

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION INTO)	
WHOLESALE WATER RATES CHARGED BY THE)	
CITY OF CARLISLE TO SHARPSBURG WATER)	CASE NO.
DISTRICT AND NICHOLAS COUNTY WATER)	2021-00382
DISTRICT PURSUANT TO KRS 278.200, KRS)	
278.160, KRS 278.180, KRS 278.190 AND 807)	
KAR 5:011)	

ORDER

On October 20, 2021, the Commission established this matter, pursuant to KRS 278.200, KRS 278.160, KRS 278.180, KRS 278.190, and 807 KAR 5:011, to review whether the city of Carlisle (Carlisle) charged its wholesale customers unauthorized rates in violation of KRS 278.160 and whether the rates are fair, just and reasonable. Additionally, on September 30, 2021, Carlisle filed with the Commission a revised tariff sheet setting forth a proposed increase to its existing wholesale water rates to Nicholas County Water District (Nicholas District) and Sharpsburg Water District (Sharpsburg District) effective October 30, 2021. The Commission suspended the proposed tariff filing pursuant to KRS 278.190 to determine the reasonableness of the new rates.

On October 22, 2021, counsel for Sharpsburg District entered an appearance and Sharpsburg District filed a response to the Commission's October 20, 2021 Order, stating that it agrees with the allegations contained in the Order and that Sharpsburg District has paid \$1,499.83 in water charges in excess of the tariff on file at the Commission.¹

¹ Sharpsburg District Response to Commission's October 20, 2021 Order, (filed Oct.22, 2021).

On October 25, 2021, Commission Staff's First Request for Information to the city of Carlisle (Staff's First Request) was entered with responses due on November 9, 2021. Carlisle's counsel entered an appearance on November 5, 2021, and Carlisle filed its response to the Commission's October 20, 2021 Order on November 9, 2021 (Carlisle Response). Carlisle also filed a supplemental response to the Commission's October 20, 2021 Order on November 11, 2021. Because the Commission was trying to expedite the processing of this case, the response to Staff's First Request was due on November 9, 2021, as well. Despite referring to Staff's First Request in the Carlisle Response, Carlisle did not file a response to Staff's First Request on November 9, 2021. At the time of entry of this Order, Carlisle has not requested leave to file a response to Staff's First Request beyond the filing due date of November 9, 2021. Nicholas District's counsel filed an appearance on November 23, 2021.

LEGAL STANDARD

The Commission has authority pursuant to KRS 278.200 to regulate the rates and service standards fixed by agreement between a utility and any city. Further, a utility may not charge a rate not contained in its tariff and the tariffed rates must be approved by the Commission.²

In *Simpson County Water District v. City of Franklin (Simpson v. Franklin)*,³ the Kentucky Supreme Court held that the Commission has jurisdiction over contracts between municipal utilities and public utilities and that changes in any rate that a municipal utility assesses a public utility for wholesale utility service must be approved by the

² See KRS 278.160. See also *Cincinnati Bell Telephone Co. v. Kentucky Public Service Com'n*, 223 S.W.3d 829, 837 (Ky. App. 2007).

³ *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994).

Commission. Consistent with KRS 278.160, contracts and rate schedules filed with the Commission shall control the rates and conditions of service of the parties. Changes to those currently on file with the Commission shall be made in accordance with KRS 278.180 and Administrative Regulation 807 KAR 5:011. Until such changes are approved by the Commission, the prior contracts and rate schedules remain in effect.

KRS 278.030 provides that a utility may collect fair, just and reasonable rates and that the service it provides must be adequate, efficient and reasonable.

DISCUSSION

After Carlisle contested the allegations of the Commission's October 20, 2021 Order in the Carlisle Response, Carlisle contested the jurisdiction of the Commission over this matter by arguing that the facts of this matter are distinguishable from *Simpson v. Franklin*.⁴ Without citing any case law to support its argument, Carlisle argued that jurisdiction of the Commission turns on whether a water district is or is not dependent upon the municipality with which it contracts.⁵ Carlisle did not address the Commission's jurisdiction based upon KRS 278.200 and stated the basis of jurisdiction is "unquestionably" the cited case of *Simpson v. Franklin*.⁶ While Carlisle's intent is not clearly stated in its response, for the sake of clarity, the Commission addresses Carlisle's argument regarding the Commission's jurisdiction here in order for this matter to proceed. The Commission rejects Carlisle's argument that the Commission does not have

⁴ Carlisle's Response at 1.

⁵ *Id.*

⁶ *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460 (Ky.1994).

jurisdiction for the following reasons. First, the Commission's October 20, 2021 Order cited its jurisdiction pursuant to KRS 278.200, which 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, 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.

The Commission regulates Sharpsburg District and Nicholas District; therefore, the contract between Sharpsburg District and Carlisle, a municipality, and the contract between Nicholas District and Carlisle are both contracts that pursuant to KRS 278.200 "shall be subject to the jurisdiction and supervision of the commission."⁷ Carlisle's Response did not address the Commission's jurisdiction pursuant to KRS 278.200, despite the Commission's October 20, 2021 Order clearly stating that it was a basis for the Order.

Further, Carlisle fails to support its argument that whether a water district is dependent upon the city with which it contracts is a factor in determining the Commission's jurisdiction. The Commission finds that without any further support, it has jurisdiction over this matter pursuant to KRS 278.200. However, Carlisle, argued at length that Sharpsburg District and Nicholas District are not dependent upon Carlisle for their respective supplies of water, and because those facts regarding dependency for water

⁷ KRS 278.200.

supply are distinguishable from *Simpson v. Franklin*,⁸ the Commission does not have jurisdiction over this matter. The Commission rejects Carlisle’s argument and rejects Carlisle’s recitation of the relevant facts in *Simpson v. Franklin* as incomplete and misleading. The Court’s decision was not, as Carlisle submitted, based upon the fact that the city of Franklin (Franklin) “had used its monopoly position to exact money from the District, in a manner that did not change its rates for its city and other direct customers.”⁹ While those facts determined the ultimate decision in the case, the majority of the Court’s opinion focused on a statutory discussion of the Public Service Commission Act of 1934 and a detailed analysis of how KRS 278.200 and KRS 278.040(2) are not inconsistent, but clearly expressed “unequivocally the legislature’s intent that the PSC exercise exclusive jurisdiction over utility rates and service.”¹⁰ Jurisdiction of the Commission was at issue in that case. The discussion from the Court did not focus on the details of the contract between Franklin and Simpson County Water District (Simpson District) as much as why the exemption of regulation for municipalities does not apply to the determination of rates and services and contracting related to the water service of a utility is engaging in ratemaking.¹¹ The Court held that Franklin waived its exemption from Commission regulation when it contracted to supply water to a Commission regulated water district and the Commission had exclusive jurisdiction over Franklin’s actions.¹² To the extent that the facts of that contract were discussed, the Court established that the subject of

⁸ Carlisle’s Response at 1.

⁹ *Id.*

¹⁰ *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460, 463 (Ky. 1994).

¹¹ *Id.*

¹² *Id.* at 460.

the contracts at issue in that case meant that the parties were engaged in ratemaking which is the exclusive jurisdiction of the Commission.¹³ The Court distinguished the contract between the city and the jurisdictional water utility from a contract under the circuit court's jurisdiction to respond to Franklin's argument that the circuit court had jurisdiction if it was an issue of mere contract interpretation.¹⁴ The Court in *Simpson v. Franklin* explained Franklin's actions to describe how the acts related to rates and services¹⁵ and the applicable portion of that opinion is that when a city contracts with a jurisdictional utility for rates and services, the Court decided "[j]urisdiction to regulate such rates and service has been exclusively vested in the PSC."¹⁶

Therefore, the Commission finds that Carlisle has not presented a supported argument that refutes the Commission's jurisdiction over the contracts between Carlisle and Sharpsburg District and Nicholas District. The remainder of Carlisle's response will be considered by the Commission in its further review of the issues in this case.

Finally, Carlisle's counsel telephoned Commission Staff and requested an emergency hearing in this case. Carlisle's filings in this matter and representations to Commission Staff reveal a lack of understanding of the tariff process and the process of renegotiating a contract. The Commission advises all parties to review the relevant statutes and regulations. There are allegations of bad faith and unfair dealing and there is evidence in the record that parties are violating statutes and regulations. On its own

¹³ *Id.*

¹⁴ *Id.* at 464.

¹⁵ *Id.* at 463.

¹⁶ *Id.* at 464.

motion, the Commission finds that an emergency hearing should be held in this matter for the Commission to take evidence on the allegations made in the Commission's October 20, 2021 Order and the allegations made by Carlisle in its response.

The Commission, on its own motion, HEREBY ORDERS that:

1. Carlisle's objection to Commission jurisdiction is denied.
2. A virtual hearing in this matter shall be held on December 17, 2021, at 9 a.m. Eastern Standard Time, in the Richard Raff Hearing Room at the offices of the Public Service Commission at 211 Sower Boulevard, Frankfort, Kentucky.
3. Carlisle shall give notice of the hearing in compliance with 807 KAR 5:001, Section 9(2)(b). In addition, the notice of hearing shall include the following statements: "This hearing will be streamed live and may be viewed on the PSC website, psc.ky.gov"; and "Public comments may be made at the beginning of the hearing. Those wishing to make oral public comments may do so by following the instructions listed on the PSC website, psc.ky.gov." At the time the notice is mailed or publication is requested, Carlisle shall forward a duplicate of the notice and request to the Commission.
4. Pursuant to KRS 278.360 and 807 KAR 5:001, Section 9(9), a digital video transcript shall be made of the hearing.
5. Commission Staff will contact counsel for the parties with instructions for participating in the virtual hearing.
6. The parties shall electronically file their respective witness lists with the Commission on or before Friday, December 10, 2021.

By the Commission



ATTEST:


Executive Director

Case No. 2021-00382

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