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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001859-OA

PUBLIC SERVICE COMMISSION
OF KENTUCKY — PETITIONER

v. ORIGINAL ACTION ARISING FROM
FRANKLIN CIRCUIT COURT
NOS. 18-CI-01115, 18-CI-01117,
AND 18-CI-01129, CONSOLIDATED

PHILLIP J. SHEPHERD, JUDGE,
FRANKLIN CIRCUIT COURT, DIV. 1 — RESPONDENT

AND

ATTORNEY GENERAL OF KENTUCKY;
METROPOLITAN HOUSING COALITION;
ASSOCIATION OF COMMUNITY MINISTRIES;
THE SIERRA CLUB; AND
COMMUNITY ACTION COUNCIL FOR
LEXINGTON-FAYETTE, BOURBON,
HARRISON, AND NICHOLAS COUNTIES, INC. — REAL PARTIES IN INTEREST

OPINION AND ORDER
GRANTING PETITION FOR WRIT OF PROHIBITION

** ** ** ** **

BEFORE: ACREE, JONES, AND KRAMER, JUDGES.

ACREE, JUDGE: This matter comes before the Court on the Kentucky Public Service Commission's Petition for a Writ of Prohibition pursuant to CR[1] 81 and CR 76.36. The Commission argues the circuit court lacked subject matter jurisdiction to entertain an interlocutory appeal of its decision not to permit intervention by certain persons in a rate-making case. We are persuaded by that argument. Having reviewed the petition and responses, and being otherwise sufficiently advised, the Petition for a Writ of Prohibition is hereby GRANTED.

I. BACKGROUND

This case began when Louisville Gas & Electric Company ("LG&E") and Kentucky Utilities ("KU") filed rate adjustment applications with the Commission. Numerous persons moved to intervene in the administrative proceedings, including: the Metropolitan Housing Coalition ("MHC"), which represents the concerns of low-income ratepayers in the Louisville area; the Association of Community Ministries ("ACM"), which provides utility assistance to low-income individuals in the Louisville area; the Sierra Club, a conservation group; and the Community Action Council for Lexington-Fayette, Bourbon, Harrison and Nicholas Counties ("CAC"), which provides energy assistance to low-income residents in KU's service area. The Commission denied motions to

[1] Kentucky Rules of Civil Procedure.

intervene filed by these parties; they became the real parties in interest before the circuit court ("Real Parties").

In denying intervention, the Commission found as to each of the Real Parties that their interests were already adequately represented by a party to the proceeding, including the Kentucky Attorney General whose office intervened as a matter of right pursuant to KRS[2] 367.150(8)(b). Still, each order denying intervention included language that, despite their non-party status in the administrative proceeding, each Real Party would "have ample opportunity to participate" by viewing all filings online, "filing comments as frequently as they choose" to be made a part of the record, and working with the Attorney General to provide testimony. Additionally, each denial stated: "if a formal evidentiary hearing is held, [Real Parties] will be provided an opportunity to present any information that they wish for the Commission's consideration in this matter."

Desiring more than this limited participation, the Real Parties claimed a right under KRS 278.410 to an interlocutory appeal of the denial of leave to intervene. They filed civil actions (now consolidated) in the Franklin Circuit Court. On November 21, 2018, the circuit court entered a temporary injunction pursuant to CR 65.04 enjoining the Commission from preventing the Real Parties from "full[y] participat[ing] in the two underlying rate cases to which they have

[2] Kentucky Revised Statutes.

sought intervention," and "ORDERED [the Commission] to permit [Real Parties] participation as intervening parties under 807 KAR[3] 5:001, Section 4(11)[.]" On December 17, 2018, the Commission filed with this Court its Petition for a Writ of Prohibition, and the Real Parties filed responses.

II. STANDARD FOR REVIEW OF WRIT PETITIONS

A writ of prohibition is an extraordinary remedy. As the Supreme Court of Kentucky described the standard for granting a writ:

> A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004). "This statement lays out what [the Supreme Court] described as two classes of writs, one addressing claims that the lower court is proceeding without subject matter jurisdiction and one addressing claims of mere legal error." *Collins v. Braden*, 384 S.W.3d 154, 158 (Ky. 2012). The Commission seeks a writ of the first class, asserting the circuit court is acting without subject matter jurisdiction.

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[3] Kentucky Administrative Regulations.

III. BASIS OF CIRCUIT COURT EXERCISE OF JURISDICTION

The circuit court claimed appellate jurisdiction in this case, stating "that the Commission's orders denying the Motions to Intervene are final and appealable as to these [Real Parties], and these orders may be properly presented to the [Circuit] Court at this time under KRS 278.410 and the Declaratory Judgment Act, KRS Chapter 418." (Opinion and Order entered November 21, 2018, at 7).

Relying on the definition of a "final or appealable judgment" found in CR 54.01, the circuit court said, "there are no remaining issues for the Commission to decide as to MHC, ACM, CAC, and the Sierra Club." (*Id.* at 7-8). The circuit court ruled as a matter of law that, "In cases where the Commission's action regarding certain litigants is, as a practical matter, a final disposition of their right to participate in the proceedings, the statute clearly authorizes immediate judicial review. KRS 278.410." (*Id.* at 8).

Cobbling together elements upon which to assert interlocutory appellate jurisdiction from an administrative proceeding, the court noted that "[a]lthough the Commission has not adopted the Kentucky Rules of Civil Procedure, the plaintiffs plainly satisfy the standard for intervention as a matter of right under CR 24, which is highly persuasive to the Court on this point." (*Id.*). The court went further, "tak[ing] notice of the collateral order doctrine, an exception to the final judgment rule in federal courts . . . [that] permits a court to

hear interlocutory appeals of matters separable from and collateral to the rights asserted in the underlying action when those issues are 'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." (*Id.*).

IV. ANALYSIS

We conclude the circuit court's reasoning for its exercise of interlocutory appellate jurisdiction is flawed. Not only is reliance on the Kentucky Rules of Civil Procedure misplaced, the circumstances of this case do not support application of the collateral order rule.

However, the fundamental error in the circuit court's analysis is its presumption that the Real Parties have a right to intervene in the Commission's proceedings. We conclude such a right does not exist in the context of the Commission's "plenary authority to regulate and investigate utilities . . . ." *Kentucky Public Service Comm'n v. Commonwealth ex rel. Conway*, 324 S.W.3d 373, 383 (Ky. 2010).

Consumers in a free market economy have no right, certainly not at common law, to dictate the rate at which a seller's product or service is sold. However, American capitalism is subject to regulation as authorized by the market participants themselves – the buyers and sellers, who are citizens all. These citizens empower representatives in state and federal governments to enact

legislative schemes to protect consumers against the excesses of sellers who, for various reasons, find themselves in, and are tempted to take advantage of, a superior bargaining position. One such legislative scheme is KRS Chapter 278.

Chapter 278 did not solve the utilities marketplace imbalance by empowering consumers with a statutory right to set their own utility rates. Through representatives, the people created the Public Service Commission and granted it "exclusive jurisdiction over the regulation of rates and service of utilities . . . ." KRS 278.040(2). The legislature saw to it that "the [Commission] had the *plenary authority* to regulate and investigate utilities and to ensure that rates charged are fair, just, and reasonable under KRS 278.030 and KRS 278.040." *Commonwealth ex rel. Conway*, 324 S.W.3d at 383 (emphasis added). In fact, "it was the intention of the Legislature to clothe the Public Service Commission with complete control over rates and services of the utilities . . . ." *Southern Bell Tel. & Tel. Co. v. City of Louisville*, 265 Ky. 286, 96 S.W.2d 695, 697 (1936). In summary, rather than *granting* consumer rights that did not exist at common law, the legislative scheme focuses on the other side of the transaction and *suppresses* the free market right of a utility to charge any rate the market will bear. In place of that suppressed right, the legislation still allows rate increases, but requires notice to the Commission and Commission approval. KRS 278.180.

The Commission's plenary rate-making authority is considerable. It "is primarily a legislative function of the state, and the right is essentially a police power." *Southern Bell*, 96 S.W.2d at 697. That power is exercised when the commission "finds that any rate is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, [at which time] the commission shall by order prescribe a just and reasonable rate to be followed in the future." KRS 278.270.

Replacing the consumers' inferior negotiating position with this police power means "[c]onsumers of public utilities must rely on the Commission to protect them from unreasonable and unfair rates." *Kentucky Industrial Utility Customers, Inc. v. Kentucky Public Service Commission*, 504 S.W.3d 695, 705 (Ky. App. 2016). There is, of course, a tradeoff. The legislative scheme not only "strips consumers of the right to price shop[,]" *id.*, it limits consumer participation in rate-making to two possibilities: (1) any person may present a complaint to the Commission in an attempt to initiate a case, KRS 278.260; and (2) "[a] person who wishes to become a party to a case [already] before the commission may, by timely motion, request leave to intervene." 807 KAR 5:001 Section 4(11)(a).

The Real Parties do not claim the right to judicial review pursuant to KRS 278.410 as persons who became parties after filing complaints. 807 KAR 5:001 Section 1(10)(a). However, understanding how one becomes a party to

Commission proceedings, generally, facilitates our explanation why persons denied intervention, specifically, are not parties entitled to judicial review.

Any person (broadly defined by KRS 278.010(2)) may present to the Commission "a complaint in writing . . . against any utility . . . [regarding] any rate in which the complainant is directly interested . . . ." KRS 278.260(1). The statutes make no distinction between formal and informal complaints, but the regulations do. *Compare* 807 KAR 5:001 Section 20 (Formal Complaints) *with* 807 KAR 5:001 Section 21 (Informal Complaints). The complaint need not be about a utility *rate* – applicable to all utility customers – but might be of a private nature and only between the complainant and the utility.[4] Either way, the Commission will entertain the complaint. But the legislation granting consumers the right to complain to the Public Service Commission guarantees nothing else.

The complaint "provisions of KRS Chapter 278, KRS 278.260, KRS 278.270 and KRS 278.280, . . . do not mandate that a complaint compels a general rate case under KRS 278.190." *Commonwealth ex rel. Conway*, 324 S.W.3d at 378-79 (footnotes omitted). It has always been so. As our highest court long ago said, if a single complaint could compel Commission action, "the commission

[4] When the nature of the complaint "is of private concern to these parties [consumer and utility] . . . , jurisdiction is not exclusive with the Public Service Commission, and the case should be submitted to the court." *Bee's Old Reliable Shows, Inc. v. Kentucky Power Co.*, 334 S.W.2d 765, 767 (Ky. 1960).

would be subjected to the whims and imaginative grievances of customers to such an extent that it would be so annoying that the intent and purpose of the law would be virtually destroyed, and the service to the general public would be thwarted if not destroyed." *Smith v. Southern Bell Tel. & Tel. Co.*, 268 Ky. 421, 104 S.W.2d 961, 963 (1937). "The commission upon its own motion might hear and determine the complaint of an individual but the act [establishing the Commission's precursor] does not make it obligatory that it do so." *Louisville Gas & Elec. Co. v. Dulworth*, 279 Ky. 309, 130 S.W.2d 753, 755 (1939). It remains the prerogative of the Commission to initiate a rate case. KRS 278.190(1) ("the commission *may*, upon its own motion, or upon complaint as provided in KRS 278.260, and upon reasonable notice, hold a hearing" concerning utility rates (emphasis added)).

Furthermore, a complainant has no right to a hearing. "Hearings are not necessarily required to resolve the complaint." *Commonwealth ex rel. Conway*, 324 S.W.3d at 379. "The commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest or for the protection of substantial rights." KRS 278.260(2).

Nor does the legislative scheme provide for judicial review of the Commission's dismissal of a complaint. "[A] single subscriber does not have an inherent right to adjudicate a controversy over rates and services in court, even though he is deprived by statute of the right to be heard by the Public Service

Commission." *Bee's Old Reliable Shows, Inc. v. Kentucky Power Co.*, 334 S.W.2d 765, 766 (Ky. 1960) (citing *Smith*, 104 S.W.2d 961). Judicial review is available only to a "*party* to a commission proceeding or any utility affected by an order of the commission . . . ." KRS 278.410(1) (emphasis added). A person whose complaint is dismissed never becomes a party before the Commission and, therefore, is entitled to no judicial review pursuant to KRS 278.410.

There are two ways for a complainant to qualify as a party to a Commission proceeding and thus be entitled to claim the right to judicial review under KRS 278.410. Both are effectively discretionary with the Commission. First, the complaint must be a "formal complaint" as defined by 807 KAR 5:001 Section 20, and it must "[i]nitiate[] action" that prompts the Commission's exercise of its discretionary authority under KRS 278.190, KRS 278.270, or KRS 278.280 to investigate, conduct a hearing, and issue an order. 807 KAR 5:001 Section 1(10)(a); KRS 278.190, .270, and .280. In such a case, the complainant would typically become a party and, pursuant to KRS 278.410, would be granted judicial review if sought. Of course, the Commission can still exclude the complainant as a party by acting "upon its own motion" under those same statutes. KRS 278.190, .270, .280; *Smith*, 104 S.W.2d at 963 (If "any single subscriber had a real and substantial ground or reason for complaint, the act authorizes the commission, of its own motion, . . . to correct any unreasonable situation . . . .").

Second, any complainant would be a party if "joined to a commission proceeding" by order of the Commission. 807 KAR 5:001 Section 1(10)(e). Again, changing the status of a person from complainant to party under the regulation's Section 1(10)(e) is the prerogative of the Commission.

In summary, a person becomes more than a complainant, rising to the status as a party, only at the discretion of the Commission. This legislative grant of discretion is emblematic of the plenary nature of the Commission's authority.

These underlying concepts explaining why a complainant cannot demand participation in a Commission proceeding have equal applicability to would-be intervenors. Although addressed by other statutes and regulations, participation by intervention in the Commission's rate-making proceedings, as with participation by complainants, is at the Commission's discretion.

There is one exception to this general statement regarding the Commission's discretion in matters of intervention. It is an exception that proves the rule. The legislature expressly and unequivocally granted to the Kentucky Attorney General the right to "[t]o be made a real party in interest to any action on behalf of consumer interests involving a quasijudicial or rate-making proceeding . . . whenever deemed necessary and advisable in the consumers' interest by the Attorney General." KRS 367.150(8)(b). Whether the Attorney General intervenes is his decision and entirely beyond the control of the Commission because the

legislature said so. Exercising power under this statute, the Attorney General did, in fact, intervene on behalf of consumer interests in this rate-making case. But the Real Parties can point to no legislation granting them a similar right to intervene.

Certainly, the legislature knows how to use language that leaves no doubt about a person's right to intervene in a proceeding. It has done so frequently, and the most common phrasing grants intervention "as a matter of right."[5] Chapter 278 never mentions intervention as a matter of right.

Two of the few references to intervention in Chapter 278 shed no light at all on the entryway to intervention in Commission proceedings. The first says only that a person the Commission already allowed to intervene shall have access to data the utility presents.[6] A second addresses the possibility that a person who

[5] KRS 5.005(3) ("Legislative Research Commission *may intervene as a matter of right* in any action challenging the constitutionality of any legislative district created by [KRS Chapter 5]." (emphasis added)); KRS 154A.110(7) ("The [Kentucky Lottery C]orporation . . . *may intervene as of right* in any such proceeding" seeking court approval of an assignment of a right to receive payments under a prize paid in installments. (emphasis added)); KRS 344.670(2) ("Any aggrieved person with respect to the issues to be determined in a civil action under this section [regarding discrimination in housing] *may intervene as of right* in that civil action." (emphasis added)); KRS 350.250(4) ("the [Energy and Environment C]abinet, if not a party, *may intervene as a matter of right*" in actions brought pursuant to KRS 350.250(1). (emphasis added)); KRS 351.030(2) (certain injured or affected miners and their survivors "*shall be granted the right of intervention* in the penalty phase of [any disciplinary] proceeding" against the mine operator. (emphasis added)); KRS 353.468(4) (in action to appoint a trustee to oversee development of severed mineral interests, the property "owner *may intervene as a matter of right* . . . ." (emphasis added)); KRS 365.607(1) (in action to cancel trademark, the Kentucky "Secretary [of State] . . . *shall be given the right to intervene* in the action." (emphasis added)).

[6] KRS 278.192(2)(c) (If the Commission permits a party to intervene in a proceeding regarding a test period for a proposed rate increase, "any intervening party in opposition to such application shall have the right to examine all data . . ." relating to the test period.).

was not a party before the Commission might intervene in the circuit court during an appeal properly brought pursuant to KRS 278.410.[7]

The language the legislature chose to describe the pathway to intervene in a Commission proceeding underscores that intervention is at the discretion of the Commission. The relevant statutes state only that a person "may request intervention"[8]; or "may . . . be granted leave to intervene"[9]; or, in the case of an applicant desiring to erect a cellular antenna tower, contiguous property owners shall be "informed of the opportunity to intervene in the commission proceedings on the application."[10] Each of these is another way of saying what is

[7] KRS 278.420(2) (regarding timing for designating a record "after the [circuit] court enters an order permitting any other party to intervene in the action" on appeal from the Commission pursuant to KRS 278.410).

[8] KRS 278.020(9) ("In a proceeding on an application filed pursuant to this section [regarding construction of electric transmission lines], any interested person, including a person over whose property the proposed transmission line will cross, *may request intervention* . . . ." (emphasis added)).

[9] KRS 278.712(4) ("Any interested person . . . *may*, upon motion to the [Kentucky State B]oard [on Electric Generation and Transmission Siting], *be granted leave to intervene* as a party to a [local] proceeding held pursuant to this section" regarding construction of a merchant electric generating facility. (emphasis added)).

[10] KRS 278.665(2) (upon application for a certificate to construct a cellular antenna tower outside the jurisdiction of a planning commission, "the [Public Service C]ommission shall require that every person who owns property contiguous to the property where the proposed cellular antenna tower will be located [be] informed of the *opportunity to intervene* in the commission proceedings on the application." (emphasis added)).

expressly stated in another statute – that a person "may intervene in accordance with commission administrative regulations."[11] So, what are those regulations?

The legislature authorized the Commission to "adopt, in keeping with KRS Chapter 13A, reasonable regulations to implement the provisions of KRS Chapter 278 . . . ." KRS 278.040(3). That includes rules for intervening. Chapter 13A authorized the Commission to promulgate regulations prescribing "[t]he procedures to be utilized by the administrative body in the conduct of hearings by or for the administrative body . . . ." KRS 13A.100(4). As the circuit court noted, the Commission did not adopt the Kentucky Rules of Civil Procedure. Instead, it promulgated 807 KAR 5:001, entitled "Rules of procedure." That regulation is where we learn what persons Kentucky law considers a party for purposes of KRS 278.410, granting them the right to judicial review of Commission orders. It is there, too, that we learn the rules for intervention in a Commission proceeding.

Although the legislature defined more than thirty of the terms used in Chapter 278 in KRS 278.010, it left to the Commission to define who it considers a "party" to its proceedings. This is significant because, other than an affected utility, one must be a "party" to be entitled to judicial review of any Commission

[11] KRS 278.543(5) (regarding complaints against "any . . . telephone utility [adopting a price regulation plan] . . . . The commission may dismiss any complaint without a hearing . . . ," although it cannot issue any order without a hearing. "A person *may intervene in accordance with commission administrative regulations*." (emphasis added)).

order. KRS 278.410(1) ("Any *party* to a commission proceeding *or any utility affected* by an order of the commission may . . . bring an action against the commission in the Franklin Circuit Court . . . ." (emphasis added)).[12]

Pursuant to the Commission's regulation, in relevant part, " 'Party' means a person who . . . [i]s granted leave to intervene pursuant to Section 4(11) of this administrative regulation . . . ." 807 KAR 5:001 Section 1(10)(d). This Court's review should be as simple as concluding that the Real Parties were not granted leave to intervene; therefore, they were not parties empowered by the legislature with the right to challenge any Commission order. When the circuit court entertained the lawsuit by the Real Parties, it could not claim subject matter jurisdiction pursuant to KRS 278.410. But that cannot end our analysis.

The Real Parties claim there are restrictions placed upon the Commission's authority to deny intervention. To be sure, intervention is governed

[12] The Real Parties in Interest argue the Commission never raised the argument that would-be intervenors who are denied intervention are not "parties" for purposes of KRS 278.410 and they claim, in fact, that the Commission's position "implies the opposite." (Response of Sierra Club, p. 17 n.16). Therefore, they assert that this Court "need not reach the question . . . ." (*Id.*). We decline the invitation to ignore the requirements of KRS 278.410. Whether the circuit court could entertain an interlocutory administrative appeal brought pursuant to that statute by persons denied party status raises an issue of subject matter jurisdiction. Subject matter jurisdiction either exists at the outset of a case or does not, and any error related to it cannot be waived. *Commonwealth v. Steadman*, 411 S.W.3d 717, 722 (Ky. 2013) (cited in *Malone v. Commonwealth*, 2015-SC-000699-MR, 2018 WL 897085, at *3 (Ky. Feb. 15, 2018)).

by the Commission's regulations and there are standards. The relevant part of the regulations states as follows:

> (11) Intervention and parties.
>
> (a) A person who wishes to become a party to a case before the commission may, by timely motion, *request leave to intervene*.
>
> 1. The motion shall include the movant's full name, mailing address, and electronic mail address and shall state his or her interest in the case and how intervention is likely to present issues or develop facts that will assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.
>
> 2. The motion may include a request by movant for delivery of commission orders by United States mail and shall state how good cause exists for that means of delivery to movant.
>
> (b) The commission *shall grant* a person leave to intervene *if the commission finds* that he or she 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*.
>
> . . . .
>
> (e) A person who the commission has not granted leave to intervene in a case may file written comments regarding the subject matter of the case.
>
> 1. These comments shall be filed in the case record.

> 2. A person filing written comments *shall not be deemed a party to the proceeding* and need not be named as a party to an appeal.

807 KAR 5:001 Section 4(11) (emphasis added); *see also* 807 KAR 5:110 section 4.[13]

The only mandate imposed upon the Commission – a mandate it imposed upon itself by promulgating the regulation – is that it "shall grant" intervention if it finds a would-be intervenor's special interest in the case "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." As to each of the Real Parties, the Commission failed to find such circumstances as would have compelled it to grant intervention.

[13] 807 KAR 5:110. Board proceedings, Section 4, is entitled, Intervention and Parties, and states:

> (1) A person who wishes to become a party to the proceeding before the board may, by written motion filed no later than thirty (30) days after the application [to construct a carbon dioxide transmission pipeline, merchant electricity generating plant, or nonregulated electric transmission line] has been submitted, request leave to intervene.
>
> (2) A motion to intervene shall be granted if the movant has shown:
> (a) That he has a special interest in the proceeding; or
> (b) That his participation in the proceeding will assist the board in reaching its decision and would not unduly interrupt the proceeding.

We conclude that a person who is neither an original party nor a utility has no more than a "right *to request* intervention" in Commission proceedings. 807 KAR 5:063 Section 1(1)(l)3 (emphasis added); 807 KAR 5:063 Section 1(1)(n)3; 807 KAR 5:120 Section 2(5)(c) ("interested persons have the right *to request* to intervene"). Contrary to the conclusion of the Franklin Circuit Court, the legislation grants no matter-of-right intervention. Whether the circumstances set out in 807 KAR 5:001 Section 4(11)(b) are present, a matter solely within the Commission's discretion to determine, has more to do with the Commission's effectual management of its own proceedings than with a right to intervene. Intervention is discretionary with the Commission.

Assessing whether the legislature's procedure for public participation in rate-making cases is a wise decision is not our role. Nothing has changed since we said "that courts need not inquire into the wisdom of legislative procedures, unless they are tainted by malice, fraud or corruption. We are primarily concerned with the product and *not with* the motive *or method* which produced it." *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 515 (Ky. App. 1990) (emphasis added). Nor has anything changed since our Supreme Court pointed out that injunctive relief pursuant to KRS 278.410(3) is limited to what is "*provided by law*." Discussing an actual final order of the Commission and not an interlocutory ruling denying intervention, the Court said:

> [T]he Franklin Circuit Court . . . may grant injunctive relief only in the manner and upon the terms, "provided by law."
>
> It is significant that the legislature used the phrase "provided by law". It did not write "according to the principles of equity jurisprudence". The Chapter presents a unified and symmetrical scheme for the exercise of the legislative power of ratemaking. We do not believe that the legislature, by the use of such restrictive language, intended to open up the area for discretionary relief granted upon comparatively nebulous and generous equitable principles. We read the legislative mandate as directing us to keep our judicial fingers out of the ratemaking pie except to the degree that the constitutions require our intervention.

Commonwealth ex rel. Stephens v. South Central Bell Tel. Co., 545 S.W.2d 927, 931 (Ky. 1976).

When the circuit court ordered the Commission to grant intervention to the Real Parties, it effectively violated the principle that "[m]andamus is . . . not an appropriate remedy to tell the . . . administrative body how to decide or to interfere with its exercise of discretion." *Humana of Kentucky, Inc. v. NKC Hosps., Inc.*, 751 S.W.2d 369, 374 (Ky. 1988). Here, the circuit court told the Commission how to decide questions solely within that administrative body's lawful purview – whether the Real Parties' interests were or were not already "adequately represented" and whether their participation would or would not "unduly complicat[e] or disrupt[] the proceedings." 807 KAR 5:001 Section 4(11)(b). Our jurisprudence only authorizes that kind of "judicial intervention in

agency matters . . . where the agency is obviously acting without jurisdiction as a matter of law or acting contrary to the constitution . . . [and] intervention is necessary to avoid irreparable harm or injury." *Kentucky Personnel Bd. v. Elkins ex rel. Kentucky State Police*, 723 S.W.2d 877, 879 (Ky. App. 1986). The Commission was acting within its jurisdiction and consistently with our constitutions. And yet, without such justification, the circuit court intervened and interfered in the Commission's proceedings.

This is not a case in which a failure of due process deprived the Real Parties of a right. They have no right at stake. *Bee's Old Reliable Shows*, 334 S.W.2d at 766 ("limitation [on individual participation in Commission proceedings] was not in violation of the Constitution, and . . . deprives no one of his rights"); *Smith*, 104 S.W.2d at 964 (There is no constitutional, statutory, regulatory, or common law right to utility service.).[14] "The due process clause

[14] A more complete discussion of the concept that no right is at stake here is as follow:

> The right to [utility] service is not inherent, nor is it a natural right. This right is not the same as his rights to life, liberty, or property. [A consumer's] right to [utility] service comes to him by virtue of the law. He is a member of society and his rights must be consistent with society as a whole. . . . While every man is entitled under section 14 of the Constitution to a remedy by due course of law, in any event, the question is always as to the nature and extent of that right. The law defines and regulates his rights and prescribes the remedy for him before the commission, which is a remedy by due course of law when appeal to the courts is given. The right to [utility] service under the common law is subject to change by the Legislature. When certain conditions exist, the Legislature may, through the commission, set up the manner and method of the regulation of the [utility] service . . . and may authorize the commission to hear evidence, fix and establish regulations, charges, rates, and services to be rendered to subscribers of the

does not restrict the state's reasonable exercise of its police power in furtherance of the public interest, even though such laws may interfere with contractual relations and commercial freedoms of private parties." *Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 590 (Ky. 1995) (citation omitted). As this rate case proceeds, it may well affect the contractual relations between the Real Parties (or those they represent) and the utilities. But that is the very nature of the legislature's exercise of police power here in furtherance of the public interest. *See Smith v. O'Dea*, 939 S.W.2d 353, 358 (Ky. App. 1997) ("Administrative tribunals in particular have been permitted to fashion procedures appropriate to their functions."). To the extent procedural due process is a factor, we repeat that it "is not a static concept, but calls for such procedural protections as the particular situation may demand." *Kentucky Cent. Life Ins.*, 897 S.W.2d at 590. The process that was due the Real Parties is that set out in the statutes and regulations governing proceedings before the Commission. Those statutes and regulations were followed.

> general public. The courts cannot compel or control the exercise of legislative functions within constitutional limitations. The legislative right to establish agencies, such as commissions, has never been questioned. . . .
>
> We see nothing in this act [the precursor to Chapter 278] that deprives [the consumer] of his life, liberty, and property without due process of law, nor is he deprived of the equal protection of the law, as provided by section 1 of Amendment 14 of the Constitution of the United States.

Smith, 104 S.W.2d at 964.

There is also the complicating factor that the Real Parties sought and obtained this judicial intervention before the Commission could complete its rate-making proceedings. Enticed by the allure of the "collateral order rule," the circuit court embraced it despite acknowledging its limited application to "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Commonwealth v. Farmer*, 423 S.W.3d 690, 696 (Ky. 2014) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 524-25, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949))). The rule is inapplicable here because there is no "claim of right" to be had. Furthermore, denial of intervention fails the collateral order test "which 'disallow[s] appeal from any decision which is tentative, informal or incomplete.'" *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42, 115 S.Ct. 1203, 1208, 131 L.Ed.2d 60 (1995) (quoting *Cohen*, 337 U.S. at 546, and citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978) ("order denying class certification held not appealable under collateral order doctrine, in part because such an order is 'subject to revision in the District Court'"). The Commission created a regulation, 807 KAR 5:001 Section 4(11)(e), granting the Real Parties the

right to continued, albeit limited, participation – something not available under our court rules of procedure. That continued participation allows the Commission, as it moves the rate-making process forward, to reconsider whether its interlocutory denial of intervention deprives it of a perspective inadequately represented by existing parties. If it deems the interlocutory denial to have been a mistake, it can correct it.

Under substantively similar circumstances, the collateral order rule was not applied in *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980). In that case, the Supreme Court of the United States reversed a lower court's order interfering with the conduct of an administrative agency's proceedings, in what was effectively the appeal of the agency's interlocutory decision. Expressing concepts equally applicable here, the high court said:

> the effect of the judicial review sought [prior to final agency action] is likely to be interference with the proper functioning of the agency and a burden for the courts. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. [Citation omitted]. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.

Id., 449 U.S. at 242, 101 S.Ct. at 494; *see also Stephens v. Kentucky Utilities Co.*, 569 S.W.2d 155, 158 (Ky. 1978) ("[p]ublic policy dictates that these [rate setting]

actions [before the Commission] not be unnecessarily prolonged."). We conclude similarly that this judicial intervention, unjustified by common law, regulation, statute, or Constitution, interfered with the Commission's statutorily granted plenary authority to engage in rate-making.

And unlike the circuit court, we find CR 24.01 neither "highly persuasive" nor applicable. To the extent the Real Parties urge the rule upon this Court, we answer simply that our highest court rejected that notion long ago when:

> Appellants suggest[ed] that the spirit of CR 24.01 should be applied, whether the civil rules may be thought to pertain to administrative bodies or not. CR 24.01 sets out the bases upon which intervention shall be permitted as a matter of right in court actions. A short answer to the contention is that even if CR 24.01 applied to proceedings before the Commission (which it does not) there is still no showing of intervention as a matter of right.

Inter-County Rural Elec. Co-op. Corp. v. Public Service Commission, 407 S.W.2d 127, 130 (Ky. 1966). That holding applies here.

Each of the parties cites two unpublished opinions of this Court having no precedential value. They select portions of each to support their respective positions. We do the same. *Young v. Pub. Serv. Comm'n of Kentucky*, No. 2009-CA-000292-MR, 2010 WL 4739964, at *2 (Ky. App. Nov. 24, 2010) ("Having determined that the appeals were interlocutory, the court then properly found it had no jurisdiction over them"); *EnviroPower, LLC v. Pub. Serv. Comm'n of Kentucky*, No. 2005-CA-001792-MR, 2007 WL 289328, at *3 (Ky. App. Feb. 2,

2007) ("Under this regulation, the [Commission] retains the power in its discretion to grant or deny a motion for intervention").

The circuit court further determined it had jurisdiction under the Declaratory Judgment Act, KRS Chapter 418. We disagree.

> A declaratory judgment proceeding will not be entertained for the determination of the procedural rules, or the declaration of the substantive rights involved in a pending suit. Such decisions and declarations must be made in the first instance by the court whose power is invoked and which is competent to decide them. *This principle has been applied, and the action dismissed on jurisdictional grounds, where the question was within the jurisdiction of an administrative agency*.

Pritchett v. Marshall, 375 S.W.2d 253, 257 (Ky. 1963) (emphasis added) (citation and internal quotation marks omitted).

In summary, the circuit court entered orders without subject matter jurisdiction. An order or judgment entered by a court without subject matter jurisdiction is void *ab initio*. *See Covington Trust Co. of Covington v. Owens*, 278 Ky. 695, 129 S.W.2d 186, 190 (Ky. 1939); *Wagner v. Peoples Bldg. & Loan Ass'n*, 292 Ky. 691, 167 S.W.2d 825, 826 (Ky. 1943); *Commonwealth Health Corp. v. Croslin*, 920 S.W.2d 46, 48 (Ky. 1996); 20 Am.Jur.2d Courts § 65 at 380. A void judgment is not entitled to any respect or deference by the courts. *Mathews v. Mathews*, 731 S.W.2d 832, 833 (Ky. App. 1987). It is "a legal nullity, and a court has no discretion in determining whether it should be set aside." *Foremost Ins. Co.*

v. Whitaker, 892 S.W.2d 607, 610 (Ky. App. 1995). In addition, because subject matter jurisdiction concerns the very nature and origins of a court's power to act at all, it "cannot be born of waiver, consent or estoppel[.]" *Nordike v. Nordike*, 231 S.W.3d 733, 738 (Ky. 2007) (internal quotation marks and citation omitted).

The circuit court has jurisdiction to enter but one order in this case – an order dismissing for lack of subject matter jurisdiction. All other orders entered in this action – past, present, or future – are void *ab initio*. *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 833 (Ky. App. 2008).

V. CONCLUSION

WHEREFORE, the petition for a Writ of Prohibition is GRANTED.

ALL CONCUR.

Entered: March 6, 2019

/s/ Glenn E. Acree
JUDGE, COURT OF APPEALS

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