DAVIESS CIRCUIT COURT

CIVIL ACTION NO. 90-CI-1225

CITY UTILITY COMMISSION OF THE CITY OF OWENSBORO, KENTUCKY — PLAINTIFF

VS.

OPINION AND ORDER DISMISSING

EAST DAVIESS COUNTY WATER ASSOCIATION, INC.; WEST DAVIESS COUNTY WATER DISTRICT; and SOUTHEAST DAVIESS COUNTY WATER DISTRICT — DEFENDANTS

* * * * *

Plaintiff City Utility Commission of the City of Owensboro, Kentucky ("OMU") brings this action to cancel, limit or reform certain contracts by which it is obligated to sell water to the East Daviess County Water Association, Inc. ("East Daviess"), West Daviess County Water District ("West Daviess") and Southeast Daviess County Water District ("Southeast Daviess"). This matter is now under submission on the joint motions of the defendants to dismiss this action for lack of subject matter jurisdiction and/or failure to join indispensable parties. CR 12.02(a) and (g). Since the case must be dismissed on the first issue, there is no need to address the second.

OMU's contract with East Daviess is expressed in an original agreement dated June 17, 1970, as amended by agreements dated April 16, 1980, November 13, 1980 and July 8, 1982. Pursuant to that contract, OMU is to provide East Daviess with water not to exceed twelve million gallons per month until the year 2020, at a rate of 37.202 cents per one thousand gallons, subject to

A TRUE COPY ATTEST:
PAT HARDESTY, CLERK
DAVIESS CIRCUIT COURT
BY: [illegible] D.C.

modification every five years, or sooner based on demonstrable increases or decreases in cost of performance.

OMU's contract with West Daviess is expressed in an original agreement dated November 3, 1966, as amended by an agreement dated February 29, 1968. Pursuant to that contract, OMU is to provide water to West Daviess in an amount sufficient to service all of West Daviess' customers until the year 2006, at a rate established initially at 28.5 cents per one thousand gallons through February 26, 1970, subject to adjustments in accordance with adjustments of rates of other customers of OMU. The rate was to be renegotiated on February 26, 1970, but if a new agreement could not be reached, then the rate would be set at 30 cents per one thousand gallons; and, regardless of any adjustments, not to exceed 33 cents per one thousand gallons prior to January 1, 1976. The present rate is not reflected in this record.

OMU's contract with Southeast Daviess is expressed in an agreement dated February 26, 1965, as supplemented by an agreement dated March 11, 1965. Pursuant to that contract, OMU is to provide water to Southeast Daviess in an amount sufficient to service all of Southeast Daviess' customers until the year 2005, at a maximum rate of 27 cents per one thousand gallons, subject to adjustments after five years. The present rate is not reflected in the record.

Both West Daviess and Southeast Daviess have a contractual right to terminate their respective contracts at their options with two years advance written notice. There are no provisions

giving OMU the option to terminate any of the contracts in advance of their stated expiration dates. OMU claims inter alia that it is unable to meet the quantity requirements of these contracts and still supply adequate water to its own customers within the city limits of Owensboro.

At the outset, it is noted that the issue is not whether this Court should defer to the expertise of the Public Service Commission. Matters of interpretation of contract are within the special expertise of courts, not utilities regulatory agencies. Texas Gas Transmission Corp. v. Shell Oil Co., 363 US 263, 270, 4 L.Ed.2d 1208, 80 S.Ct. 1122 (1960); Monsanto Co. v. United Gas Pipe Line Co., 360 F.Supp. 1054 (D.C. 1973). The issue is whether this Court has jurisdiction over the matters raised in OMU's complaint/petition, or whether the legislature has vested that jurisdiction exclusively within the province of the PSC, the power to do so being inherent in the exercise of the police power of the state. Southern Bell Telephone and Tel. Co. v. City of Louisville, 265 Ky. 286, 96 S.W.2d 695, 698 (1936).

East Daviess, West Daviess and Southeast Daviess are all public utilities subject to regulation by the Public Service Commission. KRS 278.040 (1). As a municipal utility, OMU is exempt from regulation by the Commission, except as to rates and service. KRS 278.010 (3); KRS 278.040 (2). This "rates and service" exception to the exemption cannot be avoided by contract. KRS 278.200. That statute provides:

> 278.200. Power to regulate rates and service standards fixed by agreement with city. - The commission may, under the provisions of this chapter, originate,

> establish, change, promulgate and enforce any rate or service standard of any utility that has been or may be fixed by any contract, franchise or agreement between the utility and any city, and all rights, privileges and obligations arising out of any such contract, franchise or agreement, regulating any such rate or service standard, shall be subject to the jurisdiction and supervision of the commission, but no such rate or service standard shall be changed, nor any contract, franchise or agreement affecting it abrogated or changed, until a hearing has been had before the commission in the manner described in this chapter. [Emphasis added.]

OMU relies on City of Georgetown v. Public Service Commission, Ky, 516 S.W.2d 842 (1974), which states the general proposition that municipal utilities are not subject to regulation by the PSC. Thus, OMU reasons that KRS 278.200 applies only when a nonexempt utility has contracted to provide service to an exempt utility. However, it is unnecessary to give City of Georgetown such a broad interpretation. The case dealt with whether a municipal utility waives its exemption when it provides service outside its municipal boundaries. It did not address the statutory "rates and service" exception to the exemption. The defendants rely on Board of Education of Jefferson County v. William Dohrman, Inc., Ky. App., 620 S.W.2d 328 (1981). But that case only upheld the PSC's right to regulate rates, despite a contractual provision to the contrary. OMU is not claiming here that the PSC's jurisdiction is preempted by a contractual provision. The claim is that the PSC's jurisdiction is preempted because OMU is an exempt utility.

The complaint/petition does not request a rate modification, per se; and the defendants' assertion that a modification or

abrogation of these contracts necessarily would result in a rate modification is speculation at this point. What OMU seeks is a reduction or cancellation of its obligation to furnish water to the defendants. Without question, this is a request for modification of service. "The service regulation of which the Commission was given jurisdiction clearly refers to the quantity and quality of the commodity furnished as contracted for with the facilities provided." Peoples Gas Co. of Kentucky v. City of Barbourville, 291 Ky. 805, 165 S.W.2d 567, 571 (1942). Once established by contract, such service can only be abrogated or changed after a hearing before the PSC. KRS 278.200; Fern Lake Co. v. Public Service Commission, Ky, 357 S.W.2d 701 (1962); Southern Bell Telephone & Tel. Co. v. City of Louisville, supra.

WHEREFORE, this matter is hereby DISMISSED for lack of subject matter jurisdiction.

This 2 day of April, 1991.

SPECIAL JUDGE,
DAVIESS CIRCUIT COURT

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