

RENDERED: October 3, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2069-MR

NUCKOLS FARM, INC.

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 96-CI-000201

PUBLIC SERVICE COMMISSION OF KENTUCKY
and LEXINGTON MSA LIMITED PARTNERSHIP,
d/b/a BELLSOUTH MOBILITY, INC.

APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: GUIDUGLI, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order of the Franklin Circuit Court dismissing appellant's action for review of a decision of the Public Service Commission ("the Commission") due to lack of subject matter jurisdiction because of appellant's failure to timely designate the record pursuant to KRS 278.420. Upon considering appellant's argument in light of the record herein and controlling precedent, we agree with the trial court that subject matter jurisdiction was lost when appellant failed

to timely designate the record pursuant to KRS 278.420. Thus, we affirm.

Appellant, Nuckols Farm, Inc., intervened in proceedings before appellee, the Public Service Commission, on the application of appellee, Lexington MSA Limited Partnership, d/b/a BellSouth Mobility, Inc. ("BellSouth"), to construct a cellular tower near the entrance to Nuckols Farm, which is in close proximity to the City of Midway and within the boundaries of the Lexington/Frankfort Scenic Corridor. Nuckols Farm raised procedural objections, including lack of notice, and substantive objections to the site chosen by BellSouth. At a public hearing before the Commission on August 31, 1995, Nuckols Farm contested the proposed construction of the cellular tower on the site in question. On November 27, 1995, the Commission entered an order granting BellSouth approval to build the cellular tower on the site. Subsequent to the denial of a motion for rehearing, the Commission's decision became final on January 1, 1996.

On February 7, 1996, Nuckols Farm filed an action in the Franklin Circuit Court for review of the Commission's decision pursuant to KRS 278.410. On February 26, 1996, the Commission moved to dismiss for lack of subject matter jurisdiction because Nuckols Farm failed to designate the record within ten (10) days after the action was filed as required by KRS 278.420. Upon receipt of the motion, Nuckols Farm filed a motion for enlargement of time within which to file a designation of record on March 1, 1996 and filed its designation of record on

that same date. The motion for enlargement of time stated that counsel for Nuckols Farm relied upon the old version of KRS 278.420 and overlooked the current version as amended in 1990, which required that the designation of record be filed within ten (10) days of the action's being filed. On April 17, 1996, the Franklin Circuit Court entered an order dismissing the action of Nuckols Farm for lack of subject matter jurisdiction for its failure to comply with KRS 278.420(2). From the order dismissing the action and the subsequent order denying Nuckols Farm's motion to alter, amend, or vacate, Nuckols Farm now appeals.

Nuckols Farm argues that the trial court erred in ruling that it did not have subject matter jurisdiction over the action because Nuckols Farm failed to comply with KRS 278.420. Nuckols Farm maintains that KRS 278.420 does not determine subject matter jurisdiction and that while a court does have the discretion to deny a motion for enlargement of time to file the designation of record and dismiss for failure to comply with the statutory requirements of KRS 278.420, it was error to dismiss on grounds of lack of subject matter jurisdiction. KRS 278.420(2) provides:

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.

Our Court has recently addressed this very issue in Forest Hills Developers, Inc. v. Public Service Commission, Ky. App., 936 S.W.2d 94 (1996), which we adjudge to be dispositive of the case at hand. In that case, the plaintiff failed to designate the record and the circuit court dismissed for lack of subject matter jurisdiction. On appeal, the appellant argued, as Nuckols Farm does here, that KRS 278.420(2) is not jurisdictional. Relying on Frisby v. Board of Education of Boyle County, Ky. App., 707 S.W.2d 359 (1986), the Court held that the "failure to abide by the statutory scheme for seeking review of a commission's order deprives the reviewing court of jurisdiction." Forest Hills Developers, Inc., supra at 96. The Court went on to say, however, that even if jurisdiction is initially conferred by KRS 278.410, which sets out the procedural requirements for the filing of the action for review, the trial court nevertheless acted properly in dismissing the action because the action could not have been decided without reference to the record of the administrative proceedings (emphasis added).

Likewise, in the instant case, whether we consider KRS 278.410 or KRS 278.420, or both statutes, to confer jurisdiction on the circuit court, the circuit court did not err in dismissing appellant's action. Insofar as KRS 278.420(2) determines jurisdiction, the court properly dismissed the action for lack of subject matter jurisdiction for failure to timely designate the

record. If KRS 278.410 is considered to confer jurisdiction, the court's dismissal of the action was nevertheless proper because the action could not have been adjudicated without the record of the administrative proceedings.

In the complaint filed by Nuckols Farms before the circuit court, it contends that the orders of the Commission were unlawful and unreasonable. Specifically, it alleged that BellSouth failed to meet its burden of proof that it provided reasonable notice of the application and that the construction of the cellular tower on the proposed site was necessary and convenient to the public. Clearly, review of the record of the evidence presented at administrative hearing is necessary to decide these sufficiency of evidence questions regarding whether BellSouth met its burden of proof.

For the reasons stated above, the order of the Franklin Circuit Court dismissing the action is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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