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

MAY 27 2010

PUBLIC SERVICE
COMMISSION

SOUTH SHORE WATERWORKS CO.

COMPLAINANT

VS.

CITY OF GREENUP, KENTUCKY

DEFENDANT

RESPONSE TO SOUTH SHORE WATERWORKS' BRIEF

South Shore admits no contract exists.

South Shore attaches its hope for PSC jurisdiction to that portion of KRS 278.200 which speaks of “contract franchise or agreement” between a city and a utility.

The language of the statute and the argument by South Shore may have an allure to the Commission whose *raison detre* is protection of utility consumers that come under their jurisdiction. Though seductive, this argument fails in light of the clear language of *City of Greenup vs. Public Service Commission, et al.*, 182 SW3d 535.

“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 the utility, which is regulated by the PSC.” *Greenup*, at 538. (emphasis added)

A more sure and solemn statement as to the jurisdictional reach of the Public Service Commission could not be made. The language of the opinion is clear. It permits no interpretation. It is not subject to a “tweak” or a nudge. The second highest court of the Commonwealth clearly stated that absent a contract with a utility the Public Service Commission has no jurisdiction over a city.

South Shore argues that its customers may be harmed or that other cities will seek to avoid the jurisdiction of the Public Service Commission by not entering into a contract. This may or may not be correct but is of no consequence to the issue of jurisdiction. Further, it is a problem that South Shore, and any other water utility, can solve on their own.

To clear up a factual inaccuracy, Greenup has not “refused” to enter into a contract. It takes two to tango. Greenup could just as easily have stated that South Shore has refused to accede to its terms. It is of no matter whatsoever to the issue before the Public Service Commission. The fact is the parties have no contract, and this is not disputed by South Shore.

If South Shore believes that Greenup will not enter into a contract and it needs an additional water supply, it can remedy the problem by going elsewhere. The City of Portsmouth is directly across the Ohio River. Further, there is another water system to the west of South Shore in Lewis County. South Shore could drill more wells. South Shore could invest in a water plant. South Shore could do any number of things if Greenup is unwilling, or unable because of its own obligations, to furnish it water. The same is true for water systems throughout the Commonwealth.

If a utility and a public entity cannot agree, there is no one to force them to do so. The utility, or for that matter the municipal water system, must look elsewhere to meet its customers’ needs. No one would suggest, for instance, that a private utility be forced into a contract with a public entity. Why then should a municipality be forced into a contract with a public utility?

South Shore wants to protect its own customers. Greenup wants to protect its customers. Involvement with South Shore costs Greenup money. It increases administrative costs. It increases the demands on the system. It makes water unavailable to potential customers. It strains the system.

Most importantly, if the legislature had wanted the Public Service Commission to have jurisdiction over a utility and a municipality who simply buy and sell water from time to time, presumably they would have changed the language (see previously filed Memorandum of Law on behalf of the City of Greenup). Nonetheless, the language has remained unchanged for years even in the face of the *Greenup* opinion and in the face of *Simpson County Water District vs. Franklin*, 872 SW2d 460.

The factual situation presented by this case was anticipated by the *Simpson* court. “The City candidly admits that the Public Service Commission has expertise in resolving disputes over rates and service but that construction of KRS 278.040(2) and KRS 278.200, as maintained by the district, creates a paradox and serves to illustrate that where no contract exists between a city and a regulated utility, the courts would be called upon to resolve rates and service disputes. However, from a practical point of view, there has always been a contract/agreement in place and in operation at the time a city supplied water to utility. Once established by contract, such service can only be abrogated or changed after a hearing before the PSC.” (*Simpson County Water District* at 465, citation omitted) (emphasis added)

Despite the fact that this “paradox” has been known since at least 1994, no action has been taken by the legislature. The language cited above makes clear that “once established by contract” the rates and service can only be changed by a hearing before the PSC. The choice of the word “contract” by the *Simpson* court is further illustration that only a contract can invoke the Public Service Commission’s jurisdiction. As taught to the parties by *Greenup*, a contract with a municipality can only be made in writing.

Though the undersigned has never been a member of the legislature, the motives for having Public Service Commission jurisdiction exist only with a contract seem obvious. The legislature clearly did not want to discourage emergency interconnectivity between municipal

and private water systems. To do so would have deleterious effects for the citizens of the Commonwealth. So, if the legislature had provided that the “sale” of water to a regulated utility at any time by a city would invoke the Public Service Commission jurisdiction, many cities would refuse to sell at all or even have a connection. Cities would not want to undergo the extra expense of dealing with the Public Service Commission. No disrespect is intended to this body by these statements. However, this body must realize there is considerable time, effort and expense involved in dealing with it and this serves to increase the cost to a city.

No one could predict how many cities would refuse to have any emergency hookups with regulated systems. With all due respect to South Shore’s argument, the unavailability of emergency water would be a much worse result than the paradox recognized by the *Simpson* court; i.e., a municipality providing water to a utility without contract.

Presumably, the legislature thought that no regulated utility would dare rely on regular water service with a municipality unless a contract was entered into. South Shore wishes to turn this elegant legislative scheme on its head and make the words of the legislature and the courts mean something other than what is written.

Further, South Shore is not without redress in this situation. Simply because the Public Service Commission has no jurisdiction does not mean that the courts do not. Without a contract in place, Greenup and South Shore are both subject to the jurisdiction of the court system in regards to the rates. If Greenup was charging South Shore higher rates than other water customers or unreasonable rates, then it could seek relief in the same place that a citizen of the Commonwealth can who does not have a written contract with the city; i.e., the court system. South Shore knows, however, that Greenup does not charge it any more for water than any other customer. It never has and it never will. If it does, or did, South Shore could certainly seek relief through the Circuit Court.

In the end, this case is a simple matter of reading statutes and cases. *Simpson County* and *Greenup* both stand for the clear proposition that only a contract between a regulated utility and a city invokes the jurisdiction of the Public Service Commission over a city. *Greenup* stands for the unassailable proposition that the only way a contract is formed with a city is in writing signed by the Mayor.

With all due respect to this body, it does not have jurisdiction over this dispute. South Shore's forum, if indeed it has a valid dispute, is within the court system.

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I hereby certify that a true and correct copy of the foregoing has been mailed to:

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This 27th day of May 2010.

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