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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION  
CASE NO. 2009-00247

MAY 12 2010

PUBLIC SERVICE  
COMMISSION

SOUTH SHORE WATERWORKS CO.

COMPLAINANT

VS.

CITY OF GREENUP, KENTUCKY

DEFENDANT

**MEMORANDUM OF LAW**

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Comes now the City of Greenup, Kentucky (“the City”), by and through counsel, and files herewith its Memorandum of Law addressing the questions set forth by the Public Service Commission (“PSC”) in an Order dated April 5, 2010.

The facts of this case are not significantly in dispute. Previous to the current complaint, South Shore Waterworks (“South Shore”) filed a complaint against the City alleging that a contract existed between the entities, which gave the PSC jurisdiction. Those facts resulted, ultimately, in an opinion by the Court of Appeals, *City of Greenup vs. Public Service Commission, et al*, 182 SW3d 535.

The *Greenup* opinion completely ended the litigation, in favor of the City, against South Shore and the PSC. The opinion stands out for two reasons.

First, the Court of Appeals determined that the PSC does have a right to determine its own jurisdiction. Secondly, the Court of Appeals firmly stated that a city cannot have a contract unless it is signed by the Mayor.

Reading *Greenup* with other cases such as *Simpson County Water District vs. City of Franklin*, 872 SW2d 460, and KRS 278.010(3)(D) and KRS 278.200, the inescapable conclusion is that the PSC does not have jurisdiction over the subject matter in the amended complaint.

KRS 278.040(2) provides the PSC with jurisdiction over all utilities in the state. However, KRS 270.010(3)(D) exempts from the definition of a utility a City, which distributes or furnishes water to the public for compensation. (*City of Greenup vs. Public Service Commission*, 182 SW3d 535, 538)

That exemption does, however, provide an exception. Specifically, KRS 278.200 states, “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 ...” (KRS 278.200)

That exemption led to a familiar case to the PSC, *Simpson County Water District vs. City of Franklin*. In *Simpson County Water District*, the Kentucky Supreme Court found that once a city contracts with a regulated utility the PSC enjoys jurisdiction over that agreement. There is no doubt of this matter. However, just as certainly, *Greenup* stands for the proposition that until, and unless, a contract is entered into, the PSC has no jurisdiction over cities.

There is no doubt that the City and South Shore have no written contract. The complaint itself, filed by South Shore, does not allege one. Any contract with the City must be in writing. To be specific, “Further, we construe this statute as requiring a contract entered into by a municipality to be in written format so it may be executed by the signature of the Mayor.” (*Greenup*, at 540) There are no exceptions or exemptions to this requirement.

The *Greenup* Court went on to explain, “The statutory provisions concerning the formation of a contract by a municipality must be strictly adhered to.” (*Greenup*, at 540) Quoting from *City of Princeton vs. Princeton Electric, Light and Power*, 179 SW2d 1074, 1079 (Ky. 1915):

“The laws provide how municipalities may bind themselves, and the contracts to be obligatory must be made in the manner the laws prescribe. A different rule prevails in regard to municipalities to that which governs private persons and

private corporations. The persons who contract with municipal corporations must, at their peril, know the rights and powers of the officers of such municipalities to make contracts and the manner in which they must make them. Any other rule would destroy all the restrictions which are thrown around the people of municipalities for their protection by the statute laws and the Constitution, and would render abortive all such provisions. The rule in certain instances may be harsh, but no other is practical.” (*City of Princeton* at 1079)

Once again, the statutorily mandated procedure for formation of a contract with a City has not been observed by South Shore. Such a fact may appear harsh to this body. It may appear to adversely affect water customers. Nonetheless, the law is the law and, until the legislature deems to change it otherwise, it must be followed by courts, corporations and the PSC.

Thus, the clear answer to question number one is the PSC does not have jurisdiction over either the subject matter or personal jurisdiction over the City of Greenup, Kentucky until and unless a contract is made.

The second question asked by this Commission is whether or not a contract exists between the City and South Shore based on the City regularly billing and selling water to South Shore and South Shore paying same. The answer is in the negative.

The answer to the question is found in the last part of the *Greenup* opinion. To quote Judge Miller:

“The PSC’s conclusion that a contract had been formed appears to have been based, at least to some extent, upon the conduct of the parties, which we construe as invoking the principles of contract by implication. However, it is well established that a municipality may not enter into a contract by implication.” (*Louisville Extension Water District v. Sloss*, 236 SW2d, 265 (1951))

As has been said before, municipalities operate by different rules when it comes to contracts. Contracts by implication can never be formed with municipalities. This led to harsh results in 1915, with the *City of Princeton* case. A survey of the case law will show other harsh results. Sometimes, in fact, the results are such as would never happen between private parties.

However, this body should remember that the rules for municipalities are different for a reason. They are designed not to protect the office holders but rather to protect the citizens. If contract by implication, or other means other than written, could be entered into, then cities, and more importantly the citizens, could easily be taken advantage of simply by a course of conduct. Such is not allowed or permitted. Such contracts have never been permitted and never will be absent some serious change in the statutes by the legislature.

Under the current state of law, until and unless the Mayor actually signed the contract with South Shore, there is no contract or agreement and, thus, this body does not have jurisdiction. Though not asked to opine on this particular question, the “fix” for this problem is one of legislative action and not that of the PSC or the courts.

The PSC is a body of legislative creation. Its jurisdiction is set forth by the legislature. It does not include cities unless a contract exists. A contract can only exist with a city if it is done in writing and executed by the Mayor.

However, the legislature could easily, if it chose, change the language of KRS 278.200 to say that any city who sells water to a regulated utility comes under the jurisdiction of the PSC. For whatever reason, the legislature has chosen not to so act. If and when the legislature changes the language of KRS 278.200 to permit jurisdiction where even a sale of a commodity (be it water, gas, etc.), then this body would have jurisdiction over the City of Greenup and South Shore, assuming the City is still selling water to South Shore at that point.

The final question asked by the PSC is whether or not *Greenup* precludes a contract between a city and a utility even when the city issues bills to the utility and accepts payment of same when a written contract has not been signed by the Mayor. The answer is in the affirmative.

The language of *Greenup* could not be more clear and is not subject to interpretation. The only way a municipality contracts is in writing signed by the Mayor. There are no other alternatives. There is no contract by implication. As set forth above, this protects the citizens of the municipality.

Essentially, the rule prohibiting contracts with cities absent written agreements signed by Mayors places the burden on the private party seeking to contract as opposed to the citizenry of the municipality. If South Shore wants to have a contract with the City of Greenup, thus invoking the jurisdiction of the PSC, then it is going to have to have the Mayor sign one.

### CONCLUSION

In order for the PSC to have jurisdiction over a municipality, that municipality must enter into a contract with a regulated utility. In order to have any contract, including with a regulated utility, the contract must be in writing and signed by the Mayor. Thus, the PSC has jurisdiction over disputes only involving municipalities which have entered into a written agreement signed by the Mayor with regulated utilities.

In the situation before the PSC, Greenup and South Shore have no written agreement at all. Contract by implication against cities are not permitted.

Thus, and with all due respect, the PSC does not have jurisdiction to decide this dispute.

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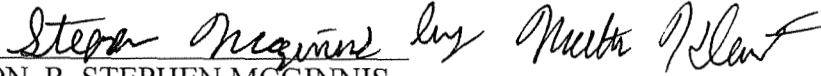
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This 12 day of May 2010.

  
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