

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 RESPONSE TO CITY OF GREENUP,
KENTUCKY'S MEMORANDUM OF LAW ON ISSUE OF PUBLIC SERVICE
COMMISSION'S SUBJECT MATTER JURISDICTION**

The City of Greenup, Kentucky ("Greenup" or "City") insists that the holding of *City of Greenup v. Public Service Commission*¹ compels a finding that the Public Service Commission ("Commission" or "PSC") does not have jurisdiction over the subject matter of the claims set forth by South Shore Water Works Company ("South Shore") in its Amended Complaint because the parties have not executed a written contract. Greenup's insistence fails to appreciate that the facts before the Commission in this proceeding are fundamentally different from those before the Court of Appeals in *City of Greenup*. Greenup has voluntarily decided to provide wholesale water service to South Shore on a regular and ongoing basis. While Greenup has refused to sign a written contract memorializing the terms of the relationship, it remains clear that an agreement exists between the parties – Greenup provides wholesale water service to South Shore and South Shore pays for that service at rates set by Greenup. This agreement is sufficient for the Commission to exercise jurisdiction over the subject matter of South Shore's claims.

¹ 182 S.W.3d 535 (Ky. App. 2005) ("*City of Greenup*").

A. A Written Contract is not a Necessary Prerequisite for the Commission to Exercise Jurisdiction over the Rates and Services of a Municipality when the Municipality Voluntarily Agrees to Furnish Utility Services to a Public Utility.

Greenup maintains that the Commission is only authorized to exercise jurisdiction over the rates and services of a municipality when a written contract exists between the municipality and a public utility.² Greenup’s position on this issue is unduly prescriptive and at odds with the plain language of KRS 278.200, which grants the Commission the authority to regulate the rates and services of a municipality whenever it is set by a “contract, franchise or agreement” between the municipal utility and a regulated utility.³ It is significant that the statute speaks of both “contracts” and “agreements” and recognizing that jurisdiction over rates and services issues is appropriate with the Commission whenever either exists between a municipality and a public utility.

Greenup argues that the scope of the Commission’s jurisdiction under KRS 278.200 is narrowed by the holding of *City of Greenup*, which suggests the Commission’s jurisdiction over a municipality’s rates and services lies only when the municipality enters into a written contract to provide utility services to a public utility. However, the facts before the Court of Appeals in *City of Greenup* were fundamentally different from those before the Commission in this proceeding. In the former, Greenup’s sales of wholesale water service were involuntarily made pursuant to the terms of orders entered by the Commission. The only basis for the Commission’s

² See Memorandum of Law, p. 2 (“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.”).

³ KRS 278.200 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.”

assertion of subject matter jurisdiction in that action was the existence of the “contract” between the parties. The litigation was focused on whether the “contract” alleged by South Shore was an actual contract that had been properly executed by the parties. There was no basis for the Court of Appeals to determine that Greenup had voluntarily agreed to provide South Shore with wholesale water service, and the issue was not presented or decided in the course of the litigation.

This proceeding is different. Greenup is no longer under any obligation to provide wholesale water service to South Shore,⁴ but it continues to do so even now as the parties brief the issue of the Commission’s jurisdiction over the rates and terms of this service. Greenup has voluntarily agreed to provide wholesale water service to South Shore for a period of almost five years, but it insists that it should not be subject to the Commission’s regulatory jurisdiction because this agreement has not been reduced to writing. South Shore simply requests that the Commission treat Greenup the same way it treats all other municipalities who voluntarily agree to do business with public utilities.

B. Greenup’s Discussion of Implied Contracts is Misplaced Because It Ignores the Significance of the Voluntary Wholesale Water Service Sales Greenup has Made to South Shore Each and Every Month for Almost Five Years.

Greenup argues that a contract between Greenup and South Shore cannot be implied through the voluntary and regular wholesale water service transactions, relying upon established authority holding that a municipality cannot enter into a contract by implication. Greenup correctly sets the law precluding the implication of a contract involving a municipality, but Greenup’s application of that law to this proceeding misses the mark. South Shore is not requesting that the Commission imply the existence of a contract based upon the conduct of the

⁴ The Court of Appeals issued its decision on July 1, 2005, and Greenup has had no obligation to provide wholesale water service to South Shore since the decision became final.

parties. Rather, South Shore is asking the Commission to take notice of the fact that an actual agreement exists between the parties. The parties have agreed that Greenup will provide wholesale water service to South Shore and that South Shore will pay for the service at rates set by Greenup. Pursuant to this arrangement, Greenup has voluntarily made numerous sales to South Shore and South Shore has submitted payment for the service each and every month dating back for nearly a decade.

As the Kentucky Supreme Court has recognized in the context of wholesale water service transactions, an agreement necessarily exists whenever a municipality sells water to a public utility.⁵ Accordingly, Greenup's argument that the General Assembly could change the language of KRS 278.200 to grant jurisdiction to the Commission over all municipalities who "sell" to public utilities should be rejected because such a change is unnecessary. An agreement does exist, both by necessity and definition, whenever a municipality voluntarily sells utility services to a public utility. Black's Law Dictionary defines a "sale" as "[t]he transfer of property or title for a price" and "[t]he agreement by which such a transfer takes place."⁶ The elements of a "sale" are identified as follows: "(1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised."⁷ Simply stated, a "sale" is an "agreement" that does not occur or exist without the mutual assent of the parties to the transaction. Greenup acknowledges that it has voluntarily made sales of wholesale water service to South Shore. The Commission should reject Greenup's effort to distinguish between sales and agreements, and accept jurisdiction over the claims set forth in South Shore's Amended

⁵ See *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460, 463 (Ky. App. 2005) (Acknowledging that "there has always been a contract/agreement in place and in operation at the time a City supplied water to a utility.").

⁶ Black's Law Dictionary, Ninth Edition (2009).

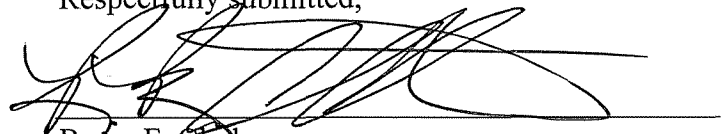
⁷ *Id.*

Complaint.⁸

C. Conclusion.

Greenup wants to have its cake and eat it too. It wants to recognize all of the benefits that result from making sales of wholesale water service to South Shore without being subject to any regulatory oversight ensuring that its rates and services are reasonable. The Commission should accept jurisdiction over the subject matter of the claims set forth in South Shore's Amended Complaint, and hold Greenup to the same standards as all other municipalities that voluntarily agree to do business with public utilities.

Respectfully submitted,



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⁸ Similarly unavailing is Greenup's claim that city residents "could easily be taken advantage of" if the Commission exercises its jurisdiction in the absence of a written contract between the parties. Greenup has offered no basis for this claim and no explanation as to how it is that city residents could be harmed if Greenup is held to the same standards as all other municipalities that voluntarily agree to do business with public utilities. The claim should be rejected by the Commission as baseless.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing SOUTH SHORE WATER WORKS COMPANY'S RESPONSE TO CITY OF GREENUP, KENTUCKY'S MEMORANDUM OF LAW ON ISSUE OF PUBLIC SERVICE COMMISSION'S SUBJECT MATTER JURISDICTION was served by first class mail, postage prepaid, upon the following party of record, this 27th day of May, 2010.

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