COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
No. 2019-SC-000195

METROPOLITAN HOUSING COALITION, et al. APPELLANTS

Matter of Right Appeal from Original Action in the
Kentucky Court of Appeals
Case No. 2018-CA-001859-0A

vs.

Arising from Franklin Circuit Court Case Nos.
18-CI-01115, 18-CI-01117 and 18-CI-01129, Consolidated

PUBLIC SERVICE COMMISSION OF KENTUCKY APPELLEE

BRIEF OF THE KENTUCKY OFFICE OF THE ATTORNEY GENERAL AS *AMICUS CURIAE*

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 28th day of May, 2019, true copies of this brief were served via U.S. Mail, postage pre-paid, upon: Hon. Samuel P. Givens, Jr. Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Phillip J. Shepherd, Franklin Circuit Judge, Division 1, Franklin County Courthouse, 222 St. Clair Street, Frankfort, Kentucky 40601; attorneys for Appellee Public Service Commission of Kentucky, Hon. John E.B. Pinney and Hon. Nancy J. Vinsel, Public Service Commission of Kentucky, P.O. Box 615, 211 Sower Blvd., Frankfort, Kentucky 40602-0615; attorneys for Appellant Association of Community Ministries, Hon. Lisa Kilkelly and Hon. Eileen Ordover, Legal Aid Society, Inc., 416 W. Muhammad Ali Blvd., Ste. 300, Louisville, Kentucky 40202; attorney for Appellant Metropolitan Housing Coalition, Hon. Tom Fitzgerald, Kentucky Resources Council, Inc., P.O. Box 1070, Frankfort, Kentucky 40602-1070; attorney for Appellant Community Action Council for Lexington-Fayette, Bourbon, Harrison, and Nicholas Counties, Inc., Hon. Iris G. Skidmore, Bates and Skidmore, 415 W. Main Street, Ste. 2, Frankfort, Kentucky 40601; and Hon. Kendrick R. Riggs, Stoll Keenon Ogden, PLLC, 2000 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202.

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Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE

The Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention (hereinafter "Attorney General"), is authorized pursuant to KRS 367.150(8) to appear before any governmental or ratemaking body to represent consumers' interests. The Attorney General is thus the only person with a statutory right to appear before the Kentucky Public Service Commission ("Commission" or "PSC") to represent utility ratepayer interests *generally*. In reliance on that statutory right, the Attorney General moved to intervene in the two underlying utility rate cases which gave rise to the instant appeal. The Attorney General's position in this matter is that Appellants have specialized interests in the rates and service at issue in the underlying utility rate proceedings that only they can adequately represent before the Commission. The Commission's orders denying intervention to the Appellants ("Orders Denying Intervention") were based, in large part, on the presumption that the Attorney General can and will represent Appellants' *unique* interests, apparently in addition to the general interests he is tasked by the Legislature to represent. The Court of Appeals' opinion denies Appellants any opportunity to represent their unique interests themselves, while further denying judicial review of whether the Commission's determination was lawful. The underlying decisions create a situation whereby intervenors are denied participation at the PSC with no judicial recourse, while the Commission nonetheless expects the Attorney General to represent the unique interests the denied intervenors were willing to address themselves.

INTRODUCTION

On September 28, 2018, Louisville Gas & Electric Company ("LG&E") and Kentucky Utilities Company ("KU", and hereinafter collectively referred to as "the Companies") each filed separate applications with the Commission seeking an adjustment of their base rates, operating under the scheme set forth under KRS Chapter 278 and associated administrative regulations. Record on Appeal (hereinafter "R.O.A.") at 11-12, 131. The KU case was denominated as No. 2018-00294 and the LG&E case No. 2018-00295. R.O.A. at 131.

Appellants Metropolitan Housing Coalition ("MHC"), Association of Community Ministries ("ACM"), Community Action Council for Lexington-Fayette, Bourbon, Harrison and Nicholas Counties, Inc. ("CAC") (hereinafter collectively "Appellants"), filed motions to intervene in one or both of the cases referenced above. R.O.A. at 184-190, 192-197, 199-203. Pursuant to Commission regulations,[1] all three Appellants articulated well-pled, special interests not otherwise represented by other parties. Neither of the Companies objected to any of the Appellants' motions to intervene. R.O.A. at 170. Despite the fact that the Appellants had repeatedly been granted intervention in prior PSC cases, the Commission nonetheless issued orders ("Orders Denying Intervention") arbitrarily denying all three Appellants' motions to intervene,[2] stating that they had failed to establish that they "have an interest in the instant proceeding that is not otherwise adequately represented" and further finding the "interests of low-income customers are already adequately represented by the Attorney General, who is a party to this proceeding and is

[1] *See* 807 KAR 5:001 § 4(11).

[2] However, the Commission *granted* motions to intervene filed by other parties representing other special interests, such as Wal-Mart, Kroger, Charter Communications, the Kentucky School Boards Association, Louisville Metro Government, Lexington-Fayette Urban County Government, the U.S. Department of Defense, and the Kentucky Industrial Utility Customers. R.O.A. at 169-170.

performing his statutory duties." R.O.A. at 207-209, 216-217. The only "evidence" cited in the Orders Denying Intervention in support of the denial was a non-record editorial published in the *Berea Citizen* newspaper, of which the Commission took "administrative notice." R.O.A. at 208-209, 216-217, and 222-223. Moreover, the Commission failed to provide any explanation or findings as to why it was reversing the well-established precedent of allowing these Appellants to intervene in prior cases.

STATEMENT OF THE CASE

The Attorney General adopts the Statement of the Case set forth in the Brief of Appellants Metropolitan Housing Coalition, Association of Community Ministries and Community Action Council for Lexington-Fayette, Bourbon, Harrison and Nicholas Counties, Inc.

ARGUMENT

I. The Court of Appeals' Failure to Address the Commission's Arbitrary Actions in Reversing Precedent as to Appellants' Participation in Commission Proceedings Must Be Addressed

The Court of Appeals failed to address the issue of the Commission's arbitrary reversal of its well-settled precedent of allowing the Appellants to intervene in Commission proceedings and the fact the Commission's findings were contrary to evidence. In denying the Appellants' intervention in the underlying matters, the PSC ignored the well-pled motions, finding that ACM, MHC and CAC merely "represent, in some form, low-income customers," and summarily concluded the Attorney General would adequately represent low-income customers. R.O.A. at 207-209, 216-217. In making its conclusory denial, the Commission ignored the content and context of the pleadings, deciding instead to reverse decades of precedent where the PSC had found the Appellants represent unique interests not otherwise adequately represented, particularly in cases where the Attorney General participated.

The Commission's only attempt to justify its denial of intervention was citing an on-line editorial (or "article" as the Commission called it) written by the Attorney General. R.O.A. at 208-209, 216-217, and 222-223. The Orders Denying Intervention found that given the Attorney General's statements as made in the "article," and since he was already

a party, the Attorney general could adequately represent the Appellants' interests. *Id.* The editorial demonstrates *not* that the Attorney General will represent Appellants' special interests in perpetuity, as indicated by the Commission's decision, but rather, that the Attorney General represented consumers generally in the Companies' previous rate cases, and in those matters was able to work with Appellants, the Companies and the other parties to provide a substantial outcome for low-income residential customers. Yet with the "article" in hand, the Commission feigned surprise at the Attorney General's work with parties in the Companies' *last* rate cases, using the op-ed to arbitrarily deny the Appellants' involvement in *these* cases. Nonetheless, but for the Appellants' involvement in the Companies' most-recent rate cases, the outcome would not have been as beneficial to low-income customers.

Indeed, as the Franklin Circuit Court Opinion and Order noted:

> the Commission made no factual finding that these entities would be obstructionist or otherwise unduly complicate or disrupt the proceedings. Instead, the Commission found that the Attorney General could adequately represent the interests of the residential and low-income rate payers that these plaintiffs seek to represent. The "evidence" relied upon to support this explanation consists of no more than a single online newspaper article, which this Court has reviewed. The article is clearly political rhetoric aimed at the Attorney General's constituents; it has no evidentiary value. It is completely unrelated to the rate adjustment proceedings and does not even represent the position of the Attorney General in those cases. In fact, as noted above, the Attorney General supports the intervention of these plaintiffs and has stated that his office cannot adequately represent their specific interests . . . It would certainly set a dangerous precedent to allow the Commission to abruptly depart from its well-known and long-held practice of allowing intervention by these plaintiffs without relying on substantial evidence to do so. By keeping these interest groups out of the rate cases, relevant testimony goes unheard and valuable information is never considered. This undermines the integrity of the regulatory process. More importantly, however, it opens the door to an administrative proceeding entirely lacking in due process. Our constitution guarantees that affected members of the

> public receive a full and fair opportunity to be heard; these plaintiffs attempt to speak for certain distinct subsets of the public. To deny them access to this proceeding is to silence the members of those communities and deny them a fair opportunity to be heard.

R.O.A. at 345-346. Administrative actions in derogation of Kentucky's Constitution are clearly not beyond the Court of Justice's scrutiny, and the Legislature's grant of plenary *ratemaking* power does not place the Commission above the law. *See Forrester v. Terry*, 357 S.W.2d 308, 310 (Ky. 1962) ("it may be said that the courts are always open for redress against the exercise of arbitrary power by administrative officials which may result in injury to any person"). Failure to address the result produced by the Court of Appeals will create situations where administrative action, unlawful or otherwise, will go unabated by the risk of judicial review. As the Appellants' pleadings have properly and consistently shown throughout the proceedings, the Commission's wholly unsubstantiated reversal of allowing Appellants' participation in the underlying matters was arbitrary and capricious, and thus requires this Court to reverse the Court of Appeals' Opinion and Order.

II. The Attorney General Represents Consumers Generally

As the Court of Appeals' Opinion and Order properly noted, the Attorney General's statutory right to intervene before the Commission is provided for by KRS 367.150, namely, subpart (8)(b). KRS 367.150 states:

> "The Department of Law [read: Attorney General] shall have the following functions, powers and duties: . . . To be made a real party in interest to any action on behalf of consumer interests involving a quasijudicial or rate-making proceeding of any state or local governmental branch, commission, department, agency, or rate-making body whenever deemed necessary and advisable in the consumers' interest by the Attorney General."

As the statute makes clear, the Attorney General represents consumers *generally*, not a specific subset. Nevertheless, the Commission's Orders Denying Intervention indicate that it expects either: 1) the Attorney General to represent the special interests of the Appellants, to the detriment of consumers generally, and each other, when those interests conflict, or 2) it understands that the Attorney General <u>must</u> represent consumers generally, and therefore knows the special interests of the Appellants will go unrepresented. Although it may be axiomatic to the Court that the Attorney General cannot ignore his legal obligation to represent consumers *generally*, it is nevertheless necessary for him to state as much. Furthermore, just as the Attorney General cannot ignore his statutory obligation, the Commission cannot foist upon the Attorney General other parties' special interests for him to represent, or in any way limit or alter the direction tasked to him by the General Assembly. Insofar as Appellants' special interests are in conflict with consumers generally, the Attorney General lawfully cannot and will not represent those special interests. The possibility of this occurring is not so farcical as to be summarily rejected, particularly given that Appellants in the underlying proceedings cited to such instances in their motions to intervene.

Additionally, the Commission's Orders Denying Intervention ignore the number of instances where the Appellants have advocated, argued for and sponsored various items and issues that are or could be outside the purview or the power granted to the Attorney General. As previously mentioned, the Orders Denying Intervention ignored these inherent conflicts and tension. Whatever animus the Commission has toward Appellants' intervention, it cannot use the Attorney General's statutory obligation to represent consumers generally as a shield to arbitrarily find that their interests are "adequately

represented" by the Attorney General. R.O.A. at 207-209, 216-217. *To do so would preclude the intervention of every other party who moves to intervene before the Commission.* The Commission's Orders Denying Intervention fail to square the circle on this issue. Coupled with the Court of Appeals' holding that parties who are denied intervention have no opportunity for judicial review of the decision, the result is unworkable. Taken to its logical conclusion, the situation caused by the Commission, and exacerbated by the Court of Appeals, will lead to an unworkable system whereby the Attorney General will be left as the only intervenor in all cases before the PSC, and the numerous special interests in countless matters will go unrepresented, even though parties stand willing to represent them.

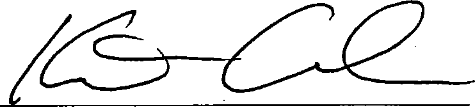
CONCLUSION

The Court of Appeals has created a system whereby the Kentucky Public Service Commission may arbitrarily deny parties intervention in matters, and any aggrieved party has no opportunity to seek judicial review as to whether the Commission's actions were unlawful. This is inappropriate. The Attorney General represents consumers generally before the Commission. The Attorney General's statutory obligation cannot be used by the Commission as a shield to deny intervention to parties who have a special interest that is otherwise unrepresented and who will not unduly complicate the proceedings.

WHEREFORE, the Attorney General respectfully moves the Court to REVERSE the decision of the Court of Appeals, and REINSTATE the Order and Opinion of the Franklin Circuit Court.

Respectfully submitted,

Andy Beshear
Attorney General



Kent A. Chandler