

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Brian J. Moline, Chair
Robert E. Krehbiel
Michael C. Moffet

STATE CORPORATION COMMISSION

MAY 04 2007

 Docket
Room

In the Matter of the Applications of Westar)
Energy, Inc and Kansas Gas and Electric) Docket No. 05-WSEE-981-RTS
Company for Approval to Make Certain)
Changes in their Charges for Electric)
Service.)

**JOINT MOTION OF CURB AND USD 259 FOR STAY OF PROCEEDINGS
AND VACATION OF THE COMMISSION'S APRIL 30, 2007, ORDER**

1. The Citizens' Utility Ratepayer Board (CURB), and the Unified School District No. 259 (USD 259) (collectively, the Joint Intervenors) jointly move the Kansas Corporation Commission (KCC or Commission) to stay the proceedings in the above-captioned docket, and jointly move the Commission to vacate its order of April 30, 2007, on the grounds that the Kansas Court of Appeals took jurisdiction over this docket on April 19, 2007, and therefore deprived the Commission of jurisdiction to act further in this matter until the court issues further orders. The facts and arguments supporting this contention are as follows:

2. Intervenor USD 259 filed an appeal with the Kansas Court of Appeals on April 19, 2007, asking the court to review the Commission's decision of March 20, 2007, relating to the accounting treatment of the LaCygne sale/leaseback (the LaCygne adjustment). The March 20 order, which addressed issues that had been remanded to the Commission by the Court of Appeals, contained several rulings in addition to the ruling on the LaCygne adjustment.

3. At the end of the order, the Commission summarized its rulings in ordering paragraphs. Ordering Paragraph D stated that “the decisions in this Order are procedural and constitute non-final agency action. K.S.A. 77-607(b)(2). To the extent this order constitutes final agency action under K.S.A. 77-607(b)(1), which is subject to judicial review, the agency officer to receive service of a petition for judicial review on behalf of the Commission is Susan K. Duffy, Executive Director. K.S.A. 2004 Supp. 77-529(c).”

4. Unfortunately, the Commission did not specify which of its rulings in the order were final and subject to judicial review: the parties were left to figure it out for themselves. Upon careful reading of the order, it was clear that only the ruling on the LaCygne adjustment was final, because it was the only decision in the order that would not require further action of some sort by the parties or by the Commission. USD 259 justly concluded that the decision on the LaCygne adjustment was ripe for appeal. Therefore, on April 19, 2007, USD 259 filed its appeal with the Court of Appeals. Under K.S.A. 66-118a, the Court of Appeals has exclusive jurisdiction over appeals of rate orders made by the Commission.

5. On April 20, the Court of Appeals issued an order to show cause why USD’s appeal should not be dismissed for lack of jurisdiction. Responses are due May 4, 2007.

6. On April 30, 2007, the Commission issued an order in this docket addressing additional issues yet to be resolved by final orders. Additionally, the Commission has a prehearing conference scheduled for May 8, and an evidentiary hearing scheduled to be held on May 10 – 11, 2007, to hear evidence on some of these matters in the docket.

7. Given that the Court of Appeals assumes jurisdiction over appeals from rate cases when an appeal is docketed with the court, and only relinquishes jurisdiction by further order, the

Commission has not had jurisdiction in this docket since April 19, 2007. Until the Court of Appeals returns jurisdiction to the Commission, the Commission has no jurisdiction to take further action in this docket. The order issued by the Commission on April 30, 2007 therefore has no force of law, and the Commission has no jurisdiction to conduct further hearings in this case.

8. Below, the Joint Intervenors present the arguments and authorities supporting their contention that the Commission was deprived of jurisdiction over this docket on April 19 and will not regain jurisdiction until an order of the Court of Appeals is issued restoring the KCC's jurisdiction over all or a part of this docket.

Arguments and Authorities

9. K.S.A. 66-118a provides that "the court of appeals shall have exclusive jurisdiction to review any agency action of the state corporation commission arising from a rate hearing." There can be no possible controversy over whether the Court of Appeals has jurisdiction over the subject matter, because it exercised jurisdiction over this very same docket and very same issue in the first round of appeals (*Unified School District No. 259 v. Kansas Corporation Commission*, Opinion 06-96251, July 7, 2006)(reversal of the LaCygne adjustment). However, after USD 259 filed its appeal, the Court of Appeals issued an order to show cause on April 20. The *Order to Show Cause* ordered the parties to "show cause by written response to be served and filed on or before May 4, 2007, why this action should not be dismissed for lack of jurisdiction." The order cited language in Ordering Paragraph D stated that "the decisions in this Order are procedural and constitute non-final agency action." (*Order to Show Cause*, Apr. 20,

2007).

10. USD 259 filed its response on May 2, 2007, explaining that the only conclusion that could be reached by the parties was that the Commission's ruling on the LaCygne adjustment was final agency action, subject to judicial review. With an evidentiary hearing scheduled in the docket for May 10 – 11, 2007, it was clear that the remaining issues in the docket could not possibly be resolved by final agency action by the time an appeal must be filed on any final action taken in the March 20 order. If the court agrees that the Commission's ruling on the LaCygne issue was final on March 20, USD 259's appeal would have been out of time if filed later on, when all the other issues are finally resolved. USD 259 explained that it would rather be dismissed without prejudice for filing its appeal too early than to be denied the right to appeal at all because it filed too late.

11. K.S.A. 66-118a confers jurisdiction on the Court of Appeals. The show cause order asked the parties "why this action should not be dismissed for lack of jurisdiction." It also raises doubt as to whether the issue is severable from the other issues in the case, even if the appeal is from a final agency action. Given the doubt as to whether the issue is severable, we must assume the case is not severable at present. Until we have a ruling from the Court of Appeals stating otherwise, it has jurisdiction over the entire case. The KCC has no jurisdiction over the matter until the Court of Appeals conducts its review, or determines that the appeal fails to meet the statutory requirements to confer jurisdiction on the court, or determines that it will hear the appeal as a collateral issue to the other issues, over which the KCC may exercise its jurisdiction while the appeal progresses at the Court of Appeals. If the court rules that USD 259's appeal is a timely appeal of final agency action, *and* severable from the rest of the

proceeding, the court will retain jurisdiction only over the LaCygne issue. If the court dismisses USD 259's appeal for lack of jurisdiction, or determines that the issue cannot be severed, the KCC will resume jurisdiction over the entire matter. Until the Court of Appeals makes its decision, the KCC has no power to act.

12. Normally, the lower court is deprived of jurisdiction over a matter once an appeal has been properly filed with an appellate court. The reason is clear: a court or administrative agency could continue to adjudicate matters related to the issue on appeal if it retained jurisdiction over the matter, which would complicate litigation and make finality of determinations by the court impossible.

13. However, Kansas courts have found that a trial court had jurisdiction to conduct a proceeding to determine attorney fees and expenses after two appeals had been docketed because it is a "distinct 'other proceeding.'" *In re Estate of Robinson*, 232 Kan. 752, 754. However, the court said "the far better practice would have been for the trial court to delay consideration of fees and expenses until after the appeals had been decided . . . [t]he ultimate result of the case before us amply demonstrates the difficulties occasioned by the trial court's election to exercise its jurisdiction without waiting on the outcome of the two appeals. *Id.*, at 754 – 55. Since the matter of whether the appeal of the LaCygne issue is or is not a "distinct other proceeding" that can proceed at the Court of Appeals while the KCC exercises jurisdiction over the other issues is pending before the Court of Appeals, it seems obvious that the "far better practice" for the KCC would be to abstain from exercising any jurisdiction at all over this docket until the Court of Appeals issues its ruling.

14. Another case clearly states, "the trial court retains jurisdiction of a case until an

appeal is docketed in the appellate court.” *Hundley v. Pfluetze*, 18 Kan. App. 2d 755, 757. In *Hundley*, the plaintiff filed a notice of appeal with the trial court before it ruled on her motion to reconsider. The fact that she had not yet actually docketed her appeal with the appellate court when the trial court made its ruling on her motion was key to the Court of Appeal’s determination that the trial court still had jurisdiction at that juncture. *Id.*

15. If the court finds that the appeal was not proper, the Nebraska Court of Appeals (in an unpublished opinion cited here for purposes of discussion rather than authority) has ruled that the lower court *never lost* jurisdiction, and that the lower court had jurisdiction over the matter to issue further orders in the case after the appeal was filed. *In re Estate of Reinek*, 1997 WL 618740 (Neb. App., Sept. 30, 1997). If the Court of Appeals in Kansas adopted this logic, it would find that the KCC would retain jurisdiction to issue further orders in this docket *if* Court of Appeals dismisses USD 259’s appeal for lack of jurisdiction—as if the appeal was never filed in the first place. However, one major flaw of such logic, which would hold that that the KCC retains jurisdiction of a matter until the Court of Appeals rules on the propriety of the appeal, is that many appeals from KCC decisions are docketed with the court and are never subject to challenges for lack of jurisdiction. At what point then, if the Court never rules on the matter, but simply reviews the appeal and issues an opinion in due time, does the KCC receive notice that it has been deprived of jurisdiction by the Court of Appeals?

16. It does not follow that the KCC retains jurisdiction to issue further orders in this docket UNTIL the Court of Appeals rules on whether USD 259’s appeal is proper. If the KCC retains jurisdiction while an improperly-filed appeal is before the Court of Appeals, as if no appeal had ever been filed, then it must also be the case that a properly filed appeal deprives the

KCC of jurisdiction over the matter, just as the court in *Hundley* said that docketing the appeal deprives the lower court of jurisdiction. The logical conclusion is that the Court of Appeals takes jurisdiction over the case under appeal from the KCC when the appeal is filed with the court, and that unless and until the Court of Appeals dismisses the appeal for lack of jurisdiction or otherwise returns jurisdiction to the KCC through an order, the KCC is deprived of jurisdiction over the case. Otherwise, there would be no certainty where the KCC's jurisdiction ends and the court's jurisdiction begins, absent an express ruling from the court.

17. The Joint Intervenors note that the statute providing that a party must request a stay or suspension in order to stay the KCC rate order *that is the subject* of the appeal (K.S.A. 66-118h) does not address whether a party must request a stay or suspension of the docket to prevent the KCC from issuing *other* orders while the case is on appeal. This omission is a strong indication that the legislature never contemplated that the KCC would retain jurisdiction over a case while it was on appeal, absent a ruling of the court severing one of the issues from the others yet to be resolved.

18. More indication that the Court of Appeals assumes jurisdiction over an appeal of a rate issue and retains it unless it issues an order is the fact that counsel has been unable to locate a single Kansas case that addresses this issue. It is simply unchallenged that the Court of Appeals assumes jurisdiction over an appeal from the KCC at the moment it is docketed, and does not return jurisdiction to the KCC until it issues an order. The order may be an order to dismiss. The order may be an order upholding the KCC decision. The order may be an order allowing the appeal to be severed from the case, and to allow the KCC to continue to take action on other matters in the docket. But there is no case that challenges the proposition that the Court

of Appeals assumes jurisdiction over an appeal from the KCC at the moment it is docketed, depriving the KCC of jurisdiction in the docket until it issues an opinion or an order.

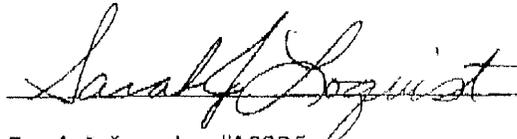
19. Finally, if the Court of Appeals ultimately decides that the KCC did not have jurisdiction over this docket after USD 259's appeal was docketed, then all of the proceedings that take place at the KCC in the meantime will have no legal effect, and will have to be repeated. The order of April 19 will have to be re-issued. Witnesses will have to appear at second set of hearings. The Commission will have to sit through a second set of hearings. Judicial economy alone dictates that it is the "far better practice" for the KCC to vacate its April 19 ruling and suspend any proceedings until the Court of Appeals rules on the questions it raised in its order to show cause.

Thus, it is for these reasons that the parties move the Commission to vacate its order of April 30 on the grounds that it had no jurisdiction over this docket. The parties also move the Commission to suspend further proceedings in this docket until the Court of Appeals issues its ruling on whether USD 259's appeal will be dismissed, and whether the issue may be severed and reviewed as a collateral issue so that the KCC may proceed to act on other issues yet to be resolved in the case.

Respectfully submitted,



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05-WSEE-981-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, or hand-delivered this 4th day of May, 2007, to the following:

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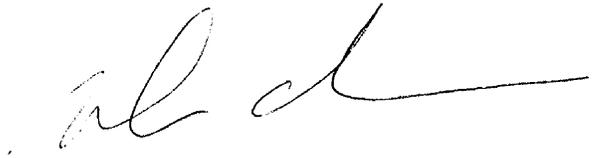
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