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December 10, 2002

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Mr. T. Ray Mattingly
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Lebanon, Kentucky 40033

Mr. J. B. Peterson
P. O. Box 528
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Mr. Jeff Preston
11950 Danville Highway
Gravel Switch, Kentucky 40328

Mr. Anthony Lyvers
2825 Rubin Smith Road
Loretto, Kentucky 40037

Dear Ms. May and Gentlemen:

Commission Staff has recently learned that a member of Marion County Water District's Board of Commissioners also serves as general manager of Marion County Water District ("Marion District"). The purpose of this letter is to bring to your attention the significant problems that this practice presents and to request corrective action.

Commission Staff is aware of the following facts: Marion District is a water district organized pursuant to KRS Chapter 74. It currently provides water service to approximately 4,846 customers in Marion and Nelson Counties, Kentucky. A board of commissioners composed of five persons controls and manages the water district. Since 1995 J.B. Peterson has served as Marion District's general manager and as a member of Marion District's Board of Commissioners.

These facts present the following issue: Is membership on a water district's board of commissioners incompatible as a matter of law with the position of water district general manager or superintendent?

Kentucky law recognizes two kinds of incompatibility between offices. Adams v. Commonwealth ex rel. Buckman, Ky., 268 S.W.2d 930 (1954). The first is a constitutional or statutory incompatibility, which the Constitution or a legislative enactment declares. See, e.g., Ky. Const. §165; KRS 61.080. The second is a common law or functional incompatibility, which the courts have declared in the



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absence of any constitutional or statutory prohibition when the two offices are inherently inconsistent or repugnant, or when the occupancy of the two offices is detrimental to the public interest. "Functional incompatibility depends on the character and relation of the offices and not on the matter of physical inability to discharge the duties of both of them. The question is whether one office is subordinated to the other, or whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest." LaGrange City Council v. Hall Brothers Co., Ky.App., 3 S.W.3d 765, 769-770 (1999). Both types of incompatibility are based upon the premise that "it is the duty of a public officer or servant to discharge his or her duties uninfluenced by the duties and obligations of another office." Rash v. Louisville and Jefferson County Metropolitan Sewer Dist., Ky., 217 S.W.2d 232, 236-237 (1949).

KRS Chapter 74 clearly establishes a superior-subordinate relationship for water district commissioners and water district general managers. KRS 74.020(1) provides that a water district "shall be administered by a board of commissioners which shall control and manage the affairs of the district." KRS 74.040 permits the board of commissioners to appoint a "competent person" as "superintendent" or general manager. Such person "shall be subject to the orders" of the board of commissioners and "shall look after the improvements" that the water district establishes. He or she, with the approval of the board of commissioners, "may employ all necessary labor and assistance in the performance of his duties, and ... shall report to the commission all expenses incurred." KRS 74.040 further provides that the board of commissioners shall fix the general manager's salary.

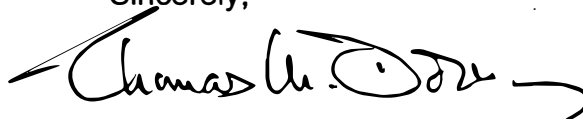
Given the nature of the relationship that exists between a water district's board of commissioners and its general manager, the offices are clearly incompatible. "Two (2) offices or positions are incompatible whenever one has the power of appointment to or removal from the other and whenever there are any potential conflicts of interest between the two (2), such as salary negotiations, supervision and control of duties and obligations to the public to exercise independent judgement." LaGrange City Council at 770. Moreover, abstaining from any official actions will not remedy any conflict between the two offices. Id.

Commission Staff is of the opinion that Marion District's present practice of retaining Mr. Peterson as general manager while he serves as a member of Marion District's Board of Commissioners is contrary to law. Commission Staff recommends that action be taken to end this practice as soon as possible and requests that Marion District advise it in writing no later than January 3, 2003 of what actions, if any, that the district intends to take in this matter. Please note that failure to take any action may create uncertainty regarding the legality of future decisions of Marion District's Board of Commissioners and may result in challenges to Mr. Peterson's continued membership on that Board.

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This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the PSC should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Gerald Wuetcher, Assistant General Counsel, at (502) 564-3940, Extension 259.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Dorman", with a long horizontal flourish extending to the right.

Thomas M. Dorman
Executive Director