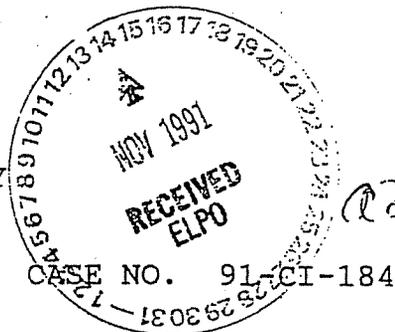


COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT



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SIMPSON CIRCUIT COURT

CITY OF FRANKLIN

PLAINTIFF

VS. MEMORANDUM OPINION AND ORDER DISMISSING
FOR LACK OF SUBJECT MATTER JURISDICTION

SIMPSON COUNTY WATER DISTRICT

DEFENDANT

MEMORANDUM OPINION

This action is before the Court on a motion of the defendant Simpson County Water District (hereinafter "District") for dismissal of this action under CR 12.02(a) for lack of subject matter jurisdiction. The District's motion was filed on September 13, 1991, supported by arguments and authorities. The plaintiff City of Franklin (hereinafter "City") has filed a written response to the motion, in which it has set forth its arguments and authorities.

This motion was heard on October 30, 1991, at which time the Court was presented with approximately one hour of arguments by counsel, Hon. Charles E. English for the District and Hon. Timothy J. Crocker for the City. At the conclusion of the hearing, the motion was taken under advisement in order to enable the Court to further consider the written and oral arguments and the various authorities which have been cited.

The District's motion to dismiss is premised on its assertion that the Kentucky Public Service Commission (hereinafter sometimes "Commission" or "PSC") has exclusive

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jurisdiction over the subject matter of this action. The City's resistance to the motion is premised upon its assertion that because cities are exempted from the definition of "utilities" found in KRS 278.010(3), the Public Service Commission does not have exclusive jurisdiction over the present controversy. Reduced to its essential terms, the issue which the pending motion poses to the Court is: Where a regulated utility, in this case the District, (admittedly subject to the jurisdiction of the PSC under KRS 278.015) contracts with a city, in this case the City of Franklin, (admittedly exempted from the definition of a utility under KRS 278.010(3)) does the Public Service Commission's jurisdiction to regulate the District's rates or service to its subscribers extend to the city? While KRS 278.200 at least arguably addresses the matter, the precise issue pending in this case appears to be one of first impression insofar as the appellate courts of Kentucky are concerned.

Taking the facts as alleged in the complaint as true; as the Court must do in considering a CR 12.02(a) motion, Pike v. George, Ky., 434 SW2d 626 (1968), together with the statements of counsel at the reported hearing on October 30, 1991, the following is a recitation of the facts pertinent to the disposition of the pending motion:

(1) The City and the District have entered into three separate contracts for the sale of treated water to the District by the City. Under the first

contract (made in April, 1967) the District paid 21.5 cents per 1,000 gallons; under the second contract (made in August, 1982) the District paid 54 cents per 1,000 gallons; under the third contract (made April 3, 1986) the District paid 84.78 cents per 1,000 gallons. The date when payment at the 84.78 cents rate took effect is not clear from the record, but that is not essential to the disposition of the pending motion, since it is undisputed that the District is now paying that rate and has continued to pay at that rate through the present time.

(2) At all times germane to this case, the District has been and is subject to regulation by the Public Service Commission. Counsel for the District has represented to the Court that the rates which the District has charged its subscribers while operating under the three separate contracts with the City have been approved by the Commission. The record does not disclose the rates which the District has charged its subscribers, but that fact is not essential to the disposition of the pending motion.

(3) In 1990, the City enacted an ordinance which, inter alia, increased the rate charged to the District from 84.78 cents to \$1.3478 per 1,000 gallons. In 1991, the City again enacted an

ordinance which increased the rate charged to the District to \$1.68 per 1,000 gallons.

(4) The District has refused to pay the increased rates ostensibly imposed by the 1990 and 1991 ordinances. Instead, it has continued to pay at the 84.78 cents rate which the 1986 contract established. Counsel for the District has represented to the Court that unless and until a rate change is approved by the Public Service Commission, if this action is dismissed by the Court for lack of subject matter jurisdiction the District will continue to pay the City at the rate of 84.78 cents per 1,000 gallons.

This suit was commenced by the City, seeking a monetary judgment against the District for delinquent payments in the sum of \$144,502.66 through July 11, 1991, plus interest and penalties and arrearages accruing after that date. The City also seeks an adjudication that "...the agreements...[between the City and the District] are null and void".

As noted above, the pivotal issue before the Court is whether the Public Service Commission has jurisdiction over the claims raised by the City in this suit. If so, then this Court lacks subject matter jurisdiction and this suit should be dismissed, with the City to pursue its remedy in the PSC. If

not, then the District's motion should be overruled, so that the City can pursue its claims in this Court.

Since it is admitted by both parties that there is no clear case law in point to guide the Court, the beginning point for the analysis which follows is the language of the various sections of KRS Chapter 278 which bear on the issue to be decided. First, KRS 278.010(3) so defines "utility" as to exclude "a city" from utilities subject to PSC regulation. Second, KRS 278.015 expressly extends the jurisdiction of the PSC to include water districts created under KRS Chapter 74, under which the Simpson County Water District has its existence. Third, KRS 278.040(2) provides that the jurisdiction of the PSC extends "to all utilities in this state". Since a city is not a utility, if KRS 278.040(2) stopped at the end of its first sentence, its impact would be obvious. However, the following sentence of KRS 278.040(2) must also be noted: "The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions." (emphasis added) Finally, KRS 278.200 seeks to address those instances where a contract has been made between a utility and a city. As the Court reads KRS 278.200, it merely provides that where a city and a utility enter into a contract, the terms of which include provisions for rates and services, then

by so contracting the City gives up its exemption from PSC regulation and renders itself subject to regulation by the PSC.

The Court agrees with the argument of counsel for the District that KRS 278.200, read together with KRS 278.040(2), creates what has been called a "rates and services" exception to a city's exemption from PSC regulation. In so concluding, the Court has very carefully weighed the cogent arguments which the City's counsel has advanced, but is persuaded that the interpretation of KRS 278.200 argued by the City must yield to the argument advanced by the District.

To some degree, the Court's interpretation of the statutes is bolstered by the case law which the parties have cited, although none of the cited cases are sufficiently similar to the case at bench to be taken as controlling precedent. In Board of Education of Jefferson County v. William Dohrman, Inc., Ky. App., 620 SW2d 329 (1981) it was held that even though a contract had been executed between a school board and a private sewage treatment company to govern rates and services, those rates and services were subject to regulation by the Commission under KRS 278.040(2). In Dohrman, supra, the Court of Appeals cites Southern Bell Telephone and Telegraph Co. v. City of Louisville, 265 Ky. 286, 96 SW2d 695 (1936) as holding that "Other subjects [ie, other than rates and services] were excepted from the Commission's exclusive jurisdiction". 620 SW2d at 329. From this Court's reading of Southern Bell Telephone and Telegraph Co. v. City of

Louisville, supra, this appears to be a correct analysis. By converse reasoning, this Court interprets Southern Bell Telephone and Telegraph v. City of Louisville, supra as suggesting that the "rates and services" exception to a city's exemption from PSC regulation as argued by the District is sound.

The decision by the Kentucky Supreme Court in Peoples Gas Company of Kentucky, Inc. v. City of Corbin, Ky., 625 SW2d 848 (1981), is also somewhat persuasive on this issue, although it dealt with the issue of "service" rather than "rates" and did not involve a contract between the City of Corbin and the Gas Company. However, after determining that the location of gas meters constitutes "service" and concluding that the city ordinance purporting to regulate the location of meters conflicted with a PSC regulation, the Supreme Court in Peoples Gas Co., supra, observed that "It is obvious to us that the plain language of KRS 278.040(2) vests jurisdiction over 'service' in the commission". 625 SW2d at 849. Even though KRS 278.040(2) has been amended since the Supreme Court decided Peoples Gas Co. that opinion still lends some strength to the position taken by the District in this case.

The City cites City of Georgetown v. Public Service Commission, Ky., 516 SW2d 842 (1974) and McClellan v. Louisville Water Company, Ky., 351 SW2d 197 (1961) as supportive of its argument that cities are exempted from PSC regulation, contract or no. The Court reads these opinions

much more narrowly than does the City. In McClellan, supra, no regulated utility nor any contract was involved. Instead, a city was merely extending its water services outside its boundaries. On these facts, the former Court of Appeals held that the City's exemption from the regulatory control of the PSC by KRS 278.010(3) extended to its dealing with its customers outside its boundaries. In City of Georgetown v. Public Service Commission, supra, the dispute was between a city and a regulated water district, with no contract between them. The holding of the former Court of Appeals in City of Georgetown turned on its conclusion that the exemption created by KRS 278.010(3) prevailed over the City of Georgetown's lack of status as a "person" under KRS 278.020(1), an issue which is not involved in the present case. While these cases lend comfort to the City's argument, the Court finds little guidance in them.

In its memorandum, and at the hearing, the District has placed considerable reliance upon a decision rendered by Special Judge William S. Cooper in a Daviess Circuit Court case, No. 90-CI-1225, styled "City Utility Commission of the City of Owensboro, Kentucky v. East Daviess County Water Association, Inc., et al". Specifically, counsel for the District has referred to opinions and orders in the Daviess Circuit Court case rendered by Judge Cooper, dated April 2, 1991 and April 26, 1991, respectively. Counsel for the City objected to the District making reference to the Daviess

Circuit Court opinions and orders, claiming that such amounted to a citation or use as authority of an unpublished opinion, contrary to CR 76.28(4)(c). On October 24, 1991, the City filed a motion to strike from the District's motion all references to the Daviess Circuit Court opinions and orders. When this case came on for hearing on October 30, 1991, the motion of the City was heard and considered before the Court heard the District's motion to dismiss. After hearing arguments of counsel, and for reasons which are more fully articulated and may be found in the transcript of the October 30, 1991 hearing, to which reference is hereby made, the Court overruled the City's motion and determined that the Daviess Circuit Court opinions and orders could be considered by the Court as persuasive authority. Subsequent to the hearing, and while this matter has been under advisement, the Court has considered the Daviess Circuit Court opinions and orders. While the Court finds same to be well-reasoned and articulate, they neither strengthen nor weaken this Court's reasoning and conclusions as set forth in the foregoing provisions of this memorandum opinion, and they have not swayed the Court either way in its disposition of the pending motion.

For the reasons expressed herein, the Court concludes that it lacks subject matter jurisdiction over this cause of action, and accordingly, that this action should be dismissed pursuant to CR 12.02(a).

ORDER OF DISMISSAL

WHEREFORE, for the reasons set forth in the above memorandum opinion, IT IS ORDERED that the motion of the defendant for dismissal of this action for lack of subject matter jurisdiction under CR 12.02(a) is SUSTAINED, and this action is hereby DISMISSED with prejudice and stricken from the docket.

ENTERED this November th 12, 1991.

William R. Harris
WILLIAM R. HARRIS, Judge
Simpson Circuit Court

Copies to:
Hon. Timothy J. Crocker
Hon. Charles E. English

* copy attest

Bonnye H. Moody

Clk, Simpson Circuit-District Court

Entered 11-12-91

By Ann T. Flannery D.C.