

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001697-MR

GERALD KAREM

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 16-CI-01361

KENTUCKY PUBLIC SERVICE COMMISSION;
KENTUCKY UTILITIES COMPANY;
LOUISVILLE GAS AND ELECTRIC COMPANY;
KENTUCKY INDUSTRIAL UTILITY CUSTOMERS
AND COMMONWEALTH OF KENTUCKY,
EX REL., ANDY BESHEAR, ATTORNEY GENERAL

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, NICKELL, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Gerald Karem appeals from the Franklin Circuit Court's order dismissing his appeal from an order of the Kentucky Public Service Commission (PSC) denying his request to intervene in a tariff approval application

jointly filed by Kentucky Utilities Company and Louisville Gas and Electric Company (collectively the utilities). We affirm.

On August 2, 2016, the utilities filed a joint application with the PSC seeking approval of a tariff rate for customers who would voluntarily sign up for a solar share program (the program) the utilities planned to create after constructing a 4-megawatt solar facility abutting Interstate 64 in Shelby County, Kentucky. The utilities asked the Commission to allow them to deviate from the requirement under 807 Kentucky Administrative Regulations (KAR) 5:011 §8 that they place three notices of the tariff filing in newspapers because the program was wholly voluntary and due to the expected costs of placing the notice in the newspapers three times. On August 3, the utilities voluntarily sent a letter about the project to some people who owned land near the planned facility, including Karem. The letter informed the landowners that they could meet with utility representatives about the project on August 23.

The Commission issued an order on August 12, 2016, which allowed the utilities to publish only one notice in the newspapers. The order also required motions to intervene to be filed by August 19, 2016. However, the order provided that tardy motions would be accepted upon a showing of “a basis for intervention and good cause for being untimely[,]” though anyone permitted to intervene after the August 19 deadline would be required to “abide by the existing procedural

schedule.” The order required all requests for hearings to be submitted by October 31, 2016.

Karem attended the landowners’ meeting with the utilities on August 23. The notice ran in newspapers across the state between about August 23 and August 25, when it was admittedly viewed by Karem. The notice set forth the by then already-expired August 19 deadline for intervention but also said late intervention requests would be granted upon a showing of good cause. The notice also contained a warning that the PSC could take final action on the tariff filing if it did not receive any requests for intervention within thirty days. No one moved to intervene within the thirty-day period¹ and, in late September, the utilities filed an unopposed motion to waive a hearing.

Many people, including Karem, subsequently filed public comments about the project, mostly expressing a desire for the utilities to locate the solar plant elsewhere. No one, however, moved to intervene until Karem did so on November 3, 2016. The PSC denied Karem’s motion the next day because it was untimely and because it found he was unlikely to present issues or develop facts

¹ Kentucky Industrial Utility Customers (KIUC) filed a motion to intervene on August 3, which the PSC granted on August 22. However, KIUC has taken a wholly passive role in all proceedings.

without unduly disrupting the proceedings. That same date, the PSC approved the utilities' requested tariff.

On November 22, 2016, Karem, via counsel, filed a motion for reconsideration of the order denying his request to intervene. In December 2016, the PSC denied Karem's motion for reconsideration, stressing that he could have moved to intervene much sooner. Karem then sought review in the Franklin Circuit Court, where the Attorney General of Kentucky was permitted to intervene as a party. However, in May 2017, the court granted the PSC's motion to dismiss. Karem then filed this appeal, but the Attorney General did not file a separate appeal or take an active role in Karem's appeal.

Before addressing the merits of Karem's arguments, we must set forth the narrow scope of our review. Kentucky Revised Statutes (KRS) 278.430 provides in relevant part that "the party seeking to set aside any . . . order of the [PSC] shall have the burden of proof to show by clear and satisfactory evidence that the . . . order is unreasonable or unlawful." An order of the PSC is unreasonable "only if it is determined that the evidence presented leaves no room for difference of opinion among reasonable minds." *Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 499 (Ky. 1998). An order of the PSC is unlawful "if it violates a statute or constitutional provision

...” *Citizens for Alternative Water Solutions v. Kentucky Public Service Comm’n*, 358 S.W.3d 488, 490 (Ky.App. 2011).

807 KAR 5:001 §4(11)(b) provides in relevant part that the PSC “shall” grant a request to intervene if it finds the requesting person:

has made a timely motion for intervention *and* that he or she has a special interest in the case that is not otherwise adequately represented or that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.

(Emphasis added). We review the PSC’s decision on requests to intervene for an abuse of discretion. *Inter-County Rural Elec. Co-op. Corp. v. Public Service Comm’n*, 407 S.W.2d 127, 130 (Ky. 1966).

Karem’s arguments to the contrary notwithstanding, the PSC did not abuse its discretion by concluding his motion to intervene was untimely. Karem had notice of the project in August 2016 in at least three ways: 1) by receiving a letter from the utilities; 2) by attending a meeting with the utilities; and 3) seeing a notice in his local paper. Yet, without explanation, he did not seek to intervene for well over two months thereafter, by which point the utilities had moved to submit the matter without having a hearing and the PSC’s deadline for requesting a hearing had expired. The fact that the overly stringent deadline for intervention had expired before the notice ran in Karem’s local newspaper is insufficient to

excuse his tardiness given the notice he received in other manners and his significant dilatoriness in seeking to intervene. Under these facts, the PSC did not abuse its discretion in denying Karem's motion on timeliness grounds.

Karem also alleges a due process-based claim from the denial of his motion to intervene. However, the "fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). So "[p]ersonal service of written notice within the jurisdiction is the classic form of notice *always adequate in any type of proceeding.*" *Id.* at 313 (emphasis added). Because Karem received actual, timely notice of the project, his due process claim fails. In addition, Karem has not shown he had a "vested property interest" in the PSC proceedings, as is required for a cognizable due process claim. *Kentucky Indus. Utility Customers, Inc.*, 983 S.W.2d at 497 (citing *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). That conclusion is reinforced by the fact that a utility customer does not have a vested property interest in utility rates. *Id.*

Though the untimely nature of Karem's motion is independently sufficient to affirm the denial of his motion to intervene, we also conclude the PSC

did not abuse its discretion when it found he had not met the substantive intervention criteria. Karem's main objective seems to be to require the project to be located elsewhere. But, as the PSC explained, the location of the solar facility was not an issue properly before it. KRS 278.216(1) only requires a utility to obtain a "site compatibility certificate" from the PSC before constructing "a facility for the generation of electricity capable of generating in aggregate more than ten megawatts (10MW)"; yet the solar facility at hand was only 4-megawatts. Karem has not shown what other legitimate issues he was likely to present or what additional relevant facts he could have developed. Finally, granting Karem's tardy motion to intervene would have disrupted the proceedings since the utilities' application stood submitted before he sought to intervene.

Karem argues vociferously that the PSC erred on the merits when it approved the tariff filing. However, we take no position on that question since we agree with the trial court that Karem lacks standing to make such arguments. KRS 278.410(1) permits "[a]ny party to a commission proceeding" to appeal to the circuit court, but Karem was never a party. Karem had standing only to contest the PSC's denial of his motion to intervene. But we have affirmed the PSC on that matter, so his sundry arguments on the merits of the PSC's approval of the program are not properly before us.

The PSC did not abuse its discretion or otherwise act unreasonably or unlawfully in denying Karem's motion to intervene. Consequently, we affirm.

ALL CONCUR.

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