

CIVIL ACTION NO. 91-CI-184



SIMPSON CIRCUIT COURT

CITY OF FRANKLIN

FILED IN OFFICE  
 SEP 13 8 37 AM '91  
 CLERK  
 SIMPSON COUNTY  
 CIRCUIT COURT  
 BONNYVILLE, MO

MOTION TO DISMISS FOR LACK OF SUBJECT  
 MATTER JURISDICTION AND  
 NOTICE OF HEARING

VS.

SIMPSON COUNTY WATER DISTRICT

DEFENDANT

Pursuant to CR 12.02, the defendant, Simpson County Water District (the "District"), moves that the complaint be dismissed because this Court lacks jurisdiction over the subject matter thereof, i.e., "rates and service of utilities" as that jurisdiction has been granted exclusively to the Public Service Commission (PSC) by KRS 278.040(2) and 278.200.

I. FACTS FOR PURPOSE OF MOTION

Assuming, for the purposes of this motion only, that all the allegations in the complaint are correct, then the alleged material facts would be as follows:

The plaintiff, City of Franklin, ("City") has established, maintained and operated a water works, pursuant to KRS 96.350 et seq., for the purpose of supplying water to its residents, to the District and to nonresidents not supplied by the District. The District is a public water district created, operated and regulated pursuant to KRS 74.010 et seq., and expressly subject to the jurisdiction of the PSC under KRS 278.015.

On 5 April 1967, the City and the District executed their original "Water Purchase Agreement" (Exhibit A to the complaint) whereby the District agreed to purchase water from the City under

the terms thereof. On 26 August 1982, the City and the District entered into their first "Supplemental Agreement" (Exhibit B to the complaint) for the continued purchase of water by the District upon certain agreed modified terms. On 3 April 1986, the City and the District entered into their "Second Supplemental Agreement" (Exhibit C to the complaint) under which the District's quantity allowance and per unit price of water were increased by agreement.

The parties' Second Supplemental Agreement provided, in relevant part, as follows:

(a) The Rate of 84.78 cents per one 1,000 gallons shall remain in force and effect and not be subject to change for a period of five (5) years from the date it becomes effective with the exception that should it be necessary for the City to increase its rates to each of its customers solely because of debt service obligations on long-term financing for construction of raw water supply improvements to the City's water treatment plant, then the Rate shall be increased in the same manner as is set forth in subparagraph (b) below.

(b) If after the expiration of the five (5) year period in which the Rate shall not be subject to change the City increases its rates to each of its customers, the Rate which applies to this contract shall be automatically increased the same percentage as that percentage increase charged such customer of the City, whose rate is increased the smallest percentage.

Subsequent to the Second Supplemental Agreement, the City incurred new debt service obligations. For the announced purpose of paying these new obligations, on 1 July 1990, the City adopted an ordinance (Exhibit D to the complaint) which increased its water rates to all customers and specifically increased the District's rate to \$1.3478 per 1,000 gallons. On 13 May 1991, the City passed a second ordinance (Exhibit E to the complaint), which again increased only the rate charged the District from \$1.3478 to \$1.68

per 1,000 gallons. The District did not consent or approve the adoption of either of these ordinances and the District has continued to pay only the rate of 84.78¢ per 1,000 gallons agreed to under the parties' Second Supplemental Agreement on 3 April 1986, and has never paid either of the two rate increases purportedly established by the City's unilateral adoption of its two subject ordinances.

The City's complaint demands both:

(a) a judgment against the District for the aggregate difference between the billings for water purchased by it since 1 July 1990 under the agreed 84.78¢ rate and the \$1.3478 and \$1.68 rates unilaterally imposed by the City ordinances; and,

(b) an adjudication that all three subject agreements between the parties are void, thereby terminating the City's obligation to provide any water to the District at any price.

## II. AUTHORITIES AND ARGUMENT

The City's complaint seeks both to enforce a "change" unilaterally made by the City's ordinances in the "rate" and to "abrogate" all the "service" previously "fixed by" the three subject contracts "between the utility (the District) and..." the City. Therefore, jurisdiction over these demands is vested exclusively in the PSC under the following statutory provisions which the Kentucky General Assembly adopted under its police power. As stated in Southern Bell Telephone and Tel. Co. v. City of Louisville, 265 Ky. 286, 96 S.W. 2d 695, 697 & 698 (1936) (copy attached):

The authority to regulate rates of public utilities is primarily a legislative function of the state, and the right is essentially a policy power.

The act of 1934 which created the Public Service Commission divested the city of the power to regulate rates and reposed that power in the commission.

The District is a "utility" subject to regulation by the PSC [KRS 278.010(3)(d) and 278.040(1)]. Since the statutory definition of "utility" [KRS 278.010(3)] expressly excludes a "city," the City is not subject to regulation by the PSC except in regard to "the regulation of rates and service of utilities" since KRS 278.040(2) expressly provides as follows:

(2) The jurisdiction of the commission shall extend to all utilities in this state. 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 power of cities or political subdivisions. (Emphasis added).

The foregoing "rates and service" "exception" to the exemption of cities from the regulatory jurisdiction of the PSC cannot be avoided by contract because of the following provisions in KRS 278.200:

278.200 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.)

The District's foregoing position was recently sustained in the attached "Opinion and Order Dismissing" entered by the Daviess Circuit Court in Civil Action No. 90-CI-1225 on 8 April 1991 (copy attached), and in its attached "Opinion and Order" overruling the City of Owensboro's post-judgment motion to alter or amend. The reasoning and conclusions in these opinions by the Daviess Circuit Court, written by Special Judge William S. Cooper, are very applicable to this case. The only distinguishing fact between the Daviess Circuit Court case and the facts involved here was that the City of Owensboro sought no relief pertaining to rates established by its contracts with Daviess utilities, but sought only to modify or terminate the same service it had agreed to provide the utilities, i.e., the supplying of water.

As recognized in the Daviess Circuit Court opinions, the holding in Board of Education of Jefferson County v. William Dohrman, Inc., Ky. App., 620 S.W.2d 328, 329 (1981) (copy attached), followed the holding in Southern Bell Telephone & Tel. Co. v. City of Louisville, supra, and held that the exclusive jurisdiction of the PSC over rates and services applied even to a contract between a utility and a political subdivision of the Commonwealth (i.e., a board of education) even though subjects of the contract other than rates and services were exempted from the PSC's exclusive jurisdiction:

Strictly speaking, the Commission had the right and duty to regulate rates and services, no matter what a contract provided. Other subjects of a political subdivision's sewer service or utility contract were excepted from the Commission's exclusive jurisdiction. (Supra at 329).

Even if the City of Franklin is exempt from regulation by the PSC, the exclusive jurisdiction over all utility rates and services granted to the PSC by KRS 278.200 is applicable to the City in this case because the City waived any such exemption from jurisdiction when it contracted with the District which is a regulated utility. This conclusion was explained by the Daviess Circuit Court in paragraph 2 on page 2 of its attached "Opinion and Order" of 30 April 1991, as follows:

In summary, the statutes and case law provide that a city utility providing utility service to individual customers within or without its municipal boundaries is exempt from PSC regulation. McClellan v. Louisville Water Co., supra. However, that exemption is waived as to rates and service when the city contracts with a regulated utility to provide or receive utility service. The PSC's ultimate purpose is to protect utilities customers residing within its jurisdictional boundaries. It does so by regulating, e.g., water districts which provide services to those residents. If the water district contracts with an otherwise exempt utility to provide the service, then the provider utility thereby waives the exemption. Otherwise, the PSC could not provide protection for those whom it was created to protect.

Even though not referred to in the Daviess Circuit Court opinions, the Kentucky Supreme Court's holding in Peoples Gas Company of Kentucky, Inc. v. City of Corbin, Ky., 625 S.W.2d 848 at 849 (1981), (copy attached) is applicable since it invalidated ordinances of a city, which had contracted with a regulated utility, which prohibited the placing of utility meters in compliance with a PSC regulation because,

It is obvious to us that the plain language of KRS 278.040(2) vests jurisdiction over 'service' in the Commission.

For the foregoing reasons, the defendant, Simpson County Water District, respectfully submits that this Court should enter an order dismissing the complaint by reason of its lack of jurisdiction over the subject matter thereof. The District has attached a proposed order to this effect.

NOTICE OF HEARING

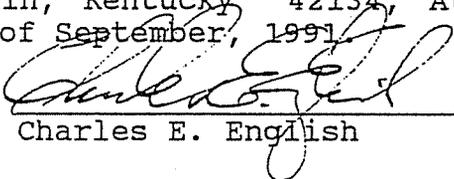
Notice is hereby given that the defendant shall bring its foregoing motion on for hearing at 2:30 p.m. on October 30, 1991.

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Attorneys for Defendant

By: 

Charles E. English  
Wayne C. Priest, Jr.

This is to certify a true copy of the foregoing motion and notice was mailed to Mr. Timothy J. Crocker, Crocker & Wilkey, 126 West Kentucky Avenue, Franklin, Kentucky 42134, Attorneys for Plaintiff, on this 12 day of September, 1991.

  
Charles E. English

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