

**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

ELECTRONIC PROPOSED ADJUSTMENT OF THE	)	CASE NO.
WHOLESALEWATER SERVICE RATES OF	)	2017-00417
LEBANON WATER WORKS	)	

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**SUR-REPLY IN OPPOSITION TO MOTION FOR AN ORDER ESTABLISHING  
A PROCEDURAL SCHEDULE AND ASSIGNING BURDEN OF PROOF**

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Comes now Marion County Water District (“Marion District”), by counsel, and for its sur-reply in opposition to the Motion for an Order Establishing a Procedural Schedule and Assigning Burden of Proof filed by the Lebanon Water Works Company (“Company”) on January 31, 2018,<sup>1</sup> respectfully states as follows:

The Company’s reply asserts that the Company “has not proposed to adjust any rate,” and that it is simply providing “notice to the Commission of this recalculation” of what it calls a “formulaic rate” set forth in the 1988 Master Water Purchase Agreement (“Master Agreement”).<sup>2</sup> This is a completely new argument raised for the first time in the Company’s reply. Indeed, the Company’s original motion never once characterizes either the Master Agreement or the tariff it filed with the Commission on September 13, 2017 as a “formulaic rate.” The reply should,

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<sup>1</sup> Marion District does not object to that portion of the Company’s motion seeking entry of a procedural schedule.

<sup>2</sup> See Company’s Reply, pp. 1, 2.



therefore, be seen for what it is – a clever attempt to resurrect a losing argument by re-labeling it as something different.

**1. The 1988 Master Agreement’s Method for Increasing Charges to Marion District is Not a Lawful “Rate”**

The Company essentially argues that the procedural process set forth in the Master Agreement is the “rate” that is at issue herein and that Section 8 of the Master Agreement is binding upon Marion District.<sup>3</sup> The problem with this argument, of course, is that it attempts to eliminate the role the Commission has to play in the setting of the rate that Marion District must pay to the Company in order to purchase water under the Master Agreement. The Company ignores the fact that any contractual requirement that works to defeat the Commission’s statutory jurisdiction over the charges that the Company may impose upon Marion District is *per se* unlawful under the Kentucky Supreme Court’s decision in *Simpson County*.<sup>4</sup> If the Master Agreement’s procedural process for changing the amount of the charges imposed by the Company against Marion District is the applicable “rate,” it is a contractual obligation against public policy and void as a matter of law. The Company’s argument that a contractual limitation upon the Commission’s statutory jurisdiction is somehow a binding rate, entitled to the force and effect of law, is simply illogical. The original procedural process which the Company defends as a “rate,” at least to the extent it precludes meaningful Commission review of proposed charges, is neither lawful nor enforceable.

The Company’s argument is also inconsistent with the June 30, 1997 Second Addendum to the Master Agreement which recognizes the Commission’s statutory authority to review proposed changes to the amounts charged by municipal utilities to jurisdictional utilities. The Second Addendum expressly provides that a proposed rate change is “subject to approval of the

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<sup>3</sup> See Company’s Reply, pp. 2-4.

<sup>4</sup> See *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994).

Public Service Commission for the Commonwealth of Kentucky....”<sup>5</sup> If anything, the process set forth in the Master Agreement, as amended in light of *Simpson County*, affirms that the Commission’s statutory obligation to assure that the Company’s rates are fair, just and reasonable under Kentucky law.

## **2. The Master Agreement Does Not Include a “Formulaic” Rate**

The Company’s next argument is that the Master Agreement established a “formulaic” rate that is simply being “recalculated” and, as a result, any protest of the Company’s increase by Marion District would equate to seeking a reformation of the Master Agreement. To support this new argument, the Company relies upon: (1) a Staff Opinion issued on November 21, 2007 that allegedly “repudiates” the Staff Opinion cited by Marion District; and (2) a Commission Order entered in Case No. 2007-00299. Both of those disputes did involve true, formulaic rates which were being recalculated. That is not the factual circumstance presented in this case, however. The distinction between a true formulaic rate and the so-called rate included in the Master Agreement is perhaps best evidenced by the omission of the alleged formulaic rate in the Company’s reply. Indeed, the only actual “formula” setting forth the manner of changing the amounts charged to Marion District is this vague statement:

Such rate modification shall be reasonably related to any demonstrated changes in the Company’s cost of operation of its business, and any rate change shall be made with the approval of the governing legislative body of the City of Lebanon.

...  
[Marion] District is not entitled to any separate or independent showing on the part of the Company as to the need or purpose of any such rate modification.<sup>6</sup>

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<sup>5</sup> See Company’s Memorandum, Thompson Testimony, Exhibit 5, p. 4.

<sup>6</sup> See *id.*, Exhibit 1, p. 6.

Characterizing the foregoing as a “formulaic rate” subject to “recalculation” is absurd. Indeed, the Commission has previously described what a real formulaic rate looks like. In Case No. 2007-00299, the Commission held:

On January 1, 2001, Morehead, Bath District, and Rowan Water, Inc. entered into an agreement for the sale and purchase of water. This agreement provides for the funding of the expansion of Morehead’s existing water treatment facilities to meet the projected future needs of the three utilities. It further provides a detailed methodology for allocating the cost of constructing and operating the proposed facilities. Bath District’s monthly payments for water consisted of three components: Monthly Capital Costs, Monthly Cash Operation and Maintenance Expense, and Meter and Billing Charge. The contract contains specific formulas to calculate each expense. The contract further provides for a recalculation of the components annually based upon Morehead’s actual expenses in the preceding fiscal year. The recalculated components are to be assessed beginning on January 1 of the following year.<sup>7</sup>

None of these components (or any other formula variables) are present in the Master Agreement that is implicated in this proceeding. There simply is no formulaic rate within the Master Agreement, despite the Company’s claim to the contrary. This argument must also be summarily rejected.

Likewise, the Company is incorrect in claiming that Commission Staff subsequently “repudiated” the February 16, 2007 Staff Opinion previously cited by Marion District in its response.<sup>8</sup> While the Commission Staff did issue a subsequent Staff Opinion that clarified the February 16, 2007 Staff Opinion was not applicable in light of additional information provided by the requesting party, nowhere does the subsequent Staff Opinion state or imply that the point of

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<sup>7</sup> *In the Matter of the Purchased Water Adjustment of Bath County Water District*, Order, Case No. 2007-00299 (Ky. P.S.C. Sep. 26, 2007).

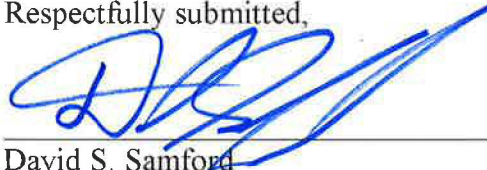
<sup>8</sup> See Reply, p. 2.

law expressed in its original Staff Opinion was somehow a mis-statement of the law. This additional argument by the Company should also be afforded no weight.

The Commission has already correctly held that the Company bears the burden of proof in this case in the Order entered on November 13, 2017. The Company did not seek rehearing of that Order and has failed to offer even a single convincing argument as to why the Commission's Order was in error. Accordingly, the Company's motion to reassign the burden of proof in this case should be overruled.

This 16<sup>th</sup> day of February, 2018.

Respectfully submitted,



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David S. Samford  
L. Allyson Honaker  
GOSS SAMFORD, PLLC  
2365 Harrodsburg Road, Suite B-325  
Lexington, Kentucky 40504  
(859) 368-7740  
david@gosssamfordlaw.com  
allyson@gosssamfordlaw.com

and

Kaelin G. Reed  
The Law Office of Mattingly & Nally-Martin, PLLC  
P.O. Box 678  
104 West Main Street  
Lebanon, Kentucky 40033  
(270) 692-1249  
kaelin@mattinglylawoffices.com

*Counsel for Marion County Water District*

**CERTIFICATE OF SERVICE**

This is to certify that foregoing electronic filing is a true and accurate copy of the document being filed in paper medium; that the electronic filing was transmitted to the Commission on February 16, 2018; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that a copy of the filing in paper medium is being hand delivered to the Commission on this the 16<sup>th</sup> day of February.



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*Counsel for Marion County Water District*