

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

SOUTH SHORE WATER WORKS
COMPANY,

COMPLAINANT

v.

CITY OF GREENUP, KENTUCKY,

DEFENDANT

CASE NO. 2009-00247

**SOUTH SHORE WATER WORKS COMPANY'S BRIEF IN SUPPORT OF THE
PUBLIC SERVICE COMMISSION'S SUBJECT MATTER JURISDICTION**

The Public Service Commission ("Commission" or "PSC") has ordered the parties, South Shore Water Works Company ("South Shore") and the City of Greenup, Kentucky ("Greenup" or "City") to brief the issue of whether the Commission has jurisdiction over the claims set forth by South Shore in its Amended Complaint.¹ This issue arises because of unique factual circumstances – Greenup has refused to enter into a written wholesale water supply contract with South Shore, but has nevertheless voluntarily engaged in regular and periodic water supply transactions with South Shore for a period of almost five years. Under applicable Kentucky law, these transactions are sufficient for the Commission to assert jurisdiction over the subject matter of South Shore's claims.

¹ Appendix A to the Commission's Order of April 5, 2010 requests briefing on the following issues: "(1) In the absence of a written contract or agreement between the City of Greenup and South Shores Water Works Company, does the Public Service Commission have jurisdiction over the subject matter of the Amended Complaint? (2) Does a contract or agreement between a municipal utility and a public utility for the provision of utility service exist when the municipal utility voluntarily engages in regular, periodic transactions for utility service with the public utility without executing a written contract or agreement with that public utility? (3) Does the holding of *City of Greenup v. Public Service Commission*, 182 S.W.3d 535 (Ky. App. 2005), preclude the existence of a contract between a municipal utility and a public utility based upon the municipal utility's issuance of bills to the public utility for water service and its acceptance of payment of such bills if the mayor of the municipality has not executed a written contract on behalf of the city?"

A. The Absence of a Written Contract Between Greenup and South Shore Does Not Preclude the Commission from Exercising Jurisdiction Over the Claims Made by South Shore in Its Amended Complaint.

Kentucky law is well-established that the Commission is “a creature of statute and has only such powers as have been granted to it by the General Assembly.”² Included among the powers bestowed upon the Commission by the General Assembly are the powers to regulate rates and service and the power to hear complaints involving those matters.³ While the Commission’s jurisdiction over rates and service generally extends only to public utilities, a class that expressly excludes municipalities, this limitation does not apply in certain instances when municipalities voluntarily elect to do business with public utilities. The General Assembly has recognized this fact in KRS 278.200, which provides:

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.

² *Boone County Water and Sewer District v. Public Service Commission*, 949 S.W.2d 588, 591 (Ky. 1997); *See also, Croke v. Public Service Commission of Kentucky*, 573 S.W.2d 927, 929 (Ky. App. 1978) (“The Public Service Commission’s powers are purely statutory; like other administrative boards and agencies, it has only such powers as are conferred expressly or by necessary or fair implication.”).

³ The Commission’s jurisdiction over complaints is authorized in KRS 278.260(1), which provides: “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.”

The general rule that has emerged from this statute is that the rates and service of municipalities fall with the scope of the Commission’s jurisdiction when municipalities “contract” with public utilities.⁴ However, the plain language of the statute is broader. It provides the Commission with jurisdiction over rates and service standards that have been established by “contract, franchise or agreement” between a public utility and a municipality. Pursuant to the terms of the statute, the Commission’s jurisdiction is not premised upon the existence of a written contract. In this instance, it is clear that Greenup and South Shore have entered into an agreement that pertains to the rates and service of wholesale water supply.

B. The Rates and Service Agreement Between Greenup and South Shore is Evidenced by the Fact that Greenup has Voluntarily Engaged in Regular, Periodic Wholesale Water Service Transactions with South Shore.

The Kentucky Supreme Court’s decision in *Simpson County Water District v. City of Franklin* (“*Simpson County*”) is often cited as supporting authority for the fact that KRS 278.200 bestows jurisdiction upon the Commission over the rates and service of a municipality when that municipality contracts with a public utility.⁵ However, it is clear from a reading of the *Simpson County* decision that the Court did not find the existence of a written contract between the Simpson County Water District and the City of Franklin to be the determining factor on the jurisdictional question. Rather, jurisdiction over the rates and service issues between the parties was found to lie with the Commission because the City of Franklin, a municipality, sold water to the Simpson County Water District, a public utility. As the Court acknowledged, “there has always been a contract/agreement in place and in operation at the time a City supplied water to a utility.”

⁴ See, e.g., *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460, 463 (Ky. 1994); *City of Greenup v. Public Service Commission*, 182 S.W.3d 535, 536 (Ky. App. 2005).

⁵ 872 S.W.2d at 463 (“We find that where contracts have been executed between a utility and a city, such as between the City of Franklin and Simpson County Water District, KRS 278.200 is applicable and requires that by so contracting the City relinquishes the exemption and is rendered subject to PSC rates and service regulation.”).

The history of wholesale water service transactions between Greenup and South Shore establishes the existence of an agreement between the parties. Greenup has provided South Shore with wholesale water service on a regular and periodic basis from September of 2002 through the present, and has submitted bills to South Shore each and every month during this period of time. The minimum monthly bill charged by Greenup during this period has increased from \$19.95 to \$28.50 to \$491.07.⁶ South Shore has paid the rates charged by Greenup in its monthly bills and continues to do so. Likewise, Greenup continues to provide South Shore with wholesale water service upon South Shore's request to the extent such service is convenient for Greenup. While the agreement between the parties has not been reduced to writing, its terms are evident. South Shore makes monthly payments to Greenup at a rate established by Greenup, and, in exchange, Greenup acts as a wholesale water supplier for South Shore.

If the Commission declines jurisdiction over the subject matter of the claims set forth by South Shore in its Amended Complaint then the result will reach beyond the scope of this particular dispute. Such action will offer municipalities a blueprint for furnishing utility services to public utilities without coming under the scope of the Commission's rates and service jurisdiction. Municipalities will simply refuse to enter into written contracts with public utilities and will instead be free to set exorbitant rates and provide inadequate and unreasonable service, just as Greenup has done in this case. Such action allows municipalities to have an improper and undue influence over the rates ultimately charged by public utilities, and paid by their customers. The Kentucky Supreme Court recognized the danger of this scenario in *Simpson County*:

⁶ The \$19.95 rate was in effect from September of 2002 through July of 2007. The \$28.50 rate was in effect from August of 2007 through July of 2008. The \$491.07 rate came into effect in September of 2008. None of these rates were approved by the Commission through a tariff filing by Greenup. Greenup did file a rate schedule with the Commission on August 28, 2002, reflecting a minimum monthly bill of \$9.95, but its bills under that schedule always included an additional \$10 service charge that Greenup did not have approved by the Commission.

The statutory exception [to the general exemption of municipalities from the Commission's rates and service jurisdiction] applicable to rates and services 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.⁷

There is simply no basis for shielding Greenup from the Commission's rates and service jurisdiction in this instance, where Greenup has voluntarily accepted monthly payments from South Shore for wholesale water service for such a long period of time. Greenup is acted in its proprietary capacity, and not its governmental capacity, in this instance and it should be subject to the same rules and regulations as South Shore.⁸

C. The Holding of *City of Greenup v. Public Service Commission*⁹ Does Not Preclude the Commission from Asserting Jurisdiction Over the Claims Set Forth by South Shore in Its Amended Complaint.

There is language within the Court of Appeals' opinion in *City of Greenup v. Public Service Commission* ("*City of Greenup*") that suggests the Commission's jurisdiction over a municipality's rates and service only lies when the municipality has entered into a written

⁷ 872 S.W.2d at 464.

⁸ See OAG 97-14 (May 9, 1997) (Recognizing that a municipality acts in its proprietary capacity, and not its governmental capacity, when it undertakes to provide water service to customers other than its own citizens).

⁹ 182 S.W.3d 535 (Ky. App. 2005).

contract to provide utility services to a regulated utility.¹⁰ However, that language should have no bearing on this proceeding. The issue before the Court of Appeals in *City of Greenup* necessarily involved the existence of an executed contract between the parties because there was no other basis for the Commission to assume jurisdiction over the matter. There was no other agreement between the parties and Greenup had not voluntarily engaged in regular and periodic wholesale water supply transactions with South Shore.¹¹ The relationship between Greenup and South Shore is now materially different. The Court of Appeals rendered its decision in *City of Greenup* on July 1, 2005. When the decision became final, Greenup no longer had any obligation to provide wholesale water service to South Shore. Nevertheless, Greenup has voluntarily continued to provide wholesale water service to South Shore. Each and every month since the decision was rendered, Greenup has issued a bill to South Shore and South Shore has paid the bill. On numerous occasions throughout this period, South Shore has requested water from Greenup and Greenup has furnished water pursuant to the request. This arrangement has persisted for nearly five years. This arrangement is an agreement that falls within the scope of the Commission's rates and service jurisdiction.

¹⁰ In particular, the Court of Appeals states: "As a municipal water system, Greenup's water system is not, in the absence of a contract to provide utility services to a regulated utility (e.g., South Shore), subject to regulation by the PSC." 182 S.W.3d at 536. Additionally, the Court of Appeals notes: "In summary, the PSC does not have jurisdiction over utility services furnished by a municipality except to the extent that those services are rendered pursuant to a contract with a utility which is regulated by the PSC. In such case the municipality, in the matters covered under the contract, is subject to the jurisdiction of the PSC." 182 S.W.3d at 538.

¹¹ Greenup began providing wholesale water service to South Shore in September of 2002. However, Greenup only began providing that service because it was required to do so pursuant to the terms of orders entered by the Commission on July 24, 2002 and August 21, 2002.

D. Conclusion.

Based on the foregoing, South Shore asks the Commission assert its jurisdiction over the subject matter of the claims set forth by South Shore in its Amended Complaint.

Respectfully submitted,

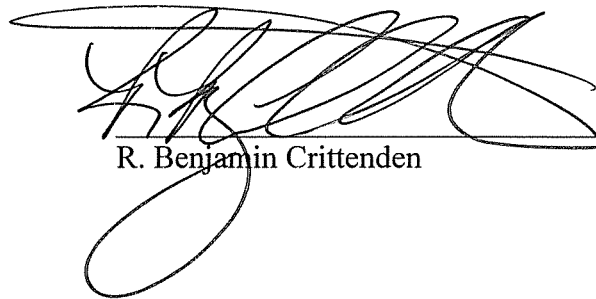


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CERTIFICATE OF SERVICE

I hereby certify that the foregoing SOUTH SHORE WATER WORKS COMPANY'S BRIEF IN SUPPORT OF THE PUBLIC SERVICE COMMISSION'S SUBJECT MATTER JURISDICTION was served by first class mail, postage prepaid, upon the following parties of record, this 12th day of May, 2010.

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