

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

SOUTH SHORE WATER WORKS CO.,

COMPLAINANT

v.

CASE NO. 2009-00247

CITY OF GREENUP, KENTUCKY,

DEFENDANT.

AMENDED COMPLAINT

South Shore Water Works Co., by and through counsel, states and alleges as follows for its Amended Complaint against the City of Greenup, Kentucky:

PARTIES AND JURISDICTION

1. South Shore Water Works Co. ("South Shore"), P.O. Box 485, South Shore, Kentucky 41175, is a public water utility operating pursuant to Chapter 278 of the Kentucky Revised Statutes.

2. The City of Greenup, Kentucky ("Greenup"), 1005 Walnut Street, Greenup, Kentucky 41144, is a municipality located in the Commonwealth of Kentucky that operates a municipal water utility.

3. The Kentucky Public Service Commission has jurisdiction over this matter pursuant to KRS 278.260(1), which provides as follows:

The commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed,

with or without notice, to make such investigation as it deems necessary or convenient. The commission may also make such an investigation on its own motion. No order affecting the rates or service complained of shall be entered by the commission without a formal public hearing.

4. This matter involves the excessive rates charged and inadequate service provided from Greenup to South Shore.

RELEVANT FACTUAL BACKGROUND

5. On April 7, 1998, South Shore's President, Mr. George Hannah, appeared before the Greenup City Council to present a Wholesale Water Supply Application, under the terms of which Greenup would provide South Shore with an emergency water supply at a wholesale rate. The Greenup City Clerk read the entire Wholesale Water Supply Application into the minutes, and it was accepted and approved by majority vote of the Greenup City Council.

6. South Shore and Greenup undertook actions as a result of the Greenup City Council's acceptance and approval of the Wholesale Water Supply Application. South Shore invested approximately \$90,450 to construct a reservoir to handle the water supply it would receive from Greenup. Greenup amended certain Community Development Block Grant proposals and used the additional federal and state funds it received—approximately \$250,000—to expand its system to connect with South Shore's system so that it could provide wholesale water service. South Shore was the third party beneficiary of these grant funds provided to Greenup.

7. In November of 2001, disputes developed between Greenup and South Shore concerning the minimum water usage that should be required of South Shore and the billing rate that would be imposed by Greenup. South Shore advised Greenup that the disputes should be resolved by the Kentucky Public Service Commission ("Commission"), but Greenup took the

position that it was not subject to the Commission's jurisdiction because it has not entered into a contract with South Shore.

8. On December 4, 2001, South Shore filed a Complaint against Greenup with the Commission, asking the Commission to assume and exercise jurisdiction over Greenup for the purpose of enforcing the Wholesale Water Supply Application accepted and approved by the Greenup City Council. The action was styled *South Shore Water Works Co. v. City of Greenup, Kentucky*, Case Number 2002-00003.

9. On July 24, 2002, the Commission agreed with South Shore and entered an Order finding that a contract existed between South Shore and Greenup and that the material terms were set forth in the Wholesale Water Supply Application. On August 21, 2002, the Commission entered an Order requiring Greenup to file a rate schedule for its wholesale water service to South Shore.

10. On August 28, 2002, Greenup filed its rate schedule with the Commission with a minimum monthly bill of \$9.95 for South Shore.

11. Greenup began providing wholesale water service to South Shore in September of 2002 at a minimum monthly bill of \$19.95. This figure included the \$9.95 charge filed with the Commission, plus a \$10 service charge that Greenup charged every month without providing any notice to the Commission.

12. From September of 2002 through July of 2007, Greenup sent monthly bills to South Shore and South Shore paid by check. The minimum monthly bill for this entire period was \$19.95. During this period, Greenup appealed the Commission's determination that a contract existed whereby it was required to provide wholesale water service to South Shore. Greenup ultimately prevailed on its appeal when the Court of Appeals issued an Opinion finding

that no contract existed between the parties. The Court of Appeals issued its Opinion in July of 2005. The issuance of the Opinion had no impact on the ongoing transactions between Greenup and South Shore. Following issuance of the Opinion, Greenup continued to send minimum monthly bills of \$19.95 to South Shore, and South Shore continued to pay. Additionally, Greenup has provided water to South Shore on numerous occasions subsequent to the issuance of the Opinion.

13. In August of 2007, Greenup increased its minimum monthly bill to \$28.50. This figure included \$18.50 for wholesale water service and the \$10 service charge. Greenup did not provide the Commission with notice of this increase or otherwise alter the rates it had on file with the Commission as of August 28, 2002. This rate remained in effect from August of 2007 through July of 2008. South Shore continued to pay on a monthly basis throughout this period at the rate billed by Greenup.

14. In September of 2008, Greenup increased its minimum monthly bill to \$491.07. This figure included \$453.84 for wholesale water service, \$27.23 for taxes, and the \$10 service charge. Greenup did not provide the Commission with notice of this increase or otherwise alter the rates it had on file with the Commission as of August 28, 2002. This rate remains in effect as of the date of the filing of this Amended Complaint. South Shore continues to pay on a monthly basis at the rate billed by Greenup.¹

15. Throughout the period in which South Shore has purchased wholesale water service from Greenup, South Shore has received service that is unjust, unreasonable, inadequate and insufficient. South Shore is precluded from obtaining water from Greenup without first calling and requesting service. Even upon proper request from South Shore, there have been

¹ Copies of bills South Shore has received from Greenup showing minimum monthly bills of \$19.95, \$28.50 and \$491.07 are attached as Exhibit 1 to the original Complaint filed in this action.

numerous instances in which Greenup has refused to provide service. When Greenup does provide water service to South Shore, it does so subject to unreasonably low usage limitations. Additionally, the service to South Shore is often cut off by Greenup without any advance notice to South Shore.

16. On June 27, 2009, the unjust, unreasonable, inadequate and insufficient service provided by Greenup led to an emergency for South Shore and the customers who depend upon South Shore for water service. In the early morning hours, the South Shore service area lost electricity and South Shore was unable to operate its pumps. South Shore used the water in its tanks to continue to provide service to its customers, but was unable to replenish its reserves with the pumps being out of operation. Without any indication of how long it would be without electricity, South Shore, acting through Mr. Hannah and legal counsel, made numerous requests for emergency water service to Greenup. Despite South Shore's timely payment for wholesale water service in the past, the numerous requests from South Shore, and the repeated explanations of the critical nature of the emergency, Greenup refused to provide service to South Shore to address the situation.

17. Upon information and belief, Greenup's refusal to provide emergency water service to South Shore was predicated on the absence of a written agreement between the parties. Acting on behalf of South Shore, Mr. Hannah advised both Greenup's mayor, Ms. Donna Hewlett, and Greenup's legal counsel, Mr. R. Stephen McGinnis, that South Shore would agree to whatever terms Greenup required in order to obtain the emergency water service.

18. Greenup's refusal to provide South Shore with wholesale water service during this time of emergency jeopardized the health and safety of all of South Shore's customers. By approximately 10:00 a.m., South Shore, working with the Morehead Office of the Kentucky

Division of Water, was compelled to issue a Conserve and Boil Water Advisory to all of its customers. By the time South Shore regained its electricity at or around 2:45 p.m., water pressure had fallen below the State-standard of 30 PSI for approximately 30 customers, and another 50 customers in higher elevations were without water service.

19. Through their rates, South Shore's customers ultimately bear the burden for paying for the wholesale water service Greenup provides to South Shore. These customers should not be deprived of this service in times of emergency. Indeed, the very purpose of South Shore obtaining wholesale water service from Greenup is to prevent emergencies such as this from impacting its customers.

20. Greenup's failure to provide South Shore with service in the event of an emergency does not represent an isolated incident, but is part of a pattern that has developed over the past several years of South Shore paying for service that it does not receive. For example: (1) On February 12, 2007, Greenup refused to provide South Shore with water service when the wash-out of a creek crossing caused South Shore to lose most of its storage; (2) Between July 20, 2008 and July 24, 2008, South Shore experienced problems with the amount of water provided by Greenup after a downed power line left South Shore without electricity; and (3) On January 18, 2009, Greenup refused to provide water service when frozen and broken customer lines and two broken water well pumps left South Shore in need of emergency service.

21. Following the filing of the Complaint that initiated this action, South Shore and Greenup began negotiating the terms of a formal agreement in an effort to normalize their relations. These negotiations continued for several months with significant progress made toward an agreement. At the City Council meeting held on January 13, 2010, Greenup decided that it will not enter into any written agreement with South Shore. This decision was

communicated to counsel for South Shore the following day.

22. Notwithstanding its refusal to enter into a contract with South Shore, Greenup has provided South Shore with emergency water service, beginning on or about January 15, 2010 and continuing through the date of filing of this Amended Complaint.

COUNT I – COMMISSION JURISDICTION OVER RATES AND SERVICES

23. South Shore affirms and reiterates the allegations set forth in Paragraphs 1-20.

24. KRS 278.200 empowers the Commission to regulate rates and services provided by municipalities to regulated utilities:

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 the 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 prescribed in this chapter.

25. In *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994), the Kentucky Supreme Court affirmed that KRS 278.200 bestows in the Commission the exclusive jurisdiction over the regulation of utility rates and services when a municipality agrees to provide water to a regulated utility. In that decision, the Court recognized that a municipality cannot escape the Commission's regulatory authority by hiding behind its purported immunity:

The statutory exception applicable to rates and service as provided will prohibit cities from exercising control over rates charged and the service provided to customers of local utilities. Jurisdiction to regulate such rates and service has been exclusively vested in the PSC. The record in this case discloses a doubling of the wholesale water rates charged to the District within a two-year period, with a direct impact upon the District's

utility rates and service. Added to the force which the City sought to apply was a call to terminate service by declaring the parties' contract null and void. It is apparent that the City, through its enhanced water sale ordinances, did not direct the setting of any particular rate schedule, but its action profoundly and directly impacts the District's general revenue level, which is one of the first steps in rate making. The City's action is an improper engagement in rate making and strongly supports PSC jurisdiction. The statutory definition of utility is not to serve as an impenetrable shield to afford the City immunity.

Id. at 464.

26. The rule that emerges from the Court's decision in *Simpson County Water District v. City of Franklin* is that a "contract" exists sufficient to bestow jurisdiction upon the Commission whenever a municipality engages in regular sales to a regulated utility. Stated otherwise, when a sale occurs a contract will always exist. Greenup has elected to provide South Shore with wholesale water service and to accept monthly payments from South Shore for that service. Greenup cannot now avoid the Commission's jurisdiction simply by refusing to sign a contract with South Shore.

27. Moreover, there is no basis for the Commission to decline to assert jurisdiction over Greenup in this instance as it is clear that Greenup is acting in a proprietary capacity and not a governmental capacity. As recognized by the Attorney General, it is a general rule when a municipality undertakes to furnish water service to consumers other than itself, it acts in its proprietary capacity, and not its governmental capacity. OAG 97-14 (May 9, 1997) (Citing 64 Am. Jur. 2d, Public Utilities § 111).

28. As set forth above, South Shore has purchased wholesale water service from Greenup every month dating back from the filing of this Complaint to September of 2002. These sales, especially those that have occurred after the Kentucky Court of Appeals ruled that the Wholesale Water Supply Application was not a contract, establish the existence of an

agreement between Greenup and South Shore sufficient to provide the Commission with authority to regulate the rates charged, and the services provided, by Greenup.

29. Accordingly, the Commission should determine that it has jurisdiction to regulate the rates and services at issue in this Amended Complaint, and should establish rates and service requirements that are just, reasonable, adequate and sufficient to protect the customers of South Shore in the event of subsequent emergencies.

COUNT II – VIOLATION OF KRS 278.160

30. South Shore affirms and reiterates the allegations set forth in Paragraphs 1-27.

31. KRS 278.160 requires utilities to file their rates with the Commission and to charge their customers in accordance with those filed rates:

(1) Under rules prescribed by the commission, each utility shall file with the commission, within such time and in such form as the commission designates, schedules showing all rates and conditions for service established by it and collected or enforced. The utility shall keep copies of its schedules open to public inspection under such rules as the commission prescribes.

(2) No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

32. As a result of its sales to South Shore, Greenup is a “utility” for purposes of KRS 278.160 and is required to comply with the terms of the statute.

33. As set forth above, on August 28, 2002, Greenup filed a rate schedule with the Commission showing that it would charge South Shore a minimum monthly bill of \$9.95.

34. As set forth above, the minimum monthly bills Greenup has charged South Shore have exceeded \$9.95 from September of 2002 through the date of the filing of this Amended Complaint.

35. As a result of Greenup charging South Shore a rate in excess of the rate set forth in the schedules filed with the Commission, the Commission should find that Greenup has violated KRS 278.160 and should order Greenup to refund to South Shore all amounts paid by South Shore in excess of the rate filed with the Commission. This amount will be established by South Shore at the hearing on this matter.

COUNT III – VIOLATION OF KRS 278.180

36. South Shore affirms and reiterates the allegations set forth in Paragraphs 1-33.

37. KRS 278.180 sets forth the manner in which a utility is authorized to change its rates, and provides in pertinent part as follows:

(1) Except as provided in subsection (2) of this section, no change shall be made by any utility in any rate except upon thirty (30) days' notice to the commission, stating plainly the changes proposed to be made and the time when the changed rates will go into effect. However, the commission may, in its discretion, based upon a showing of good cause in any case, shorten the notice period from thirty (30) days to a period of not less than twenty (20) days. The commission may order a rate change only after giving an identical notice to the utility. The commission may order the utility to give notice of its proposed rate increase to that utility's customers in the manner set forth in its regulations.

38. As a result of its sales to South Shore, Greenup is a "utility" for purposes of KRS 278.180 and is required to comply with the terms of the statute.

39. As set forth above, on August 28, 2002, Greenup filed a rate schedule with the Commission showing that it would charge South Shore a minimum monthly bill of \$9.95.

40. As set forth above, the minimum monthly bills Greenup has charged South Shore have changed on multiple occasions between September of 2002 through the date of the filing of this Amended Complaint.

41. In changing its rates from the rates filed with the Commission on August 28,

2002, Greenup has failed to comply with the requirements set forth in KRS 278.180.

Accordingly, the Commission should find that Greenup has violated KRS 278.180 and should order Greenup to refund to South Shore all amounts paid by South Shore in excess of the rate filed with the Commission. This amount will be established by South Shore at the hearing on this matter.

COUNT IV – VIOLATION OF KRS 278.030 AND KRS 278.280

42. South Shore affirms and reiterates the allegations set forth in Paragraphs 1-39.

43. KRS 278.030(2) provides that “[e]very utility shall furnish adequate, efficient and reasonable service, and may establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service.”

44. KRS 278.280(1) provides:

Whenever the commission, upon its own motion or upon complaint as provided in KRS 278.260, and after a hearing had upon reasonable notice, finds that the rules, regulations, practices, equipment, appliances, facilities or service of any utility subject to its jurisdiction, or the method of manufacture, distribution, transmission, storage or supply employed by such utility, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed, and shall fix the same by its order, rule or regulation.

45. As a result of its sales to South Shore, Greenup is a “utility” for purposes of KRS 278.030 and KRS 278.280 and is required to comply with the terms of the statutes.

46. By failing to provide South Shore with wholesale water service upon request in several emergency situations, including the situation of June 26, 2009 described in detail above, Greenup has failed to provide adequate, efficient and reasonable service to South Shore as those terms are used in KRS 278.030, and has provided unjust, unreasonable, inadequate and

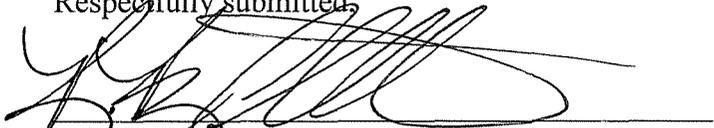
insufficient service as those terms are used in KRS 278.280.

47. Accordingly, the Commission should find that Greenup has violated KRS 278.030 and KRS 278.280 and should order that Greenup be fined in an amount determined to be reasonable by the Commission for jeopardizing the health and safety of South Shore's customers.

WHEREFORE, South Shore requests the following relief from the Commission:

- (1) An Order finding that the Commission has jurisdiction to regulate the rates charged and services provided by Greenup to South Shore;
- (2) An Order finding that Greenup has violated KRS 278.160, KRS 278.180, KRS 278.030 and KRS 278.280 for the reasons set forth above;
- (3) An Order requiring Greenup to refund to South Shore all amounts paid by South Shore to Greenup, from September of 2002 through the date of the filing of this Amended Complaint, in excess of the rate Greenup filed with the Commission on August 28, 2002;
- (4) An Order imposing a fine on Greenup for its violations of KRS 278.030 and KRS 278.280 because the violations jeopardized the health and safety of South Shore's customers;
and
- (5) An Order finding that Greenup has the duty to continue to provide South Shore with wholesale water service going forward and to comply in all respects with KRS Chapter 278 in providing that service.

Respectfully submitted,

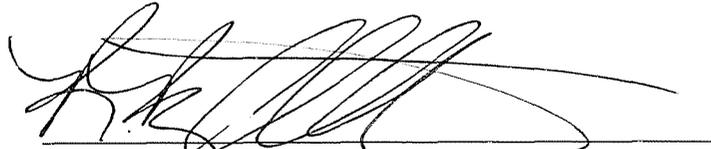


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by first class mail, postage prepaid, upon the following parties of record, this 5th day of February, 2010.

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