Association its annual maintenance charge, but he is no longer entitled to vote in the Association.

Petitioner filed a complaint with the Commission on September 22, 2006, alleging that because he is not a member of the Association but is receiving wastewater utility services from Stillwater, that Stillwater is a *de facto* public utility under the jurisdiction of the Commission and it is providing illegal public

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<sup>2</sup> There are also 178 members of the Association who own property in the Community with on-site sewer systems. While these members currently do not receive wastewater sewer service from Stillwater, they have the potential to hook up to the sewer system in the future if they obtain a township permit and Stillwater is able to construct the infrastructure necessary to reach their properties.

utility service without a certificate of public convenience from the Commission. Stillwater filed an answer and new matter alleging that it is an exempt provider of non-regulated sewer services to residents and a wholly owned subsidiary of the Association, a Pennsylvania planned community association. A telephonic hearing was held with the Administrative Law Judge (ALJ) on January 10, 2007. While both parties offered exhibits which were admitted into the record, neither party filed briefs.

The ALJ denied Petitioner's complaint by initial decision issued April 6, 2007, concluding that Stillwater was not a public utility within the meaning of the Code. Section 1101 of the Code mandates that a public utility must obtain a certificate of public convenience from the Commission before it may lawfully "begin to offer, render, furnish, or supply service within this Commonwealth." 66 Pa.C.S. §1101. The ALJ noted that Section 102 of the Code defines the term "public utility" in pertinent part as follows:

(1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:

...

(vii) Sewage collection, treatment, or disposal for *the public* for compensation.

66 Pa.C.S. §102.<sup>3</sup> (Emphasis added). The ALJ found that Stillwater only served Association property owners who were located within the geographical limits of the Community. It was not open to the indefinite public, but rather served only a

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<sup>3</sup> Section 102 of the Code goes on to list exemptions, including an exemption for "bona fide cooperative associations," which will be discussed below.

special, limited class of people. Therefore, the ALJ concluded that Stillwater did not provide its services “for the public” and did not qualify as a public utility within the meaning of the Code.

Petitioner filed exceptions to the ALJ’s decision and Stillwater filed reply exceptions. By tentative opinion and order entered on January 28, 2008, the Commission granted in part and denied in part Petitioner’s exceptions and reversed the initial decision of the ALJ. The Commission noted that the decisions of Pennsylvania courts had made it clear that the absence of control over customers or a relationship between the utility and its members was critical in determining public utility status. *See Drexelbrook Associates v. Pennsylvania Public Utility Commission*, 418 Pa. 430, 212 A.2d 237 (1965); *Warwick Water Works, Inc. v. Pennsylvania Public Utility Commission*, 699 A.2d 770 (Pa. Cmwlth. 1997). There is no control over the persons to whom wastewater services are provided in this case because neither Stillwater nor the Association has control over who buys or sells homes in the Community. Also, Stillwater has no relationship with Association members other than through the provision of sewer services. Therefore, the Commission found that Stillwater was a *de facto*, uncertified public utility.

However, the Commission also noted that the definition of “public utility” found in Section 102 of the Code specifically states that “[t]he term does *not* include . . . [a]ny bona fide cooperative association which furnishes service only to its stockholders or members on a nonprofit basis.” 66 Pa.C.S. §102. (Emphasis added). Because the Code does not specifically define the term “bona fide cooperative association,” the Commission has established five criteria to be considered when determining whether an entity qualifies for this exemption:

- (1) the purpose of the organization's internal structure is to furnish [utility] service;
- (2) the organization furnishes service, either directly or by contract with another organization only to its members who are identified as such;
- (3) membership is limited to those who avail themselves of the services furnished by the association;
- (4) control and ownership by each member is substantially equal; and
- (5) economic benefits are passed to the members on a substantially equal basis.

(Commission Opinion of January 28, 2008 at 7 (citing *Re Adrian Water Co.*, 53 Pa. P.U.C. 139 (1979))). All five of these factors must be established in order for an organization to qualify as a *bona fide* cooperative association under the Code.

The Commission stated that while Stillwater made reference to a *bona fide* cooperative association in its answer and new matter, the record was devoid of evidence to support a conclusion that Stillwater, through its parent company the Association, met the above criteria. Therefore, the Commission afforded the Association the opportunity to become a *bona fide* cooperative association under the qualifications of *Adrian*. If the Association chose not to become a *bona fide* cooperative association, the tentative order would become final and Stillwater would be required to apply for a certificate of public convenience with the Commission.

On June 18, 2008, Stillwater filed a petition to reopen the record in order to establish that the Association met the qualifications outlined in the tentative order and qualified as an exempt *bona fide* cooperative association under *Adrian* without having to officially modify its status from a planned community to a real estate cooperative. By opinion and order entered on December 19, 2008, the Commission remanded the case for these purposes and a second telephonic hearing was held before the ALJ.

On December 9, 2009, the ALJ issued an initial decision upon remand denying Petitioner's complaint and concluding that the Association met all of the requirements of a *bona fide* cooperative association under *Adrian* so that its subsidiary, Stillwater, was exempt from the Commission's jurisdiction pursuant to Section 102 of the Code. The ALJ found that the covenant of the Association required it to provide sewer service to the unit owners and this was the only function Stillwater carried out. The Association provided sewer service to its members through Stillwater and membership was limited to those who resided within the geographical limits of the Community. The ALJ found that control and ownership by each Association member was substantially equal as all members in good standing, regardless of whether they received sewer service directly, were standby customers, or owned lots with on-site sewer systems, were entitled to one vote within the Association. The ALJ also found that the economic benefits or detriments of the Association were passed on to members on a substantially equal basis. For example, if a budget surplus occurred, the excess funds could be used to reduce fees for the coming year, to complete a capital project, or they could be placed in a reserve fund. Given these facts, the ALJ determined that both the Association and Stillwater were nonprofit corporations with higher or lower sewer costs being passed on directly to the property owners or members. Petitioner again

filed exceptions to this decision and Stillwater filed reply exceptions. On March 15, 2010, the Commission issued an opinion and order denying Petitioner's exceptions, adopting the initial decision upon remand of the ALJ, and dismissing Petitioner's complaint against Stillwater. This appeal followed.<sup>4</sup>

It is difficult to deduce the actual arguments Petitioner is advancing on appeal from his disjointed, rambling brief as he devotes most of his efforts toward disparaging the Association's counsel and enunciating his personal political views. After reviewing Petitioner's petition for review and brief to this Court, even providing him every benefit of the doubt, nowhere does he challenge specific findings of the Commission regarding the *Adrian* factors or offer any argument as to why Stillwater and the Association failed to meet these requirements. Because Petitioner failed to properly raise and preserve these arguments on appeal, they are waived. See Pa. R.A.P. 1513(d); *Met-Ed Industrial Users Group v. Pennsylvania Public Utility Commission*, 960 A.2d 189, 201 n.18 (Pa. Cmwlth. 2008) (citing *Doren v. Mazurkiewicz*, 695 A.2d 967 (Pa. Cmwlth. 1997)).

It appears Petitioner raises two legitimate arguments on appeal. First, Petitioner argues that the Commission committed an error of law by refusing to give binding effect to the prior settlement agreement between the parties and the August 2, 2002 decision issued by the Federal District Court for the Middle District of Pennsylvania. According to Petitioner, this federal ruling definitively determined the legal relationship of the parties, held that a property owners'

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<sup>4</sup> Our scope of review of the Commission's opinion and order is limited to determining whether the Commission committed an error of law, violated any constitutional rights, or rendered a decision that is not supported by substantial evidence. *North Lebanon Township v. Public Utility Commission*, 962 A.2d 1237, 1244 n.4 (Pa. Cmwlth. 2008).

association was never legally created and now bars the Commission, or any State agency for that matter, from imposing an association, rules, regulations, or by-laws on Petitioner or any other property owner within the Community.

This argument is without merit for several reasons. First, the Federal District Court did not address the Association's status as a *bona fide* cooperative association under the Public Utility Code; it merely reviewed and approved the terms of the settlement between the parties, part of which included Petitioner voluntarily relinquishing his voting rights in the Association. Because a settlement was reached, substantive review by the federal court was unnecessary and was not conducted. Second, the August 2, 2002 ruling that Petitioner relies upon is merely a memorandum opinion denying Defendant Stillwater's motion in limine, which does not qualify as a final order entitled to res judicata or binding effect. In short, the federal decision has no bearing upon the underlying issues of this case.

Petitioner also argues on appeal that Stillwater is and has always been registered as a "for profit" corporation, and the ALJ erred in denying Petitioner the right to introduce evidence of its alleged for profit status. According to Petitioner, Stillwater is not eligible for the *bona fide* cooperative association exemption because Section 102 specifically states that the association must furnish its services "on a nonprofit basis." However, the alleged corporate status of an organization does not automatically determine whether the organization qualifies as a *bona fide* cooperative association under the Code. *See Philadelphia Association of Wholesale Opticians v. Pennsylvania Public Utility Commission*, 30 A.2d 712, 717 (Pa. Super. 1943); *Adrian*. The record demonstrates that the Association passes along any economic benefits or detriments to its members on a substantially equal basis. If a budget surplus occurs, the excess funds must be allocated in one of



three ways – to reduce fees for the coming year, to complete a capital project, or placed in a reserve fund. These facts support the determination that Stillwater and the Association operate on a nonprofit basis.

Accordingly, the order of the Commission is affirmed.

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DAN PELLEGRINI, JUDGE

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**ORDER**

AND NOW, this 21<sup>st</sup> day of October, 2010, the opinion and order of the Pennsylvania Public Utility Commission, dated March 15, 2010, is affirmed.

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DAN PELLEGRINI, JUDGE