

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

In the Matter of:

PROPOSED ADJUSTMENT OF THE WHOLESALE )  
WATER SERVICE RATES OF CENTRAL CITY ) Case No. 2019-00260  
MUNICIPAL WATER & SEWER )

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**REPLY OF CENTRAL CITY  
IN SUPPORT OF ITS  
MOTION FOR RECONSIDERATION**

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In its Motion for Reconsideration, the City of Central City directly addresses the two concerns the Commission expressed when it established this case. Central City explained how the proposed projects funded by Rural Development (“RD”) would help to provide service to Muhlenberg County Water District and Muhlenberg County Water District No. 3 (the “Water Districts”) and how Central City substantially complied with the contracts. The Water Districts did not provide any information or argument to rebut Central City on these two issues. Instead, the Water Districts presented two flawed arguments that should be rejected by this Commission. Central City, by counsel, accordingly provides the following Reply to address the Water Districts’ faulty arguments.

**I. KRS 278.400 does not relate to Central City’s Motion because the Commission did not make a determination on a hearing.**

The Water Districts argue that Central City’s Motion for Reconsideration should be denied because it failed to meet procedural deadlines set forth in KRS 278.400. Central City’s Motion for Reconsideration, however, was not filed under the authority of KRS 278.400, and its statutory provisions do not apply.

Despite quoting a portion of the statute, the Water Districts omit the opening clause of KRS 278.400, which limits its scope by stating, “After a determination has been made by the commission in any hearing . . . .” (Emphasis added.) The statute specifically mentions that it will apply after a decision is made on any hearing. In the present circumstances, no hearing was held to assist the Commission in making a decision. It was merely an initial order of the Commission that established this case.

As of the date that the Commission issued its order, the Commission did not have sufficient facts to make a final determination on the issues that it raised. Rather, the Commission merely established this case because the Commission had initial questions on whether Central City’s proposed project is related to providing the Water Districts service and whether Central City complied with certain contractual provisions. Central City has now—for the first time in its Motion to Reconsider<sup>1</sup>—had an opportunity to present facts to address the Commission’s concerns. (And, notably, the Water Districts have not provided any response to those two issues.) Accordingly, there has not been a determination based on any hearing, such that the deadlines of KRS 278.400 are triggered.

Moreover, there would be an absurd impact on all cases if the Water Districts’ argument that KRS 278.400 applied to the Commission’s initial order. For example, if KRS 278.400 applied to interim Commission orders, no party could request for a change in the initial procedural schedule more than 23 days after the order was issued. That rule would even apply to intervenors who may not know they need a change in the procedural schedule until their testimony is due eight weeks after the initial order is issued. Such an absurd result is not what the General Assembly intended when it enacted KRS 278.400.

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<sup>1</sup> For this reason, it could have been styled differently, including “Motion to Adopt the Proposed Rate based on Prior Review and Oversight of a Federal Agency.”

Because KRS 278.400 does not apply to Central City's Motion, the Water Districts' argument must be rejected.

**II. The Commission has explicitly recognized that approval of a City's proposed rate set forth by Rural Development is supported by the policy expressed in KRS 278.023.**

The Water Districts argue that KRS 278.023 does not apply to cities. Central City does not dispute that KRS 278.023 does not "explicitly apply to cities," as the Commission has previously stated.<sup>2</sup> But the Commission also held that approval of a City's proposed rate that is based on the minimum rate set forth by RD complies with the policy of the General Assembly as expressed in that statute.

The Commission's holding is consistent with the express declaration of policy codified in KRS 278.023, which states:

Because federal financing of such projects entails prior review and oversight by the federal agency and obligates the utility to certain actions, and because conflicting requirements by the federal agency and the Public Service Commission may place the water utility in an untenable position and delay or jeopardize such projects, it is declared to be the policy of the Commonwealth that such agreements shall be accepted by the Public Service Commission, and that the commission shall not prohibit a water utility from fulfilling its obligations under such an agreement.<sup>3</sup>

The Water Districts' argument that the legislative history of KRS 278.023 supports their position is flawed. As a general rule of statutory construction, judicial bodies need not rely on legislative history in these cases. As the Supreme Court said, "Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's

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<sup>2</sup> *City of Harlan*, Case No. 2003-00358 (Ky. PSC Oct. 24, 2003).

<sup>3</sup> KRS 278.023(1).

legislative history.”<sup>4</sup> In this case, there is no need to resort to legislative history because the General Assembly clearly articulated its policy that agreements between RD and water utilities “shall be accepted by the Public Service Commission, and that the commission shall not prohibit a water utility from fulfilling its obligations under such an agreement.”

Even if the Commission were to look to the legislative history, it would find support for Central City’s position. “A universally accepted rule of statutory construction is that the General Assembly is presumed to know the status of the law and the constructions placed on it by the courts.”<sup>5</sup> No court nor Commission has ever determined that the underlying policy behind KRS 278.023 should not apply to cities. In fact, ever since this Commission’s 2003 decision in *City of Harlan*, the General Assembly knew the status of the law and the construction that has been placed on KRS 278.023 by this agency. There has never been a need to amend KRS 278.023 because of the Commission’s prior decision.

**III. The Water Districts have failed to respond to the two issues that were of specific concern to the Commission and that were specifically addressed by the City.**

The Water Districts’ last argument is that “Central City has not yet met its burden of showing the facts of the City of Harlan case and this case are the same.” Central City’s Motion for Reconsideration (and the Water Districts’ response) demonstrates that this argument cannot be supported by facts. In the Commission’s order, it determined that the circumstances of Central City’s proposed rates may differ from those of Harlan’s 2003 proposed rates based on two factors: (1) the record is not yet clear on whether Central City’s proposed project is related to the provision of water service to the wholesale customers and (2) whether Central City

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<sup>4</sup> *Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011)

<sup>5</sup> *Givens v. Commonwealth*, 359 S.W.3d 454, 464 (Ky. App. 2011)(quoting the dissent of Justice Lambert in *Butler v. Groce*, 880 S.W.2d 547, 550 (Ky. 1994)).

complied with certain procedural requirements set forth in contracts with the wholesale providers. Central City explained in detail how the proposed project is related to serving the Water Districts and how it has substantially complied with the contracts. The Water Districts did not provide any response to Central City's support that the proposed projects will assist in providing service to the Water Districts and that the City substantially complied with the contracts.

A party concedes arguments that are not raised in its response.<sup>6</sup> In this case, the Water Districts have not presented any argument that Central City's proposed projects are related to providing the Water Districts service or that Central City has substantially complied with the contacts. Accordingly, the Water Districts have waived opposition to those positions.

#### **IV. Conclusion**

The Supreme Court has stated it well: "In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly." The intent of the General Assembly is codified in KRS 278.023: "the commission shall not prohibit a water utility from fulfilling its obligations under such an agreement." This Commission has acknowledged and confirmed this policy by approving the City of Harlan's proposed rate that was based on RD requirements. In the order establishing this case, the Commission mentioned two issues that may be distinguishing features between this case and the *City of Harlan* case. Central City has now provided the Commission with information to address its concerns, and the Water Districts have conceded those points through their silence. Accordingly, the Commission should grant Central City's

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<sup>6</sup> *Humphrey v. United States Att'y Gen.'s Office*, 279 F. App'x 328, 331 (6th Cir. 2008) (stating that where a party failed to respond to argument, any opposition was waived).

motion and approve Central City's proposed volumetric rate of \$3.31 per 1,000 gallons to the Water Districts.<sup>7</sup>

Respectfully submitted,



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M. TODD OSTERLOH  
JAMES W. GARDNER  
STURGILL, TURNER, BARKER & MOLONEY, PLLC  
333 W. Vine Street, Suite 1500  
Lexington, Kentucky 40507  
Telephone No.: (859) 255-8581  
tosterloh@sturgillturner.com

ATTORNEYS FOR CITY OF CENTRAL CITY

### CERTIFICATE OF COMPLIANCE

In accordance with 807 KAR 5:001, Section 8(7), this is to certify that the City of Pikeville's September 3, 2019, electronic filing is a true and accurate copy of the documents being filed in paper medium; that the electronic filing has been transmitted to the Commission on September 2, 2019; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that an original and a copy of the filing are being delivered to the Commission within two (2) business days.



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Counsel for City of Central City

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<sup>7</sup> The Water Districts request oral argument. Although Central City is not opposed to oral argument, it notes that the legal arguments have been presented in writing by the parties.