

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2001-CA-002006-MR

GEORGE KRAUSER, JR., AND PATRICIA KRAUSER;  
DON EDLING AND MARTHA EDLING; LEONARD GROSS;  
BARBARA BALLARD, DR. ARMAND GORDON;  
CLARA BILHARZ; WILLIAM AND THELMA MCGUIRK;  
MARK AND MARY LEE O'BRYAN; TRUDY YORK MILLER;  
PATRICE RYMAROWITZ; CLARE BLACKBURN;  
STEVEN AND JUDY SPOONER; EDWARD AND BARBARA  
WEILAGE; AND THEODORE AND ANN H. STEWART

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER CRITTENDEN, JUDGE  
ACTION NO. 01-CI-00655

PUBLIC SERVICE COMMISSION OF KENTUCKY;  
MARTIN J. HUELSMANN, CHAIRMAN AND COMMISSIONER  
OF THE PUBLIC SERVICE COMMISSION OF KENTUCKY;  
EDWARD J. HOLMES, VICE-CHAIRMAN AND COMMISSIONER  
OF THE PUBLIC SERVICE COMMISSION OF KENTUCKY;  
GARY W. GILLIS, COMMISSIONER OF THE PUBLIC SERVICE  
COMMISSION OF KENTUCKY; CROWN COMMUNICATIONS,  
INCORPORATED; KENTUCKY CGSA, INCORPORATED;  
TRITEL COMMUNICATIONS, INCORPORATED; TRITEL FINANCE,  
INCORPORATED; AND VERIZON WIRELESS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: George Krauser, Jr., Patricia Krauser, Don  
Edling, Martha Edling, Leonard Gross, Barbara Ballard, Dr.

Armand Gordon, Clara Bilharz, William McGuirk, Thelma McGuirk, Mark O'Bryan, Mary Lee O'Bryan, Trudy York Miller, Patrice Rymarowitz, Clare Blackburn, Steven Spooner, Judy Spooner, Edward Weilage, Barbara Weilage, Theodore Stewart and Ann H. Stewart (hereinafter Krauser) have appealed from an order of the Franklin Circuit Court entered on August 27, 2001, which dismissed their action contesting a decision of the Public Service Commission (PSC). Having concluded that strict compliance with the procedural guidelines at KRS<sup>1</sup> 278.420 is necessary in order to perfect an appeal from a PSC decision, we affirm.

On October 21, 1999, Crown Communications, Inc., Kentucky CGSA, Inc. (d/b/a BellSouth Mobility), Verizon Wireless, Tritel Communications, Inc., and Tritel Finance, Inc. (collectively, the appellees), submitted an application to construct a cellular communications tower near Old Cannons Lane in Louisville, Jefferson County, Kentucky. The Louisville and Jefferson County Planning Commission (Planning Commission) rejected Crown's application by unanimous decision on December 2, 1999. On March 3, 2000, pursuant to Kentucky administrative procedures, the appellees filed an appeal of the Planning Commission's decision with the PSC. Following a public hearing,

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<sup>1</sup> Kentucky Revised Statutes.

at which Krauser and the Planning Commission were both heard, the PSC granted Crown's application on May 9, 2001.

On June 1, 2001, Krauser filed an action in the Franklin Circuit Court seeking judicial review of the PSC's order granting Crown's application. On June 22, 2001, and June 27, 2001, the appellees filed separate motions to dismiss, arguing that Krauser had failed to comply with KRS 278.420 by failing to designate those portions of the record necessary to resolve the issues raised in the action. On June 29, 2001, Krauser filed a belated designation of the record, and on July 5, 2001, Krauser filed a motion for enlargement of the time period in which to file a designation of the record under KRS 278.420. In essence, Krauser's motion for enlargement argued that it was within the sound discretion of the Franklin Circuit Court to grant the enlargement due to excusable neglect.

Following a hearing on the respective motions for dismissal and enlargement, the Franklin Circuit Court ruled that Krauser's failure to comply with KRS 278.420 deprived it of subject-matter jurisdiction, and accordingly, it dismissed Krauser's action. The circuit court stated that it was bound by this Court's earlier decision in Forest Hills Developers, Inc. v. Public Service Commission,<sup>2</sup> and that Krauser's attempt to

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<sup>2</sup> Ky.App., 936 S.W.2d 94 (1996).

distinguish the case sub judice from Forest Hills was unconvincing. This appeal followed.

Krauser argues that the designation of the record under KRS 278.420(2) is not jurisdictional. Specifically, he maintains that the basis for the Franklin Circuit Court's jurisdiction over his action is KRS 278.410 rather than KRS 278.420. Krauser argues that irrespective of his failure to timely designate the record, that the Franklin Circuit Court was vested with jurisdiction to adjudicate the action and that the circuit court abused its discretion by denying his motion to enlarge the time period during which the record could be designated.

KRS 278.410 provides that any party to a PSC proceeding or any utility affected by an order of the PSC may, within 30 days of the order, bring an action in Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable. KRS 278.420(2) states:

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.

In Forest Hills, supra, this Court held that KRS 278.420(2) required the party filing an action in circuit court pursuant to KRS 278.410 to timely and properly designate the portions of the record necessary to resolve the issues raised in the action. This Court further held that the failure of the party to timely and properly designate the record deprived the circuit court of subject-matter jurisdiction to adjudicate the action. This Court in Forest Hills quoted its previous decision in Frisby v. Board of Education of Boyle County,<sup>3</sup> 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.'"<sup>4</sup> In the case sub judice, the Franklin Circuit Court properly relied upon this Court's decisions in Forest Hills and Frisby in dismissing Krauser's action.

While Krauser attempts to distinguish the case sub judice from the decision in Forest Hills, like the circuit

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<sup>3</sup> Ky.App., 707 S.W.2d 359, 361 (1986).

<sup>4</sup> Forest Hills, 936 S.W.2d at 96.

court, we find his argument unconvincing. Both cases involved the same critical facts: the party filing the action failed to designate the record within ten days of filing the action, the party filing the action later attempted to file a belated designation of the record, and the party filing the action filed a motion for enlargement of the time period in which to designate the record. The only procedural distinction between the two cases is that the appellant in Forest Hills attempted to argue that the record did not have to be designated because no portion of the record was essential to deciding the action.<sup>5</sup> In determining the proper application of the holding in Forest Hills to the case sub judice, we conclude that the distinction between the two cases is irrelevant. The holding in Forest Hills is clear and it requires the timely and proper designation of the record pursuant to KRS 278.420 in order for the subject-matter jurisdiction of the Franklin Circuit Court to be invoked pursuant to KRS 278.410. Krauser failed to comply with the mandatory jurisdictional requirement of timely and properly designating the record.

For the foregoing reasons, the order and opinion of the Franklin Circuit Court dismissing the action is affirmed.

ALL CONCUR.

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<sup>5</sup> Unlike the appellant in Forest Hills, Krauser admits that portions of the record are necessary to decide the action. Krauser's counsel also admits that he simply neglected to designate the record because of the contemporaneous timing of his son's wedding.

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