

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000559-MR

BULLITT UTILITIES, INC., BY
ROBERT W. KEATS, ITS CHAPTER 7 TRUSTEE APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 17-CI-01160

KENTUCKY PUBLIC SERVICE COMMISSION;
ATTORNEY GENERAL OF THE
COMMONWEALTH OF KENTUCKY;
CITY OF HILLVIEW, KENTUCKY; AND
CITY OF HUNTERS HOLLOW, KENTUCKY APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, KRAMER, AND K. THOMPSON, JUDGES.

JONES, JUDGE: Bullitt Utilities, Inc., by Robert W. Keats, Its Chapter 7 Trustee, brings this appeal from an order of the Franklin Circuit Court affirming an order of the Kentucky Public Service Commission (the “Commission”), which determined that Bullitt Utilities, through its trustee, had no right to file an application for a

surcharge tariff under KRS¹ Chapter 278. Following review of the record and applicable law, we AFFIRM.

I. BACKGROUND

Bullitt Utilities previously operated a sewage collection and transmission facilities and a wastewater treatment plant in the City of Hunters Hollow, Kentucky (the “Hunters Hollow Plant”). In March of 2014, the steel aeration tank at the Hunters Hollow Plant experienced catastrophic failure. As a result of this failure, over 250,000 gallons of raw, untreated sewage were discharged into the public waterway. Because of the failure of the steel aeration tank, the wastewater treatment portion of the Hunters Hollow Plant closed and only the lines used to collect wastewater remained in operation. Thereafter, all wastewater collected by the Hunters Hollow Plant’s collection system was redirected and treated by Bullitt County Sewer District (“BCSD”). Bullitt Utilities hired private contractors to help remedy the damage caused by the aeration tank’s failure, which ultimately cost it in excess of \$3.4 million dollars.

Bullitt Utilities was considered a “utility” as defined in KRS 278.010(3)(f) and, accordingly, its rates and services were regulated by the

¹ Kentucky Revised Statutes.

Commission.² In June of 2014, Bullitt Utilities filed an application for a Certificate of Public Convenience and Necessity and Surcharge with the Commission, seeking to recover costs incurred as a result of the aeration tank's failure and costs to build new facilities (the "First Surcharge Action"). While the First Surcharge Action was pending, on August 21, 2015, counsel for Bullitt Utilities sent a notice to the Commission advising that "Bullitt Utilities is surrendering this [the property of Bullitt Utilities] property to the Commission effective September 1, 2015." A.R.³ 217. The Commission refused to allow Bullitt Utilities to abandon its property at that time; however, it treated the notice as an application to abandon the Hunters Hollow Plant under KRS 278.021 and opened an investigation into the application (the "Abandonment Action"). A hearing was held on August 27, 2015, at which Bullitt Utilities testified that:

1) [it] authorized Counsel for Bullitt Utilities to send the August 21, 2015 notice regarding abandonment to the Commission's Executive Director; 2) Bullitt Utilities unconditionally disclaims, renounces, relinquishes, or surrenders all property interests or all rights to utility property, real or personal, necessary to provide service; and 3) Bullitt Utilities authorized sending to the Commission the August 21, 2015 notice of intent to abandon the operation of the facilities used to provide service.

² Whether Bullitt Utilities is currently considered a "utility" is disputed by the parties; however, there is no dispute that Bullitt Utilities was a "utility" in 2014.

³ Citations to "A.R." refer to the record of the proceedings before the Commission. Citations to "R." refer to the record of the proceedings before the Franklin Circuit Court.

A.R. 221.

On August 21, 2015, the Commission entered an order finding that Bullitt Utilities had met the statutory requirements of KRS 278.021(2)(a) and (b), making it necessary for the Commission to make a finding of abandonment. However, because the residences that Bullitt Utilities serviced would likely be deemed uninhabitable if Bullitt Utilities immediately ceased providing services, the Commission ordered Bullitt Utilities to continue operating the Hunters Hollow Plant collection system for 30 days or until the Franklin Circuit Court entered an order attaching Bullitt Utilities' assets and placing them under the control and responsibility of a receiver.

The next day, the Commission filed a petition with the Franklin Circuit Court requesting that it attach Bullitt Utilities' assets and appoint BCSD as receiver for Bullitt Utilities, pursuant to KRS 287.021(1) (the "Receivership Action"). On September 23, 2015, the Franklin Circuit Court entered an order granting the relief requested by the Commission. That order indicated, in pertinent part, as follows:

2. BCSD is appointed receiver to take charge, preserve, operate, control, manage, maintain and care for Bullitt Utilities' sewage collection and treatment facilities; to collect all receivables and profits, and to exercise generally the powers conferred by this Court and such other powers that are usual and incidental to the management of a public utility providing sewage collection and treatment service to the public.

R. 173.

As Bullitt Utilities had abandoned its operations and BCSD had been appointed its receiver, the Commission determined that Bullitt Utilities no longer had any right to collect charges or rates from the customers served by the Hunters Hollow Plant or to bring or defend any action related to the assets and operations of the Hunters Hollow Plant. Accordingly, the Commission dismissed Bullitt Utilities from the First Surcharge Action and substituted BCSD in its place. On December 10, 2015, BCSD and the Attorney General of Kentucky, an intervenor in the First Surcharge Action, filed a joint motion to dismiss. The Commission dismissed the First Surcharge Action without prejudice on December 15, 2015.

On December 18, 2015, Bullitt Utilities' creditors filed an involuntary Chapter 7 Bankruptcy petition against it. The Bankruptcy Court appointed an interim trustee on December 29, 2015, to take title and possession of the property of Bullitt Utilities' bankruptcy estate. The order appointing the interim trustee specifically indicated that the trustee:

shall have full authority and control over the surcharge claim and any related claims in the possession of the Alleged Debtor. The interim trustee shall promptly review the surcharge claim and the [First Surcharge Action], and then will make a determination regarding whether to reinstate the [First Surcharge Action], appeal the [First Surcharge Action], or reassert the [First Surcharge Action].

A.R. 36-37.

Based on the mandate in that order, on January 4, 2016, the Trustee filed a motion to intervene in the First Surcharge Action and moved for a rehearing on the Commission's order dismissing the First Surcharge Action without prejudice. The Commission granted the Trustee's motion for a rehearing for the limited purpose of determining "whether Bullitt Utilities now has any legal rights as a utility which can be asserted by the Trustee and whether the Commission can grant any relief absent modification or amendment of the Franklin Circuit Court's order appointing BCSD as receiver for the assets of Bullitt Utilities." A.R. 42.

Following briefing on those issues, the Commission entered an order denying the Trustee's motion to intervene and motion for a rehearing and dismissing the First Surcharge Action with prejudice. At the outset of its analysis, the Commission noted that the Trustee had acknowledged in his brief that he did not possess any greater rights than those held by Bullitt Utilities at the time that the Chapter 7 bankruptcy proceedings had commenced. Accordingly, the Commission considered the Trustee's motion for rehearing and motion to intervene in light of Bullitt Utilities' right to such relief. First addressing the Trustee's motion for a rehearing, the Commission concluded that KRS 278.400 limited the right to apply for a rehearing to "any party." Because Bullitt Utilities was no longer a party at the time the Commission dismissed the First Surcharge Action, the Commission

concluded that Bullitt Utilities—and by extension, the Trustee—was precluded from seeking a rehearing of the order of dismissal. Looking next to the Trustee’s motion to intervene, the Commission found that the Trustee had not cited to any authority supporting his claim that he had a right to intervene in the First Surcharge Action.

The Commission acknowledged that the Bankruptcy Court’s order had granted the Trustee “full authority and control over the surcharge claim and any related claims *in the possession of the Alleged Debtor.*” A.R. 49. However, the Commission found that as of the date that the petition for involuntary Chapter 7 bankruptcy had been filed, Bullitt Utilities had already abandoned all interests in its utility assets. The Commission expressed confusion as to whether the Bankruptcy Court had appointed the Trustee to take control of the property of the estate that was currently in possession of BCSD as receiver and operate any business of Bullitt Utilities, or whether the authority of BCSD had been terminated by virtue of the appointment of the Trustee. The Commission urged the Trustee to seek clarification from the Bankruptcy Court as to whether BCSD had power to act with respect to the Hunters Hollow Plant.

The Trustee then filed a motion with the Bankruptcy Court seeking the clarification requested by the Commission. On September 1, 2016, the Bankruptcy Court entered an order declaring that: the Trustee was authorized to

act on behalf of Bullitt Utilities in all legal proceedings; all of Bullitt Utilities' assets, including its claim for a surcharge, were part of its bankruptcy estate and under the sole control and authority of the Trustee; and the Trustee was authorized to re-file a surcharge claim on behalf of Bullitt Utilities.

The Bankruptcy Court explained the reasoning behind its order in a separate memorandum opinion. Therein, the Bankruptcy Court first found that on the date that the involuntary petition was filed, it retained jurisdiction to determine which assets were property of the bankruptcy estate; that BCSD was considered a "custodian" within the meaning of 11 U.S.C.⁴ § 101(11); and that 11 U.S.C. § 543 directs custodians of estate property to turn over that property to the bankruptcy trustee unless the creditors' interest would be better served by estate property remaining in the custodian's control.

The Bankruptcy Court next considered whether Bullitt Utilities' legal title to its assets was severed by virtue of the Abandonment Action. The Court concluded that the Abandonment Action clearly divested Bullitt Utilities of operational control of the Hunters Hollow Plant; however, it found nothing indicating that Bullitt Utilities' legal title to the Hunters Hollow Plant had been severed. Specifically, the Bankruptcy Court noted that there was no indication that Bullitt Utilities had voluntarily conveyed title of its assets to either the

⁴ United States Code.

Commission or BCSD, that it had not been presented with any order of the Franklin Circuit Court severing Bullitt Utilities' title to its assets, and that the Commission lacked authority to sever Bullitt Utilities' title. Additionally, the Bankruptcy Court cited to a Commission staff opinion given in the First Surcharge Action, which concluded that BCSD had not become the owner of Bullitt Utilities' assets or the owner of the Hunters Hollow Plant despite the fact that BCSD controlled Bullitt Utilities' assets by virtue of the receivership.

Following entry of the September 1, 2016, Bankruptcy Court order, BCSD moved the Franklin Circuit Court to terminate its appointment as receiver and return all assets to Bullitt Utilities. On receipt of BCSD's motion, the Trustee filed an emergency motion with the Bankruptcy Court seeking enforcement of the automatic stay and an order requiring BCSD to continue providing utility services to Bullitt Utilities' customers. On September 26, 2016, the Bankruptcy Court entered an order clarifying that the Trustee held title to the property of Bullitt Utilities' bankruptcy estate and, therefore, had the right to assert control of Bullitt Utilities' surcharge claim, but that the receivership order of the Franklin Circuit Court was to otherwise remain in full force and effect, with BCSD having the right and authority to control and manage the cash and operations of Bullitt Utilities.

On November 30, 2016, the Trustee filed an application with the Commission requesting authority for Bullitt Utilities to implement a surcharge to

recover the costs incurred in responding to the March 2014 failure at the Hunters Hollow Plant (the “Second Surcharge Action”). The Trustee additionally moved to deviate from the Commission’s rules regarding filings required when requesting a surcharge. The Commission entered an order on December 29, 2016, granting in part and denying in part the Trustee’s request to deviate from the filing requirements. The order found numerous deficiencies in the Trustee’s application, and specified which deficiencies must be cured before the application would be accepted as filed. Additionally, the Commission directed the Trustee to file a brief addressing Bullitt Utilities’ status as a “utility,” as defined in KRS 278.010(3)(f); Bullitt Utilities’ legal authority to file a tariff with the Commission; and Bullitt Utilities’ interest in the rates collected from, and obligations with respect to the service rendered to, the customers of the Hunters Hollow Plant under state law. A.R. 340.

The Trustee filed a brief on January 13, 2017, addressing the deficiencies and legal issues identified by the Commission. Therein, the Trustee acknowledged that a utility for which a receiver has been appointed would normally act only through the receiver; in this case, however, the Bankruptcy Court’s orders established that the Trustee was authorized to act on Bullitt Utilities’ behalf concerning anything related to Bullitt Utilities’ claim for a surcharge. The Trustee argued that, despite abandonment, Bullitt Utilities

remained a “utility” for purposes of KRS 278.010(3)(f). In support of this contention, the Trustee directed the Commission’s attention to an order it had recently rendered in a separate abandonment case.⁵ In that case, Cedar Hills—the utility as issue—had filed an application to abandon and identified a proposed receiver. While the utility had been under the Commission’s jurisdiction, the proposed receiver was not. Accordingly, a question arose as to how rates for the utility would be set while the utility was subject to the receivership. The Commission concluded that the receiver was merely acting as a caretaker for Cedar Hill’s assets and, accordingly, that Cedar Hills remained a regulated utility subject to the Commission’s jurisdiction for the duration of the receivership. The Trustee contended that the same analysis should apply in the instant case, *i.e.*, that the Commission should find that Bullitt Utilities remained a utility under its jurisdiction and, therefore, retained the right to file a surcharge claim. The Trustee’s brief further informed the Commission that any surcharge collected from Bullitt Utilities’ customers would be subject to distribution under the jurisdiction of the Bankruptcy Court. The Trustee expressed his belief that Bullitt Utilities was still under an obligation to provide services to its customers, but that BCSD was fulfilling that obligation on Bullitt Utilities’ behalf.

⁵ *In re.: An Investigation of Cedar Hills Disposal Sanitation Corps. Notice of Intent to Abandon Serv.*, No. 2015-00100, 2016 WL 1545547 (Ky. P.S.C. Apr. 11, 2016).

The Attorney General and the City of Hillview, who had been granted leave to intervene in the Second Surcharge Action, each filed responses to the Trustee's brief. The Trustee was then granted leave to file a reply brief. On October 12, 2017, the Commission entered an order concluding that Bullitt Utilities no longer had the authority to seek a surcharge tariff. While the Commission did not dispute the fact that Bullitt Utilities remained the legal title holder of its assets, despite having abandoned those assets in the Abandonment Action, it concluded that Bullitt Utilities' status as legal title holder was irrelevant to whether it could pursue a surcharge claim. The Commission found that Bullitt Utilities' authority to file a request for a surcharge was derived from its meeting the definition of "utility" under KRS 278.010(3)(f), the fact that it provided a utility service, and the fact that it collected rates under a tariff for that service. Through the Abandonment Action, Bullitt Utilities had extinguished its obligation to provide utility services, thereby removing itself from the Commission's jurisdiction. The Commission concluded that, by virtue of the Abandonment Action, Bullitt Utilities no longer had any service obligation, and, accordingly, no longer met the definition of a "utility." Therefore, it had no authority to seek a surcharge tariff.

On November 8, 2017, the Trustee filed a petition on appeal in the Franklin Circuit Court pursuant to KRS 278.410. In the petition, the Trustee first

contended that the Commission had failed to render a decision on his application for a surcharge within the statutorily prescribed timeframe, which, in and of itself, demonstrated that the Commission's order was unlawful and unreasonable. Additionally, the Trustee contended that the Commission's delay in considering the application meant that the Commission had lost jurisdiction over the application and that the Commission was equitably estopped from rejecting it. The Trustee argued that the Commission's order was unlawful, as it ignored the impact of the Bankruptcy Court's orders and the Supremacy Clause of the United States Constitution. Further, the Trustee argued that the Commission had erroneously interpreted the statutory definition of "utility," erroneously analyzed the abandonment statute, and had reached a conclusion in conflict with its previous orders and staff opinions. The Trustee sought a judgment vacating the Commission's order and allowing him to impose the requested surcharge, as well as an injunction preventing the Commission from interfering with his ability to add the requested surcharge.

Following oral arguments and briefs from all interested parties, the circuit court entered an opinion and order on March 23, 2018, affirming the Commission's order rejecting Bullitt Utilities' surcharge application. The circuit court first addressed Bullitt Utilities' contention that the Commission had failed to render a decision on its application within the ten-month deadline imposed by KRS

278.190(3). The circuit court found that the Commission had not violated this deadline, as Bullitt Utilities' application had not been accepted as filed until January 13, 2017, and the Commission had issued its decision on October 12, 2017. In arguing that the Commission had violated KRS 278.190(3), Bullitt Utilities had contended that its application was filed on November 30, 2016, which would have made the Commission's decision untimely. However, the circuit court found that the Commission had the authority to adopt regulations related to filing surcharge applications. Because Bullitt Utilities had not complied with those regulations when it tendered its application in November of 2016, the circuit court concluded that the Commission was within its right to reject the application until Bullitt Utilities had cured the identified deficiencies. Further, the circuit court noted that even if the Commission had not acted timely in rendering its decision, Bullitt Utilities had not been without remedy. Per statute, Bullitt Utilities would have been permitted to begin charging the requested surcharge rate until the Commission reached a decision on the surcharge application.

The circuit court disagreed with Bullitt Utilities' contention that the Commission's order was in contravention of the Bankruptcy Court's orders and the Supremacy Clause, as it found that Bullitt Utilities' status as legal title holder of its property did not entitle it to file a claim for surcharge. The circuit court acknowledged that the definition of "utility" in KRS 278.010(3)(f) encompassed

“any person . . . who owns, controls, operates, or manages any facility used or to be used for or in connection with . . . the collection, transmission, or treatment of sewage for the public, for compensation” While Bullitt Utilities was still technically the owner of the Hunters Hollow Plant, the circuit court agreed with the Commission that, by virtue of the Abandonment Action, it had relinquished all ownership rights to the Hunters Hollow Plant for purposes of KRS Chapter 278.

The circuit court concluded, however, that even if Bullitt Utilities was still considered a “utility,” it would have no right to pursue a surcharge claim. This conclusion was based on the circuit court’s reasoning that the Commission had the exclusive authority to determine whether a utility could provide utility services and collect rates for those services. The circuit court reasoned that by virtue of that authority, the Commission had the right to prohibit an unauthorized utility—such as one that had voluntarily abandoned its right and obligation to provide utility services—from collecting rates. Further, the circuit court concluded that it would be unreasonable to allow a company that abandoned a utility to continue collecting rates from customers being serviced by a receiver.

The circuit court disagreed with Bullitt Utilities’ contention that the Commission’s order was inconsistent with its prior orders and staff opinions. Further, the circuit court found that equitable estoppel was inappropriate as Bullitt Utilities had not put forth any argument demonstrating that “gross inequity” had

occurred as a result of the Commission's actions or inactions. Finally, the circuit court concluded that, *in toto*, the Commission's order lawfully and reasonably applied KRS Chapter 278 and was not arbitrary.

This appeal followed.

II. STANDARD OF REVIEW

Judicial review of an order of the Commission is governed by KRS 278.410(1). Accordingly, a court may only vacate or set aside an order or determination of the Commission when the Commission's decision is "unlawful or unreasonable." KRS 278.410(1). The party seeking to set aside the Commission's order carries the burden of proving by clear and satisfactory evidence that the order is unreasonable or unlawful. KRS 278.430. "To be held unlawful, the order must violate a state or federal statute or constitutional provision, and an order is unreasonable if it is not supported by substantial evidence and the evidence leaves no room for a difference of opinion among reasonable minds." *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 510 (Ky. App. 1990) (citing *Energy Regulatory Comm'n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980)).

"Although KRS Chapter 278 grants the Commission sweeping authority to regulate public utilities, the Commission is a creature of statute and its powers are purely statutory, having only such powers as conferred expressly, by

necessity, or by fair implication.” *Kentucky Indus. Util. Customers, Inc. v. Kentucky Pub. Serv. Comm’n*, 504 S.W.3d 695, 705 (Ky. App. 2016) (citing *Croke v. Pub. Serv. Comm’n of Kentucky*, 573 S.W.2d 927 (Ky. App. 1978)). “Whether the [Commission] exceeded the scope of its authority is a question of law that we scrutinize closely and review *de novo*.” *Id.* (quoting *Cincinnati Bell Tel. Co. v. Kentucky Pub. Serv. Comm’n*, 223 S.W.3d 829, 836 (Ky. App. 2007)). “Finally, as always, we review questions of law *de novo*.” *Id.* (citing *City of Greenup v. Pub. Serv. Comm’n*, 182 S.W.3d 535, 539 (Ky. App. 2005)).

III. ANALYSIS

On appeal, Bullitt Utilities alleges the following counts of error: (1) the Commission did not decide Bullitt Utilities’ second surcharge application within the deadline required by KRS 278.190(3); (2) the Commission ignored the impact of the Bankruptcy Court’s orders and the Supremacy Clause; (3) the Commission erroneously determined that Bullitt Utilities was not a utility and could not file a tariff; (4) the Commission’s analysis of the abandonment statute is erroneous; (5) the Commission’s efforts to distinguish its prior orders, staff opinion, and actions fail; and (6) the Commission’s order is arbitrary and violates Section 2 of the Kentucky Constitution. We consider the arguments as necessary to resolve this appeal.

A. Timeliness of the Commission’s October 12, 2017, Order

KRS 278.190(3) places the priority for applications for new rates or surcharges above all other matters before the Commission. The statute mandates that the Commission give applications for new rates “preference over other questions pending before it and decide the same as speedily as possible, and in any event not later than ten (10) months after the filing of such schedules.” KRS 278.190(3).

Bullitt Utilities contends that the Commission’s requiring an entity to comply with regulations it has promulgated before accepting an application for surcharge as filed impermissibly extends the ten-month deadline in KRS 278.190. Bullitt Utilities notes that KRS 278.190(3) does not contain any language indicating that an application must be *accepted* before the deadline clock begins running. Rather, it states that the Commission must make a decision on an application not later than ten months after the *filing* of a schedule of new rates. Bullitt Utilities interprets “filing” as the submission of a surcharge application to the Commission, regardless of whether that application complies with the Commission’s regulations. Bullitt Utilities argues that any regulation that works to extend the deadline in KRS 278.190(3) cannot be applied.

KRS 13A.120(2)(i) prohibits an administrative body, such as the Commission, from promulgating administrative regulations “[t]hat modify or

vitate a statute or its intent.” Any regulation that violates this prohibition is “null, void, and unenforceable.” KRS 13A.120(4). Further, administrative regulations must be “justified by, and . . . an implementation of, a statute expressly granting such authority.” *Bowling v. Kentucky Dept. of Corr.*, 301 S.W.3d 478, 491 (Ky. 2009). Therefore, we must determine whether the Commission has the statutory authority to implement the regulations at issue and, if so, whether those regulations modify KRS 278.190(3) thereby making them unenforceable.

“An administrative body’s powers are defined and limited by the agency’s enabling statute.” *Kentucky Real Estate Comm’n v. Milgrom*, 197 S.W.3d 552, 554 (Ky. App. 2005) (citing *Pub. Serv. Comm’n of Kentucky v. Att’y Gen. of the Commonwealth*, 860 S.W.2d 296 (Ky. App. 1993)). Per KRS 278.040, the Commission is granted broad power to regulate the utilities of the Commonwealth and enforce the provisions of KRS Chapter 278. Under KRS 278.040(3), the Commission is granted the power to adopt “reasonable regulations to implement the provisions of KRS Chapter 278” KRS 278.160 provides that a utility must file schedules for rates “[u]nder the rules prescribed by the [C]ommission . . . within such time and in such form as the [C]ommission designates.” Thus, there does not seem to be any serious question that the Commission has the authority to promulgate rules concerning filings under KRS 278.190. The real issue is whether the Commission’s position that compliance

with those rules is necessary before a schedule is deemed filed under KRS 278.190 modifies the intent of the statute. We cannot find that it does.

“In construing statutes, we must give effect to the intent of the General Assembly.” *Johnson v. Commonwealth*, 449 S.W.3d 350, 353 (Ky. 2014) (citing *Maynes v. Commonwealth*, 361 S.W.3d 922, 924 (Ky. 2012)). “We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration.” *Id.* (quoting *Maynes*, 361 S.W.3d at 924).

“Statutes in pari materia or those which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose, must be construed together and the legislative intention apparent from the whole enactment must be carried into effect.” *Milner v. Gibson*, 249 Ky. 594, 61 S.W.2d 273, 277 (1933) (citations omitted).

KRS 278.160 gives the Commission express authority to prescribe rules concerning the form and timing of schedules filed by utilities and indicates that utilities must comply with those rules. Under the authority of KRS 278.160, the Commission promulgated rules with which a utility is required to comply—or be granted a deviation from—before an application for surcharge or new rates will be accepted for filing. *See generally* 807 KAR⁶ Chapter 5. In light of KRS

⁶ Kentucky Administrative Regulations.

278.160, we cannot find that the Commission's requiring utilities to comply with its rules before it will accept an application or schedule as filed vitiates the purpose of KRS 278.190(3). KRS 278.190(3) indicates that the Commission must render a decision on a surcharge application no later than ten months after that application is filed; under KRS 278.160 an application is not considered filed until the applicant has complied with the regulations in 807 KAR Chapter 5. The Commission is not modifying the statutory deadline by requiring that a party submit all required documents before its application is accepted as filed. If anything, the Commission is seeking to better effectuate KRS 278.190(3)'s mandate that rate applications be heard as quickly as possible by adopting filing regulations to ensure that it has all documents necessary to properly consider an application.

At the earliest, the Trustee did not file documents complying with the Commissions' regulations until January 13, 2017—accordingly, that is the earliest possible date on which the surcharge application could be accepted as filed. The Commission entered an order rejecting the Trustee's surcharge application on October 12, 2017, within the ten-month statutory deadline.

B. Effect of Bankruptcy Court Orders

Bullitt Utilities next argues that the Commission ignored the orders of the Bankruptcy Court when it concluded that the Trustee had no authority to file

the application for surcharge. Appellees contend that the Commission had no duty to heed the Bankruptcy Court's order indicating that the Trustee did, in fact, have authority to file the surcharge claim, as the Bankruptcy Court cannot interfere with the Commission's regulations regarding whom in the Commonwealth of Kentucky may provide utility services to the public. Additionally, Appellees contend that the Bankruptcy Court cannot vest the Trustee with greater rights than Bullitt Utilities had at the time the bankruptcy petition was filed. As Appellees posit that Bullitt Utilities lost its right to apply for a surcharge tariff following conclusion of the Abandonment Action, they contend that the Trustee has no right to do so.

i. Bankruptcy Court's Authority

“The [Bankruptcy] Court has exclusive jurisdiction over all property of the debtor as of the commencement of the case, as well as property of the estate, regardless of where the property is located.” *In re Salander O'Reilly Galleries*, 453 B.R. 106, 114 (Bankr. S.D.N.Y. 2011) (citing 28 U.S.C. § 1334(e)). “It follows that a determination of what constitutes property of the estate subject to [the Bankruptcy Court's] exclusive jurisdiction, also belongs to the Bankruptcy Court.” *In re DeFlora Lake Dev. Assocs., Inc.*, 571 B.R. 587, 593 (Bankr. S.D.N.Y. 2017) (citing *In re McGuire*, 2015 WL 628284, at *12 (Bankr. W.D. Tenn. Jan. 14, 2015); *In re Brock*, 58 B.R. 797, 804 (Bankr. S.D. Ohio 1986); *In re Pruitt*, 401 B.R. 546, 553 (Bankr. D. Conn. 2009)). However, “[i]n the absence of

any controlling federal law, ‘property’ and ‘interests in property’ are creatures of state law.” *Barnhill v. Johnson*, 503 U.S. 393, 398, 112 S.Ct. 1386, 1389, 118 L.Ed.2d 39 (1992) (citing *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 370, 65 S.Ct. 405, 408, 89 L.Ed. 305 (1945); *Butner v. United States*, 440 U.S. 48, 54, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979)). “A bankruptcy estate succeeds only to ‘legal or equitable interests of the debtor . . . as of the commencement of the case.’” *In re Majestic Star Casino, LLC*, 716 F.3d 736, 748 (3d. Cir. 2013) (quoting 11 U.S.C. § 541(a)(1)). “It is a given that ‘[t]he trustee . . . can assert no greater rights than the debtor himself had on the date the [bankruptcy] case was commenced.’” *Id.* (quoting *Guinn v. Lines (In re Trans-Lines West, Inc.)*, 203 B.R. 653, 660 (Bankr. E.D. Tenn. 1996)).

“The Bankruptcy Code gives bankruptcy courts the power to ‘issue any order, process, or judgment that is necessary or appropriate to carry out [its] provisions.’” *Id.* at 746 (quoting *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel Cybergenics Corp. v. Chinery*, 330 F.3d 548, 567 (3d Cir. 2003); 11 U.S.C. § 105(a)). The Commission is subject to that power as an “entity,” which is defined in the Bankruptcy Code to include a “governmental unit.” *Id.* (citing 11 U.S.C. § 101(15)).

ii. Status of Bullitt Utilities' Assets

As noted above, the Bankruptcy Court concluded that—despite the Abandonment Action—Bullitt Utilities retained legal title to all of its assets as of the date that the bankruptcy petition was filed, therefore making those assets a part of its bankruptcy estate. The order and opinion of the Bankruptcy Court has not been appealed and, even if it had been, this Court would not have the jurisdiction to consider the appeal. Nonetheless, to provide greater clarity to this opinion, a brief synopsis of the status of Bullitt Utilities' assets at the time the bankruptcy petition was filed follows.

At common law, “[a]bandonment of personal property is defined as ‘the relinquishment of a right or of property with the intention of not reclaiming it or reassuming its ownership or enjoyment.’” *Greer v. Arroz*, 330 S.W.3d 763, 765 (Ky. App. 2011) (quoting *Ellis v. Brown*, 177 F.2d 677, 679 (6th Cir. 1949)). “Under Kentucky law, the elements of abandonment are a voluntary relinquishment of possession and intent to repudiate ownership.” *Id.* (citing *Ellis v. McCormack*, 309 Ky. 576, 218 S.W.2d 291, 392 (1949)). Personal “[p]roperty which is abandoned becomes subject to appropriation by the first taker or finder who reduces it to possession. Such person thereupon acquires absolute ownership in the property abandoned, as against both the former owner and any person upon

whose land it happens to have been left.” 1 AM.JUR. 2D, *Abandoned, Lost, and Unclaimed Property* § 24 (2007) (citations omitted).

As noted by the Bankruptcy Court, title to real property “once acquired cannot be lost by abandonment.” *Carlson v. Asher Coal Min. Co.*, 172 F.2d 243, 247 (6th Cir. 1949) (citing *Napier v. Baker*, 235 Ky. 724, 32 S.W.2d 49 (1930); *Duncan v. Mason*, 239 Ky. 570, 39 S.W.2d 1006 (1931); *Cox v. Colossal Cavern Co.*, 210 Ky. 612, 276 S.W. 540 (1925)). An interest in real property cannot be abandoned except by the execution of a written instrument. *Ellis v. Brown*, 177 F.2d 677, 679 (6th Cir. 1949) (citing *id.*). It is undisputed that no document has been executed severing Bullitt Utilities’ legal title to its real property.

As to its personal property, while Bullitt Utilities has abandoned it under KRS Chapter 278, it cannot be said that it has abandoned it as understood at Kentucky common law. By abandoning its property under KRS 278.021(2)(a), Bullitt Utilities meets the first element of abandonment of property—the relinquishment of a right or of property. However, while KRS 278.021 expressly indicates that abandonment will be found if a utility “[d]isclaims, renounces, relinquishes, or surrenders all property interests or all rights to utility property, real or personal,” it does not indicate that so doing represents an intention of not reclaiming that property. In fact, the language of the statute indicates that

ownership is *not* lost by abandonment and that possession and control of a utility's assets can be returned.

Under KRS 278.021, once a utility has been classified as “abandoned,” its assets are placed under the sole control and responsibility of a receiver. Per KRS 278.021(7), the receiver then controls and manages those assets until “the Franklin Circuit Court, after reasonable notice and hearing, orders the receiver *to return control of those assets to the utility* or to liquidate those assets as provided by law.” (Emphasis added). Accordingly, unless and until a utility's assets are liquidated, there remains a possibility that an abandoning utility's assets will be returned to it after a period of time. Thus, abandonment under KRS 278.021 does not have the same legal significance as abandonment under common law. Bullitt Utilities remains the legal owner of all of its assets; those assets are simply in the possession, and under the control, of the receiver.

BCSD, as receiver, is a “custodian” under the Bankruptcy Code. 11 U.S.C. § 101(11)(A) defines “custodian” as a “receiver or trustee of any property of the debtor, appointed in a case or proceeding not under this title.” BCSD clearly falls within that definition. In an action separate from the bankruptcy proceedings—the Receivership Action—BCSD was appointed a receiver under KRS 278.021 to “control and manage the assets and operations of the utility,” *i.e.*, Bullitt Utilities, after Bullitt Utilities had applied for abandonment.

11 U.S.C. § 543 governs the turnover of property by a custodian. “Through [11 U.S.C.] § 543, Congress has apparently authorized bankruptcy courts to review and conclude matters relating to a state court receivership.” *In re Sundance Corp., Inc.*, 149 B.R. 641, 649-50 (Bankr. E.D. Wash. 1993). Because “receivership property becomes property of a bankruptcy estate upon the filing of a petition, control and decisions affecting the receivership assets which were formerly *in custodia legis* of the state court come under and become the domain of the bankruptcy court.” *Id.* at 650. 11 U.S.C § 543 requires a custodian to deliver any property held by it to the bankruptcy trustee. 11 U.S.C. §543(b)(1). An exception to this rule exists if a bankruptcy court concludes that the creditor’s interests are better served by permitting a custodian to continue in possession, custody, or control of the property. 11 U.S.C. § 543(d)(1). It is within the bankruptcy court’s discretion whether to apply the exception of § 543(d). *In re Dill*, 163 B.R. 221, 225 (E.D.N.Y. 1994). Even if the bankruptcy court permits a custodian to remain in possession of the debtor’s property, “the debtor’s property remains subject to the bankruptcy court’s jurisdiction.” *In re 245 Assocs., LLC*, 188 B.R. 743, 749 (Bankr. S.D.N.Y. 1995).

None of the parties to this proceeding dispute that BCSD, by virtue of the receivership, has the authority to file a surcharge application for its services related to Bullitt Utilities. Under the authority of 11 U.S.C. § 543, the Bankruptcy

Court ordered BCSD turn over the right to file a surcharge claim to the Trustee. This was in the best interest of Bullitt Utilities' creditors, as BCSD refused to seek a surcharge that would allow for the creditors to receive the funds owed. The Bankruptcy Court made clear that the remaining assets controlled by BCSD would remain in its control after hearing testimony from the Trustee that he was incapable of operating the Hunters Hollow Plant and believed putting him in charge of doing so "would put at risk the health, welfare, and safety of the residents of Hunter [sic] Hollow[.]" A.R. 574.

Thus, at first blush, it would appear that the Commission is required to abide by the order of the Bankruptcy Court and allow the Trustee to file a surcharge application. We reiterate, however, that the Bankruptcy Court cannot bestow the Trustee with rights additional to those held by the debtor at the time of the commencement of bankruptcy. To understand what rights Bullitt Utilities had at the time the Chapter 7 petition was filed, it is imperative to consider the statutory scheme governing proceedings before the Commission.

iii. Bullitt Utilities' Rights Under KRS Chapter 278

KRS Chapter 278 indicates that only a "utility" has the right to apply for a surcharge. A "utility" is defined as one "who owns, controls, operates, or manages any facility used or to be used" in connection with the "collection, transmission, or treatment of sewage for the public" KRS 278.010(3)(f). As

noted above, Bullitt Utilities retains legal title to its property. This does not mean, however, that it is still considered an “owner” for purposes of KRS 278.010(3)(f). KRS 278.010 does not contain a definition for “owner;” however, in the Abandonment Action, Bullitt Utilities “unconditionally disclaim[ed], renounce[d], relinquish[e]d, or surrender[ed] all property interests or all rights to utility property, real or personal, necessary to provide service.” A.R. 221. In effect, Bullitt Utilities gave up its right to be considered an “owner,” and in turn, a “utility,” as those terms are understood in KRS Chapter 278. All rights incidental to having the status of a utility were likewise lost. This is consistent with KRS 278.030(2), which states that “[e]very utility shall furnish adequate, efficient and reasonable service” Bullitt Utilities is no longer providing service, having abandoned its facilities to the care of BCSD by virtue of the Abandonment Action and the Receivership Action. It no longer has any rights associated with being a utility. Bullitt Utilities’ retention of legal title to its facilities is irrelevant for the Commission’s purposes.

“We are not constrained to interpret statutes in such a manner as to render their application an absurdity.” *Layne v. Newberg*, 841 S.W.2d 181, 183 (Ky. 1992) (citing *Overnite Transp. Co. v. Gaddis*, 793 S.W.2d 129 (Ky. App. 1990)). Allowing a person or entity who has abandoned its utility under KRS

278.021(2), but nonetheless retains legal title to utility property, to retain utility status and the right to file a surcharge application would create an absurd result.

KRS 278.021(2)—the abandonment statute—contemplates four situations which would cause the Commission to find that a utility has been abandoned. The ones at issue in this case, KRS 278.021(2)(a) and (b), concern those situations where a utility is voluntarily abandoned. However, KRS 278.021(2)(c) and (d) govern situations where a utility is involuntarily abandoned. No matter under what subsection a utility is found to abandoned, the end result is the same. The utility is considered abandoned, despite the fact that it may still hold legal title to its property. It would be absurd to conclude that the Commission could force a utility to abandon its operations due to inadequate service or noncompliance yet still allow that utility to collect rates for services it is not providing. Likewise, it would be absurd to allow two different entities—here, the legal owner of a utility and the entity operating that utility—to file and collect surcharges from the same customers based on the same utility services. A reasonable interpretation of the statutes is that an abandoned utility—while retaining legal title—has relinquished its ownership rights, is no longer considered a “utility” under KRS 278.010(3), and cannot file for a surcharge.

Such an interpretation is not inconsistent with prior orders of the Commission to which Bullitt Utilities directs our attention. In *Cedar Hills*, the

Commission did find that Cedar Hills, who had abandoned the operation of its facilities, was still a utility and subject to the Commission’s jurisdiction. *Cedar Hills*, 2016 WL 1545547 at *5. However, this statement was made in response to a question as to what regulations the Regional Water Resource Agency (“RWRA”), the receiver for Cedar Hills, who was not under the Commission’s jurisdiction, would be subject to. The Commission concluded that RWRA was required to abide by Commission regulations while it was acting as receiver for Cedar Hills because Cedar Hills was subject to the Commission’s jurisdiction. *Id.*

We do not read *Cedar Hills* as holding that Cedar Hills retained the ability to file a surcharge application, or retained any other rights incidental with operating a utility. Rather, the Commission was clarifying that because RWRA was the receiver and was operating the utility, it stood in the place of Cedar Hills and was therefore regulated by the Commission. No order of the Commission in this case contradicts this principle. All parties agree that BCSD has the ability to file an application for a surcharge only by virtue of the fact that it is the receiver for Bullitt Utilities. Because Bullitt Utilities abandoned its facilities and BCSD has taken control of those facilities, BCSD now has the status of “utility”—for purposes of this action—and because of that status has the right to file for a surcharge.

KRS Chapter 278 indicates that the right to file an application for a surcharge is intrinsic to being a “utility.” In ordering that the Trustee had the right to apply for a surcharge, but had no obligation take control of the management or operations of the Hunters Hollow Plant—*i.e.*, to function as a “utility” as defined in KRS 278.010(3)—the Bankruptcy Court granted the Trustee rights greater than those held by Bullitt Utilities at the time the bankruptcy proceedings were commenced. Had the Bankruptcy Court ordered that BCSD relinquish control and operations of the Hunters Hollow Plant to the Trustee, he would be considered a “utility” as an operator of the plant.⁷ That, however, did not happen. Accordingly, the Commission need not consider the Trustee’s application.

IV. CONCLUSION

In light of the foregoing, we affirm the order of the Franklin Circuit Court.

ALL CONCUR.

⁷ We are not suggesting that the Trustee should petition the Bankruptcy Court to order this. The Trustee has acknowledged that he is incapable of operating the Hunters Hollow Plant and believes that charging him with doing so “would put at risk the health, welfare, and safety of the residents of Hunter [sic] Hollow[.]” A.R. 574. If that is the case, ordering the Trustee take charge of operations of the Hunters Hollow Plant would be violative of *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986).

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