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April 12, 2004

Mr. Tom Green
Tetra Tech, Inc.
800 Corporate Drive
Suite 100
Lexington, Kentucky 40503

Re: Henry County Water District No. 2

Dear Mr. Green:

Commission Staff acknowledges receipt of your electronic mail message of March 18, 2004 regarding the application of Henry County Water District No. 2's ("Henry District") Offsetting Improvement Charge.

Your message and Commission Staff's investigation present the following facts:

A landowner in Henry County wishes to convey approximately 38 acres of his property to an adjoining landowner. The proposed purchase price is \$2,450 per acre or approximately \$97,000. The proposed transfer requires the transferor to divide his property and create a new tract of real estate.

The acquiring landowner currently operates a farm in Henry County and intends to combine the acquired property with his existing farm. He intends to use the acquired tract for agricultural purposes only and, as a condition for his receipt of payments under a soil conservation program, he has contracted with the federal government to limit the land's use to that purpose. The acquiring landowner states that he has no need for water service on the acquired tract and does not intend to apply for water service for the acquired tract.

Because the transferor is subdividing his property, the Henry County Planning and Zoning Commission (HCP&ZC) must approve the subdivision and the creation of the new tract. As a condition for approving the subdivision, HCP&ZC

requires certification of the availability of water service to the new tract. Henry District refuses to make such certification unless the water district's Offsetting Improvement Charge is paid.

Citing his intentions not to seek water service for the new tract and the lack of any need for such service, the acquiring landowner disputes the assessment of the Offsetting Improvement Charge to the proposed transfer. Henry District has advised the acquirer that the charge will be refunded if the acquirer subsequently consolidates the acquired tract with his current holdings. The acquiring landowner states that, as the estimated cost of consolidating the acquired tract of land to his present tract is approximately \$6,000, consolidating the tracts for the sole purpose of obtaining a refund is not economical.

These facts pose the following question: May Henry District require payment of its Offsetting Improvement Charge before certifying the availability of water to the proposed new tract?

KRS 278.030(1) permits a utility "to demand, collect and receive fair, just and reasonable rates for services rendered or to be rendered." KRS 278.030(2) permits a utility to "establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to provide service." KRS 278.160(2) prohibits a utility from collecting any rate or charging any fee except that prescribed in its rate schedules on file with the Public Service Commission.

Henry District currently assesses an Offsetting Improvement Charge to offset the costs associated with a new development's hydraulic effects on Henry District's water distribution system. Under the terms of this rate, Henry District is prohibited from certifying the availability of water to a proposed residential subdivision until "the charge for the entire subdivision is received." For residential subdivisions, the charge is approximately \$980 per tract. Henry District also assesses an Offsetting Improvement Charge to commercial and industrial customers. The level of this charge is based upon an engineering evaluation of the prospective customer's demand for water. In the case of commercial and industrial customers, the charge must be paid prior to the initiation of water service.

Henry District's Offsetting Improvement Charge Rate Schedule does not mention agricultural customers nor does it make any provision for subdivisions for agricultural purposes. This omission is significant in light of the references to residential, commercial and industrial customers and development. The absence of any reference to agricultural subdivision suggests that the water district has no legal authority to assess the charge for such property division.

Commission Staff's review of the record of Case No. 2001-00393¹ further suggests that Commission approval of the Offsetting Improvement Charge did not extend to property divisions for solely agricultural purposes. While the Commission noted in that proceeding its concerns about the consequences of real estate development and of the addition of new customers to an existing water distribution system, it did not discuss divisions of property made solely for agricultural purposes that do not result in new service connections.

Commission Staff also questions whether, under the stated facts, the assessment of an Offsetting Improvement Charge is reasonable. The proposed assessment does not appear to advance the charge's stated purpose. The proposed acquirer has stated his intention to use the acquired property for agricultural purposes only and not to apply for water service to the acquired tract. He has contractually agreed with the federal government to use the property solely for agricultural purposes. The transaction, therefore has no discernable hydraulic effect upon Henry District's water distribution system. Assuming that an Offsetting Improvement Charge is assessed and that the acquired property remains undeveloped, the likelihood that either the transferor or the acquirer will be refunded the charge appears limited. Given the estimated cost of consolidating the tracts, consolidation of the tracts solely to recover the charge is not economical.

Based upon the above discussion, Commission Staff is of the opinion that Henry District may not assess an Offsetting Improvement Charge under the present facts. It respectfully suggests that Henry District consider revisions to its present rate schedule to address agricultural divisions of property and to ensure that such divisions are appropriately charge for their likely hydraulic effect on Henry District's distribution system. Commission Staff stands ready to assist the water district in such efforts.

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 Commission 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,



Thomas M. Dorman
Executive Director

cc: David Neville

¹ Case No. 2001-00393, The Tariff Filing Of Henry County Water District No. 2 To Add Tariff Language For An Offsetting Improvement Charge (Ky. PSC July 25, 2002).