COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISISON

In the Matter of:

The Proposed Adjustment of Wholesale Service Rates of the Hopkinsville Water Environment Authority	)))	Case No. 2009-00373

PETITION FOR AMENDED ORDER OR REHEARING

Christian County Water District (CCWD) by counsel, petitions for the issuance of an amended order containing findings of facts supporting the conclusion that the proposed rate is reasonable or in the alternative for a rehearing pursuant to KRS 278.400.

The order of July 2, 2010 fails to state any finding of facts to support the conclusion that the rate proposed by Hopkinsville Water Environmental Authority is reasonable. On page 5 of the order, the Commission summarily concludes:

> Our review of the evidence of record indicates that the HWEA's proposed adjustment to its wholesale rate is reasonable and will not result in excessive rates. The results of the cost of service study demonstrate that the proposed wholesale rates will not generate rates that exceed HWEA's reasonable expenses to provide wholesale service and a reasonable return on investment

There is no finding of any fact that supports this conclusion. In Simpson County Water Dist. v. City of Franklin, 872 S.W.2d 460, 465 (Ky. 1994), the case that imposed jurisdiction on the Commission to regulate contract water rates of cities, the Court said that the PSC acts as a quasi-

judicial agency utilizing its authority to conduct hearings, render findings of fact and conclusions of law, and utilizing its expertise in the area and to the merits of rates and service issues.

The Commission has repeated this requirement in its orders:

> The Commission acts as a quasi-judicial agency and as such **is required to render its own finding of facts and conclusions of law** as to the merits of rates and service issues upon the conclusion of any hearing or submission of any case to the Commission for a decision. Application of Mallard Point Disposal Systems, Case No. 2003-00284, October 16, 2003. (Emphasis added)

The necessity of findings is stated in Marshall County v. South Central Bell Tele. Co., Ky. 519 S.W.2d 616, 619 (1975):

> There was no finding of any evidentiary fact, only the generalized finding that extended area service "is in the public interest and...public convenience and necessity require the establishment thereof." That finding is nothing more than a conclusion of law or a recitation of an ultimate fact—a mere parroting of the language of the statute. This court has held repeatedly that a finding of that type, with no findings of basic evidentiary facts, is fatal to an order of an administrative body the validity of which depends on a determination of fact.

"An opinion of an administrative agency should set forth the basic findings of fact." Louisville and Nashville Railroad Company v. Comm ex rel. Kentucky Railroad Commission, Ky., 314 S.W.2d 940, 943 (1958). Due process requires that an administrative agency make findings of basic evidentiary facts and failure to do so is fatal on appeal. Simms v. Angel, Ky., 513 S.W.2d 176, 177 (1974).

The failure of the Commission to provide any facts supporting its conclusion leaves CCWD without any basis to determine how the rate was calculated, what expenses were allowable, what if any adjustments were made to the cost study or any

other information to make an informed decision about whether to accept the Commission's determination or to pursue other remedies. For example, the cost study referenced in the order includes allocation of expenses for fire protection, yet HWEA does not provide fire protection to the CCWD. CCWD has a contractual two million gallons per day and 49 million gallons per month maximum capacity from the HWEA, yet it appears from the cost study that no adjustment was made to reflect this limited capacity availability to the District. The CCWD is also without an explanation of what the "reasonable return on investment" (order, page 5) for the HWEA is and how that impacts the calculation of the wholesale rate.

The CCWD is without information about how the Commission determined any aspect of the HWEA rate or how it determined the reasonableness of any expense. Without this information, the CCWD has no basis to provide an informed response to the order. Its right to a fair determination of its rate has been denied.

> A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids any agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." Utility Regulatory Commission v. Kentucky Water Service Co, Inc, Ky. App., 642 S.W.2d 591, 593 (1982).

The Commission's order in this case has deprived CCWD of any opportunity to offer a response to the conclusion that the HWEA's rate is reasonable.

The order on pager 5 seems to suggest that CCWD has an obligation to dispute the reasonableness of the proposed rate and must provide evidence to meet its burden of proof. CCWD does not have a burden of proof in a rate

proceeding. "The utility has the burden of proof to show that the requested change of rate is just and reasonable. KRS 278.190(3)". Application of Mallard Point Disposal Systems, Case No. 2003-00284, October 16, 2003. See Kentucky-American Water Company v. Commonwealth of KY. ex rel Attorney General and Public Service Commission, (KY) 847 S.W.2d 737 (1993). It is the HWEA that must provide evidence that its rate is reasonable and the Commission that must review that evidence to determine if it sufficient to prove that the proposed rate is fair, just and reasonable. Any effort to shift the burden to the CCWD is contrary to law. Yet, without findings of fact, it is impossible for the CCWD to determine what evidence was relied on and what evidence the Commission found to be sufficient to justify the proposed rate.

CCWD asserts that the Commission should issue an amended order containing the legally required findings of fact so that it can evaluate the determination of the reasonableness of the rate. KRS 278.390 provides that any order remains in effect until revoked or modified by the Commission. Until a court acquires jurisdiction over the order, the Commission may amend its order. Such amendment will provide CCWD the ability to determine the factual basis of the Commission's order and to have a meaningful opportunity to seek rehearing.

If the Commission fails to amend the order and treats this petition as one for rehearing, any order issued must be appealed to Franklin Circuit Court because there is no statutory provision for a rehearing of a rehearing order. CCWD will effectively deprived of its rehearing rights.

For these reasons, CCWD seeks an order amending the July 2nd order to include findings of fact supporting the reasonableness of the proposed wholesale rate increase or in the alternative for a rehearing for the purpose of the issuance of findings of fact.

Submitted by:

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Certificate:

I certify that a copy of this petition was served on Damon Talley, 112 N. Lincoln Blvd. Box 150 Hodgenville, KY 42748 by first class mail the 19th day of July, 2010.

John N. Hughes