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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001516-MR

BASIL C. POLLITT AND
THE GAS GROUP, INC.

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 01-CI-00581

COMMONWEALTH OF KENTUCKY,
PUBLIC SERVICE COMMISSION

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Basil C. Pollitt and the Gas Group, Inc. appeal from a March 2, 2004, order of the Franklin Circuit Court granting summary judgment and a permanent injunction in favor of the Public Service Commission (PSC). We affirm.

In February 1999, an unmarked natural gas line was discovered in Warren County, Kentucky. PSC was alerted to the

line's existence and initiated an investigation. During the investigation, PSC discovered numerous safety violations and ascertained the owner of the line was the Gas Group. The Gas Group was owned and operated by Pollitt.

Consequently, PSC ordered the Gas Group and Pollitt to show cause why they should not be subject to penalties for violations of Kentucky Revised Statutes (KRS) 278.020; KRS 278.160; 807 Ky. Admin. Regs. (KAR) 5:022, §§ 14(5)(a), 14(5)(c)(2), 14(5)(e)(2), 13(9); 807 KAR 5:023; 49 C.F.R. 192.707(a); 49 C.F.R. 192.707(e)(2); 49 C.F.R. 192.615 and 49 C.F.R. 199. A summons was issued advising Pollitt that he had twenty (20) days to respond. The summons further provided notice of the date, time and place of an evidentiary hearing before PSC. The summons was personally served upon Pollitt on April 22, 1999. Pollitt never responded.

On May 18, 1999, PSC conducted an evidentiary hearing. Pollitt did not appear at the hearing. On September 2, 1999, PSC issued an order finding that Pollitt was the owner and operator of a natural gas distribution facility known as the Gas Group. It further found the unmarked natural gas line:

[C]onsisted of 22 miles of three and four-inch plastic pipe which extends northward along Kentucky Highway 185. The system is pressurized and valves are located at 4-mile intervals. The gas distribution system services natural gas to approximately 50 customers. . . .

PSC concluded that the Gas Group violated KRS 278.020, KRS 278.160; 49 C.F.R. 192.707(a); 49 C.F.R. 192.707(e)(2); 49 C.F.R. 192.615; and 49 C.F.R. 199. PSC assessed civil penalties of \$25,750.00 and directed the Gas Group to file an application for a certificate of convenience and necessity, as well as a schedule of rates. Neither Pollitt nor the Gas Group filed an appeal in the circuit court from PSC's September 1999 order within thirty (30) days as provided by KRS 278.410(1).

Some two years later, on May 14, 2001, PSC filed a complaint in the Franklin Circuit Court seeking enforcement of its September 1999 order and an injunction terminating the distribution of natural gas by the Gas Group. On November 1, 2001, PSC filed a motion for summary judgment and for a permanent injunction. On March 2, 2004, the circuit court granted summary judgment in favor of PSC and issued a permanent injunction terminating the flow and distribution of natural gas through the gas line. This appeal follows.

The Gas Group claims that the circuit court erred by entering summary judgment in favor of PSC to enforce its September 1999 order and issuing a permanent injunction. The proper standard of review to be applied on appeal from a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the

moving party was entitled to judgment as a matter of law." Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. 1996). The record is viewed in the light most favorable to the nonmoving party and any doubts shall be resolved in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). As resolution of this appeal centers upon issues of law, we review the circuit court's decision *de novo*.

Initially, we observe that the exhaustion of administrative remedies doctrine requires a party to exhaust "all administrative remedies available within the agency whose action is being challenged" Popplewell's Alligator Dock No. 1 v. Revenue Cabinet, 133 S.W.3d 456, 471 (Ky. 2004)(citation omitted). An exception to the exhaustion doctrine is recognized where the issue of jurisdiction of the agency is raised and resolution is a question of law, not dependent upon controverted facts. Dep't of Conservation v. Sowders, 244 S.W.2d 464 (Ky. 1951); Goodwin v. City of Louisville, 309 Ky. 11, 215 S.W.2d 557 (1948).

In this case, it is clear that Pollitt and the Gas Group did not exhaust their administrative remedies. However, Pollitt and the Gas Group argue PSC lacked jurisdiction; thus, the exception to the exhaustion of administrative remedies doctrine would apply. The facts relevant to decide the jurisdiction of PSC are not in dispute. Therefore, we believe

the exception to the exhaustion doctrine is applicable to this case. As such, we shall analyze whether PSC possessed jurisdiction.

KRS 278.040 provides that "[t]he Public Service Commission shall regulate utilities and enforce the provision of this chapter." To resolve the issue of whether PSC possessed jurisdiction to enter the September 1999 order, it is necessary to determine whether the Gas Group was a "utility" within the meaning of KRS 278.010(3)(b), which defines utility as follows:

The production, manufacture, storage, distribution, sale, or furnishing of natural or manufactured gas, or a mixture of same, to or for the public, for compensation, for light, heat, power, or other uses.

PSC argues that the Gas Group was a utility because the natural gas line provided "farm tap" gas services to some fifty property owners along the gas line's route. The property owners paid for the gas utilized. Thus, PSC concluded the Gas Group clearly distributed natural gas to the public for compensation and met the requirements of a utility under KRS 278.010(3)(b).

Conversely, Pollitt and the Gas Group argue that the natural gas line originally only supplied gas to an end user, Midwestern Pipelines, Inc., and not to the public. Although the Gas Group's contract with Midwestern terminated in 1997 and the gas line no longer supplied gas to an end user, Pollitt and the

Gas Group maintain that the character of the natural gas line should be determined at the time of its creation. Moreover, Pollitt and the Gas Group point out that the farm taps were provided to the fifty property owners by mandate of the PSC. See KRS 278.485 (requiring a gas pipe line company to furnish gas service to the owner of any property over which its gas gathering line is located.) Thus, Pollitt and the Gas Group maintain that the Gas Group should not be considered a utility because the gas line only distributed natural gas to the public pursuant to the PSC's mandate and because the gas line was originally a pure gathering line to transport gas to Midwestern.

The language of KRS 278.010(3)(b) is clear that any person who operates a facility which produces or distributes natural gas to the public for compensation is a utility. In the case at hand, the undisputed facts reveal that the Gas Group distributed natural gas through its line to some fifty property owners. Further, the Gas Group's contract with its end user terminated in 1997; thereafter, the gas line was utilized for a time solely as a distribution line supplying natural gas to the fifty property owners.¹

Pollitt and the Gas Group, however, urge this Court to create an exception to KRS 278.010(3)(b) because the Gas Group was mandated to furnish the farm taps. KRS 278.010(3)(b)

¹ It appears that sometime in September 2003, the Gas Group acquired a contract with another end user, Viking Energy, LLC.

recognizes no such exception, and we are not at liberty to add language to a statute. See City of Covington v. Kenton County, 149 S.W.3d 358 (Ky. 2004).

We also reject the assertion of Pollitt and the Gas Group that the natural gas line was originally a gathering which could not be "transformed" into a distribution line. As is evidenced by this case, the character of a natural gas line is not static, but rather changes with the needs of its owner and the public. To recognize otherwise would be untenable. Accordingly, we hold that the Gas Group was a utility within the meaning of KRS 278.010(3)(b), and PSC possessed jurisdiction in this matter.

We view the remaining contention of Pollitt and the Gas Group to be without merit.

In sum, we are of the opinion the circuit court properly entered summary judgment in favor of PSC upholding the \$25,750.00 in civil penalties and issuing the permanent injunction terminating the distribution of natural gas through the line.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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