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August 5, 2019

## PSC STAFF OPINION 2019-009

Roy B. Sawyers  
District Manager  
Mountain Water District  
P.O. Box 3157  
Pikeville, KY 41502

Re: Request for Staff Opinion

Dear Mr. Sawyers:

Commission Staff acknowledge receipt of your letter dated March 29, 2019, on behalf of Mountain Water District ("Mountain Water") in which you requested a Staff Opinion regarding the applicability of the Kentucky State Plumbing Code. Specifically, you indicated that the Kentucky State Plumbing Code requires that all buildings with installed plumbing fixtures and intended for human habitation, occupancy or use within the vicinity or within a reasonable distance of the public sewer "shall" be connected to the sewer. You then pose the following questions regarding the implementation of Kentucky State Plumbing Code:

1. "Whether the Commission allows for enforcement and/or penalties for non-compliance by a water or sewer district;"
2. "If so, does the enforcement fall solely on said district or in conjunction with other state and local agencies such as the local Department of Health, county government, etc.;"
3. "What penalties may be assessed for non-compliance;" and
4. "Would a tariff change be required of the district."

Commission Staff followed up with you on or about April 22, 2019 to clarify the nature of your questions. After discussing this matter with a representative of Mountain Water, Commission Staff understood that Mountain Water is seeking to enforce the Kentucky State Plumbing Code against property owners in its service area to compel them to attach to Mountain Water's sewage collection and treatment facilities where required by the plumbing code. Mountain Water seeks a staff opinion on whether it has authority to enforce the Kentucky State Plumbing Code against property owners in that

manner. This opinion is advisory in nature and not binding on the Commission should the issues addressed herein be formally presented for Commission resolution.

Mountain Water is a water district created pursuant to KRS Chapter 74.<sup>1</sup> There is no statute explicitly authorizing or prohibiting water districts, like Mountain Water, from enforcing the Kentucky State Plumbing Code. However, water districts are considered political subdivisions of the Commonwealth and county governments.<sup>2</sup> As political subdivisions of the Commonwealth, they may only exercise authority that has been legislatively conferred on them.<sup>3</sup> Thus, if the enforcement of the Kentucky State Plumbing Code does not fall within the functions assigned to water districts, Mountain Water would have no authority to enforce the code.<sup>4</sup>

The Kentucky State Plumbing Code was promulgated by the Department of Housing, Buildings, and Construction pursuant to KRS 318.130. The Department of Housing, Buildings, and Construction is authorized to enforce the plumbing code pursuant to KRS 318.180(1). Further, KRS 318.140(1) authorizes local governments to enforce the plumbing code, stating:

Any local government may, by ordinance, enact the Kentucky State Plumbing Code, regulating the construction, installation, or alteration of plumbing within such local government, providing for the issuance of plumbing installation permits and fixing permit and inspection fees. . . . The department may

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<sup>1</sup> Case No. 19009499, *Application for Approval of Merger Between Marrowbone Creek Water District, Shelby Valley Water District, Pond Creek Water District, and John's Creek Water District*, Order (Ky. PSC June 27, 1986) (order merging the existing districts in Pike County pursuant to KRS Chapter 74 to form "Mountain Water District").

<sup>2</sup> See *Public Service Com'n of Kentucky v. Dewitt Water Dist.*, 720 S.W.2d 725, 727 (Ky. 1986) ("There are approximately 115 water districts in the Commonwealth of Kentucky which are nonprofit political subdivisions of county government."); see also *Davis v. Powell's Valley Water Dist.*, 920 S.W.2d 75, 77 (Ky. App. 1995) (holding that a water district is a "political subdivision" of the Commonwealth as that term is used in KRS 61.101 *et. seq.*); *South Woodford Water District v. Byrd*, 352 S.W.3d 340, 343-4 (Ky. App. 2011) (holding that a water district is a political subdivision of the Commonwealth and is therefore entitled to immunity).

<sup>3</sup> See *Northern Kentucky Area Development District v. Snyder*, 570 S.W.3d 531, 533 (Ky. 2018) quoting *Herndon v. Herndon*, 139 S.W.3d 822, 826 (Ky. 2004) ("[A]dministrative agencies have no inherent authority and may exercise only such authority as may be legislatively conferred.' It is axiomatic that NKADD, as a state agency, only has the power that the General Assembly gives it."); see also *Northern Kentucky Area Planning Commission v. Cloyd*, 332 S.W.3d 91, 94 (Ky. App. 2010) (noting similarities between water districts and planning commissions relevant to their treatment as political subdivisions of the Commonwealth).

<sup>4</sup> Cf. *Appalachian Racing, LLC v. Family Trust Foundation of Kentucky, Inc.*, 423 S.W.3d 726, 736 (Ky. 2014) (internal quotations omitted) ("administrative agency is limited to a direct implementation of the functions assigned to the agency by the statute").

authorize any such local government or combination of local governments to administer, carry out, and enforce the Kentucky State Plumbing Code and the rules and regulations of the department relating thereto and to issue permits and make inspections thereunder within such local government, in which event a permit issued under the provisions of the local government plumbing code ordinance shall be deemed a permit issued by the department.

KRS Chapter 318 contains no definition of the term “local government” as used in KRS 318.140(1). Further, other Kentucky statutes have alternatively defined the term “local government” to both include and exclude entities like water districts.<sup>5</sup> However, KRS 318.140 refers to local governments enforcing the plumbing code after enacting it by ordinance. Water districts have no authority to enact ordinances. Further, statutes authorizing the promulgation of the Kentucky Building Code, which require the Kentucky State Plumbing Code to be incorporated into the building code, similarly provide for local government enforcement, but then refer only to “city, county, or state building inspector[s],”<sup>6</sup> which would indicate the local governments referred to are city and county governments. Thus, “local government,” as used in KRS 318.140, does not appear to include water districts formed pursuant to KRS Chapter 74 and, therefore, KRS 318.140 does not appear to provide Mountain Water direct authority to enforce the Kentucky State Plumbing Code.<sup>7</sup>

County or city governments would likely be “local government[s]” authorized to enforce the Kentucky State Plumbing Code under the circumstances identified in KRS 318.140, and there may be statutory authority authorizing them to delegate their enforcement authority to other public and private entities. For instance, KRS 198B.050(2) requires that the Kentucky State Plumbing Code be incorporated in to the Kentucky State Building Code, and KRS 198B.060 (15) authorizes local governments to contract with a “person, firm, or company” to enforce the Kentucky Building Code. KRS 198.060 (14) provides that:

A local government may associate with other local governments, and may seek the technical assistance of other

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<sup>5</sup> See, e.g. KRS 91A.0802 (“‘Local government’ means city, county, charter county, consolidated local government, urban-county government, or unified local government.”); KRS 65.027 (“‘local government’ means city, county, urban-county, consolidated local government, charter county, unified local government, or special district.”); see also KRS 74.010 (indicating that water districts must now be established pursuant to the procedures for establishing a “nontaxing special district”).

<sup>6</sup> KRS 198B.010.

<sup>7</sup> While it appears that water districts would not meet the definition of “local governments” as used in KRS 318.140, Commission Staff is not able to provide a specific definition that term as used therein, because the Commission’s jurisdiction to provide such interpretations is limited to interpreting the applicability of statutes to utilities.

agencies or area development districts in order to provide for the local enforcement of the Uniform State Building Code.

However, while “local government[s]” appear to have at least some authority to delegate their enforcement authority, water districts created pursuant to KRS Chapter 74 would not be able to accept that function if it is not within their statutory authority.<sup>8</sup>

Water districts created pursuant to KRS Chapter 74 are authorized by statute to provide water, sewage, and gas distribution services;<sup>9</sup> to operate fire protection districts;<sup>10</sup> and to engage in other activities necessary to provide those services.<sup>11</sup> With the exception of the operation of fire protection districts, which would be unrelated to the enforcement of the Kentucky State Plumbing Code, the services water districts are authorized to provide are utility services.<sup>12</sup> Consistent with the traditional rule in most if not all jurisdictions, the Commission has determined that a utility’s obligation to provide adequate service ends at the point where the utility’s facilities connect to the customers system, which is generally at the meter or near where the customer’s service line connects with the main if there is no meter.<sup>13</sup> Conversely, the Kentucky State Plumbing

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<sup>8</sup> See, e.g., *In re Advisory Opinion to Governor*, 627 A.2d 1246, 1251 (R.I. 1993) (holding that an agency may only delegate its authority to an outside agency if the agency delegating its authority has authority to make the delegation and the agency receiving the delegation has authority pursuant to its enabling statutes to engage in the activity being delegated).

<sup>9</sup> KRS 74.012 (indicating that the Commission may authorize the formation of a water district to provide water service); KRS 74.400 (authorizing water districts to operate gas distribution systems); KRS 74.407 (authorizing water districts to operate sewage collection and treatment facilities); see also KRS 74.408 (“The authority of a water district to establish water and gas distribution systems, and sewage treatment and disposal systems, having been recognized and established, it shall be the function of the board of commissioners of the water district to determine when, and in what order, each of these functions shall be commenced.”).

<sup>10</sup> KRS 74.075.

<sup>11</sup> See, e.g., KRS 74.040 (authorizing the board of commissioners of water districts to hire employees); KRS 74.070 (authorizing the board of commissioners of water districts to manage the water districts, to enter into contracts on behalf of the water districts; to establish bylaws consistent with KRS Chapter 74, to prosecute and defend suits on behalf of the water districts, and to hire a chief executive officer to carry on the work of the water districts).

<sup>12</sup> See KRS 278.010 (3) (defining a utility based on the services they provide, including water service, wastewater collection and treatment service, and gas distribution service).

<sup>13</sup> See 807 KAR 5:071, Section 8 (indicating that sewage utilities are responsible for maintaining pipes from the boundary line of the easement, public road, or street under which a main may be located but that the customer is responsible for maintaining the service line to any structure from that point); see also 807 KAR 5:066, Section 12(a) (indicating that water utilities are responsible for the meter and everything on the utilities side of the meter whereas the customer is responsible for facilities on the customers side of the meter).

Code regulates the construction of the customers' facilities.<sup>14</sup> Thus, enforcement of the Kentucky State Plumbing Code would not fall within Mountain Water's authority to provide water, sewage, and gas utility service.

The Commission has, in the past, found that water districts can permissibly collect fees within their service area for other services provided by local governments. For instance, in Case No. 2003-00276,<sup>15</sup> the Commission authorized Gallatin County Water District (Gallatin District), as part of a larger water supply agreement with the City of Warsaw, to contract to collect sewage and garbage collection fees in Gallatin District's service area within the city. However, it is not unusual for investor owned utilities to similarly collect those fees, which are at times imposed by ordinance, on behalf of local governments.<sup>16</sup> Thus, it is logical that water districts providing utility service would be permitted, in certain circumstances, to collect such fees on behalf of local governments in the same manner that other utilities collect those fees.

Conversely, other than refusing to connect to customers' facilities that might be deemed unsafe or improper,<sup>17</sup> the enforcement of building, electric, and plumbing codes on customers' premises is not a role traditionally filled by utilities.<sup>18</sup> Moreover, enforcement of the Kentucky State Plumbing Code would be much more involved than simply collecting a fee from existing customers on behalf of a local government. Among other things, it would likely require water districts to retain local government plumbing

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<sup>14</sup> See KRS 318.130 (requiring the Department of Housing, Buildings, and Construction to promulgate of the Kentucky State Plumbing Code to regulate "the construction, installation, and alteration of plumbing and plumbing fixtures and appliances, house sewers and private water supplies."); KRS 318.015(2) ("The state plumbing code . . . shall apply to and shall be in full force and effect for all public buildings regardless of location in the Commonwealth."); see also KRS 278.040 (2) (granting the Commission exclusive jurisdiction over utility rates and service in the Commonwealth).

<sup>15</sup> Case No. 2003-00276, *In the Matter of: The City of Warsaw's Service Contract with the Gallatin County Water District*, Order (Ky. PSC Dec. 10, 2003).

<sup>16</sup> See, e.g. Case No. 2010-00036, *Application of Kentucky-American Water Company for an Adjustment of Rates Supported by Fully Forecasted Test Year*, Order (Ky. PSC. Dec. 14, 2010) (discussing Kentucky American's practice of collecting sewage, garbage, and storm water fees on behalf of the Lexington-Fayette Urban County Government); see also *City of Lancaster v. Garrard County*, No. 2013-CA-000716, 2017 WL 3446983 (Ky. App. 2017) (where the court held that the county government had statutory authority to fund its 911 emergency telephone service by imposing a fee on each meter for water service to be collected by the city utility and water association); KRS 96.940 (allowing any "sewer body" and "water supplier" to contract for the joint collection of bills).

<sup>17</sup> See, e.g., 807 KAR 5:071, Section 8(4) ("If a governmental agency requires an inspection of the customer's plumbing, the sewage utility shall not connect the customer's service pipe until it has received notice from the inspection agency certifying that the customer's plumbing is satisfactory.").

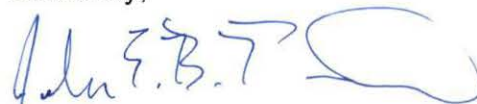
<sup>18</sup> Commission Staff have been unable to locate a single case in which a utility took on the role of enforcing building, electric, or plumbing codes.

inspectors that it would not otherwise have employed,<sup>19</sup> and it would likely require the district to institute and maintain actions to enforce the plumbing code.<sup>20</sup> Thus, enforcement of the Kentucky State Plumbing Code would be a significant undertaking outside of water districts' statutory authority and purpose to provide water, wastewater, and gas service, and it is wholly distinct from the collection of certain fees on behalf of local governments.

Commission Staff believes that Mountain Water is not authorized to enforce the Kentucky State Plumbing Code for the reasons discussed above. Further, while Commission Staff observed that KRS Chapter 318 appears to authorize the Department of Housing, Buildings, and Construction and certain local governments to enforce the plumbing code, Commission Staff declines to give a specific or definitive opinion on the authority of any other entities to enforce the code, because enforcement of the plumbing code does not fall within the regulation of utility service over which the Commission has jurisdiction. Moreover, because Commission Staff believes that Mountain Water, like other water districts, is not authorized to enforce the plumbing code, there is no reason to address whether enforcement of the code, in the context at issue, would require a tariff change or authorize Mountain Water to impose penalties on customers.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented as discussed above. However, Commission Staff does not represent Mountain Water or its agents and, therefore, this opinion should not be interpreted as legal advice from Commission Staff. Mountain Water should consult with its counsel if it wants to obtain legal advice regarding this matter. Further, this opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. To formally present the issues herein to the Commission, Mountain Water could file an application for a declaratory order pursuant to 807 KAR 5:001, Section 19. Questions concerning this opinion should be directed to Staff Attorney, Benjamin Bellamy, at (502) 782-2584.

Sincerely,

A handwritten signature in blue ink that reads "John E.B. Pinney" followed by a stylized flourish.

John E.B. Pinney,  
Acting General Counsel

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<sup>19</sup> See KRS 318.140 (2) (indicating local government plumbing inspectors must be licensed and have 8 years of experience as a master or journeyman plumber).

<sup>20</sup> KRS 318.140 (1)(authorizing local government enforcement actions); KRS 318.190 (indicating the courts that have jurisdiction to hear actions seeking to enforce the plumbing code).