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July 22, 2019

Ms. Gwen R. Pinson
Executive Director
Public Service Commission
P.O. Box 615
Frankfort, KY 40602

Re: TFS2019-00357
Wholesale Provider: City of Central City, Kentucky
Wholesale Purchaser: Muhlenberg County Water District

Dear Ms. Pinson:

On June 24, 2019, the City of Central City, Kentucky (“Central City”) filed with the Kentucky Public Service Commission (the “Commission”) notice of a proposed adjustment of its rate for wholesale water service to Muhlenberg County Water District (“MCWD”) to \$3.31 per 1,000 gallons from \$2.63 per 1,000 gallons. According to this notice, Central City’s proposed adjustment is to become effective on July 31, 2019.

For the reasons outlined below, the Commission should not approve Central City’s proposed wholesale rate. Instead, MCWD requests that the Commission initiate a formal proceeding to evaluate the reasonableness of the proposed water service rate increase.

1. Central City failed to provide sufficient information and justification for the proposed wholesale rate increase. On the date the notice of the proposed adjustment was filed with the Commission, counsel for Central City provided a courtesy copy of the filing to MCWD. Prior to this filing, Central City had not communicated with MCWD concerning the proposed wholesale rate increase nor had Central City provided any information

regarding the proposed increase. Based upon the limited information contained in Central City's notice, MCWD is unable to ascertain whether the proposed rates are based upon Central City's actual cost of providing water service to MCWD, as required in Paragraph 11 of the Water Purchase Contract between Central City and MCWD (the "Contract").¹ Furthermore, because the notice does not contain any calculations or details regarding how the proposed rates were derived, MCWD is unable to determine whether the proposed adjustment is consistent with the methodology set forth in Paragraph 13 of the Contract.

2. Central City has ignored the notice requirements included in the Contract. Paragraph 14 of the Contract requires Central City to notify MCWD in writing of any proposed rate adjustment or modification to the wholesale rate within five (5) business days after the Central City Municipal Water and Sewer Board (the "Water and Sewer Board") recommends a wholesale rate adjustment. This provision is intended to permit MCWD the opportunity to review any proposed rate adjustment and to submit comments to the Central City City Council prior to final action on such recommendation. Central City has not provided any notice to MCWD concerning the requirements of Paragraph 14. Because of Central City's failure to disclose if or when the Water and Sewer Board recommended the rate increase, MCWD is unsure whether Central City's Water and Sewer Board has even recommended the new wholesale rate.
3. In addition to the lack of notice, MCWD is also unsure whether the Central City City Council has formally adopted the new wholesale rate. Pursuant to Paragraph 15 of the Contract, the effective date of the new wholesale rate must be at least 30 days after Central City adopts the new rate. Formal procedures must be followed in order for adoption to occur. The Central City City Council must enact an Ordinance to adopt the proposed rate. This requires two readings by the Central City City Council and publication in the

¹ Water Purchase Contract was executed by Central City and MCWD on June 20, 2011 and approved by the Commission on March 17, 2013. The Contract is on file with the Commission.

- newspaper. Central City has not provided any information concerning whether it has enacted a new rate Ordinance.
4. Paragraph 16 of the Contract establishes the Muhlenberg Joint City-County Water Production Planning Committee (the “Joint Planning Committee”). Some of the primary purposes of the Joint Planning Committee include the facilitation of communications between Central City and MCWD and the planning of future water treatment plant expansions or other water production improvements. Unfortunately, the Joint Planning Committee has not met in over 18 months and may have been disbanded causing this channel of communication between the parties to break down. Because of the lack of communication and the inadequate information received from Central City, MCWD does not know the reason for the proposed increased rate or for what purpose the funds from Rural Development will be used.
 5. KRS 278.023 requires the Commission to accept contracts between certain water utilities and the U.S. Department of Agriculture and states that the Commission shall not prohibit a water utility from fulfilling its obligations under such agreements. In its notice, Central City asserts that KRS 278.023 applies to municipal utilities and therefore the Commission must accept the agreement between Central City and Rural Development. This position is contrary to the clear and unambiguous language of that statute. The text of KRS 278.023 does **not** include a city as one of the applicable entities. The pertinent section of KRS 278.023 reads:
 - (1) The provisions of this section shall apply to any construction project undertaken by a ***water association, commission, district, or combined water, gas or sewer district formed under KRS Chapter 74 or 273***, which is financed in whole or in part under the terms of an agreement between the water utility and the United States Department of Agriculture or the United States Department of Housing and Urban Development. 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.” (emphasis added)

The notice filed with the PSC and sent to MCWD included an order from Case No. 2003-00358² that authorized the City of Harlan to charge the rates specified by Rural Development. Diligent research has revealed this case as the only case that allows a municipal utility to take advantage of KRS 278.023. The Harlan Order appears to be an aberration.

The legislative history of KRS 278.023 does not support Central City’s suggestion of a policy that exempts municipal utility’s wholesale rates from Commission jurisdiction if such rates are specified in a Rural Development letter of conditions. In the 25 years following the issuance of the Kentucky Supreme Court’s decision in *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994), there has been no action by the General Assembly to modify KRS 278.023 to include municipal utilities within its coverage. When the General Assembly last amended KRS 278.023 in 1994,³ it made no effort to place cities within the statute’s coverage even though *Simpson County Water District* had been issued several months earlier. If the General Assembly had intended for KRS 278.023 to apply to cities, it would have done so.⁴

² *Proposed Adjustment of the Wholesale Water Service Rates of the Harlan Municipal Water Works*, Case No. 2003-00358, Order (Ky. PSC Oct. 24, 2003).

³ 1994 Ky. Acts 333-334.

⁴ See, e.g., *Boone County Water District v. Public Service Commission*, 949 S.W.2d 588, 591 (Ky. 1997) in which a Commission interpretation of KRS Chapter 278 that would have made sewage collection facilities subject to the Commission’s jurisdiction was rejected. “If the legislature had wanted activities pertaining to sewage collection and transportation to be regulated by the Public Service Commission, it would have specifically so stated in Chapter 278

Despite Central City's reliance upon the Commission's decision in Case No. 2003-00358, the Commission has no authority to carve out by interpretation an exception to its required review of municipal utility rates under KRS 278.200. The statute contains no exception for a municipal utility with a Rural Development letter of conditions. Neither does KRS 278.023. The Commission is under the same limitation as a reviewing court and "is not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used" in those statutes.⁵

Counsel for MCWD has extensively searched the Commission's orders and has found no others in which the Commission expressed views similar to those expressed in its decision in Case No. 2003-00358. The Commission has had several recent opportunities to incorporate the views expressed in Case No. 2003-00358 into 807 KAR 5:069, its administrative regulations dealing with federally funded construction projects. This regulation has been amended four (4) times since 2013. In each instance, the Commission chose not to redefine "water utility" as used in that regulation to include a city-owned utility, but continued to limit that term to only water districts and water associations. The Commission's failure to include municipal utilities within the definition of "water utilities" indicates a clear rejection of the view expressed in Case No. 2003-00358.

6. The Rural Development Letter of Conditions to Central City is dated March 23, 2018. Central City has not provided any information whatsoever to MCWD concerning the purpose of the proposed \$850,000 loan from Rural Development. Therefore, it is unknown to MCWD whether the proposed Rural Development Project is related to Central City's water treatment plant, other water production improvements, other improvements to enhance Central City's ability to provide wholesale water service to

of the Kentucky Revised Statutes. The legislature did not do so."

⁵ *Commonwealth v. Garnett*, 8 S.W.3d 573, 575-576 (Ky. Ct. App. 1999).

MCWD, or some other improvements **unrelated** to providing wholesale water service to MCWD.

7. Furthermore, Central City has not provided any information to indicate that it is actively pursuing the proposed Rural Development Project.

SUMMARY

Pursuant to KRS 278.190, KRS 278.200, and the Kentucky Supreme Court's holding in *Simpson County Water District*, the Commission has jurisdiction over the wholesale rates charged by a city to a jurisdictional utility. MCWD respectfully requests that the Commission initiate a formal proceeding to investigate the reasonableness of the proposed rate, establish a procedural schedule that allows for discovery, and issue all orders necessary to ensure that the proposed rate is not placed into effect or otherwise assessed until after the Commission investigates the reasonableness of the proposed wholesale rate.

MCWD further requests that the Commission consider consolidating this proceeding with the Muhlenberg County Water District No. 3 proceeding since both proceedings rely on common questions of law and fact. MCWD further requests that, pursuant to 807 KAR 5:001, Section 8, the Commission direct the use of electronic filing procedures for such proceeding.

Sincerely,

Stoll Keenon Ogden PLLC



Damon R. Talley

DRT

cc: Muhlenberg County Water District
Todd Osterloh, Attorney for Central City