Memo

To: David Twiggs, COO General Manager
From: Jason Charles Temple, PE, Director of Public Works
Linda Mayhood, Assistant General Manager

Date: December 16, 2015
Re: Agreement for Wholesale Water Service to Paron Owensville Water Authority

Per the Board of Director’s approval on January 27, 2015 to pursue surplus wholesale water sales, the Public Works Department began discussions with Paron Owensville Water Authority (POWA) about a future long-term Wholesale Water Agreement. A final version of a Wholesale Water Agreement is complete and ready for board review and approval. Included with the Agreement is the Letter from John Bethel, Director of the Public Service Commission (PSC), stating his opinion that selling wholesale water to POWA would not cause Hot Springs Village to become a public utility subject to regulation by the PSC. The Agreement has been reviewed by Don M. Schnipper, legal counsel, with his comments incorporated into the current Agreement.

The existing emergency water connection located at the intersection of Highway 5 and DeSoto Blvd at the Bank of the Ozarks side will continue to serve as the point of delivery under the terms of the Agreement. The connection is limited to a 2-inch water metered connection thus restricting the flow to that of a small rural water line. The cost of the meter installation was approximately $2,000 and paid for by the POWA.

Staff recommends the wholesale water rate be based on the current HSV Commercial Water Rate ($3.48/1000 gallons) that is based on our recent utility rate study plus 15%. The wholesale water rate for 2016 will be $4.00 per 1,000 gallons for water used.

Staff recommends the Board review and approve at the next board meeting the proposed Wholesale Water Agreement as a long-term agreement for water service to the POWA.
September 22, 2014

Mr. Jason Charles Temple
Public Works Director
Hot Springs Village Property Owners' Association

Dear Mr. Temple:

I am responding to your August 25, 2014 letter asking whether a contract between the Hot Springs Village Property Owners' Association’s Public Works (HSVPOAPW) to sell water at wholesale to a local community water association would cause HSVPOAPW to become a public utility subject to regulation by the Arkansas Public Service Commission. In our telephone conversation today, you also asked whether the provision of sewer services by HSVPOAPW to adjacent areas as HSVPOA members or as an improvement district or users association would cause HSVPOAPW to become a public utility subject to regulation by the Arkansas Public Service Commission. Based upon the information you have provided, it does not appear that the circumstances you describe would cause HSVPOAPW to become a public utility subject to regulation by the Arkansas Public Service Commission. Please be aware that this advice represents my opinion on behalf of the Arkansas Public Service Commission's General Staff and does not represent an official determination of the Arkansas Public Service Commission. If you need additional information, please contact me.

Sincerely,

John P. Bethel

[Signature]
AGREEMENT FOR WHOLESALE WATER SERVICE

THIS AGREEMENT FOR WHOLESALE WATER SERVICE (hereinafter called "Agreement"), made and entered into this ______ day of ________, 20___ by and between Paron-Owensville Water Authority, 24000 Highway 9, Paron, AR 72122 (hereinafter called "POWA") and Hot Springs Village Property Owners Association, 895 DeSoto Blvd., Hot Springs Village, Arkansas 71909 (hereinafter called "HSVPOA").

WITNESSETH THAT:

WHEREAS, HSVPOA owns and operates a Community Public Water System (as defined by the Arkansas Department of Health) that provides water service to the Hot Springs Village Community currently has capacity in excess of that need to serve its present customers, all of which are located within its boundary; and

WHEREAS, POWA owns and operates a Community Public Water System that provides water service to the communities of Paron and Owensville, and environs thereto, desires to purchase potable treated water from HSVPOA for use and consumption by its retail water customers; and

WHEREAS, while the Declaration (Article VI, Section 1) prohibits the sale of water and sewer utilities outside the boundaries of HSVPOA, said Section also allows such sale to other entities than HSVPOA owners after the Association has complied with Arkansas law relative to such water and sewer sales to the public for compensation; and

WHEREAS, the Arkansas Public Service Commission has been notified of the proposed sale of water to POWA, and the Director of such agency has responded in writing that said PSC would not regulate the sale by HSVPOA of wholesale water and sewer utilities to other entities; and

WHEREAS, HSVPOA desires to sell POWA potable treated water.

NOW, THEREFORE, POWA and HSVPOA, in consideration of mutual promises and covenants herein contained, do hereby agree as follows, to-wit;

ARTICLE 1 DEFINITIONS

1.0 References to “water” in sections following of this Agreement means water conforming to drinking water standards of the Arkansas Department of Health applicable to Community Public Water Systems.

1.1 All capitalized words and terms not otherwise defined herein shall have the meaning set forth below unless the context implies or infers a contrary or different meaning.

(1) "Agreement" shall mean this Wholesale Water Agreement by and between HSVPOA and POWA.
(2) "Commencement Date" shall mean the date that HSVPOA commences the delivery of water to POWA.

(3) "Delivery Point" shall mean the location where POWA’s water distribution system is to be connected to HSVPOA’s water distribution system in vicinity of the intersection of State Highway 5 and Desoto Blvd., Hot Springs Village.

(4) "Delivery Point Facilities" shall mean the facilities required at the Delivery Point to complete the connection of HSVPOA and POWA water systems consisting of a water meter, backflow preventer, connecting piping and other appurtenances.

(5) "Domestic Usage" shall mean water used for household purposes, such as drinking, food preparation, bathing, washing clothes and dishware, flushing toilets, and watering lawns and gardens.

ARTICLE 2  TERM OF AGREEMENT

The Effective Date of this Agreement shall be the date first mentioned above and the Commencement Date will be sometime thereafter allowing the necessary time to construct the Delivery Point Facilities. The initial term of this Agreement shall be two (2) years from the Commencement Date unless otherwise sooner terminated. Notwithstanding, the term of this Agreement shall automatically be extended for up to three (3) one (1) year terms upon expiration of each term unless either party services notice in writing to the other party, as specified elsewhere herein, at least six (6) months prior to the expiration of the then current term of its intent to terminate this Agreement upon expiration of the then current term.

ARTICLE 3  HSVPOA OBLIGATIONS

3.0 HSVPOA agrees to furnish POWA, during the term of this Agreement up to, but not exceeding, one hundred fifty thousand (150,000) gallons of water per day for Domestic Usage subject to the limitations set forth herein including Force Majeure events.

3.1 HSVPOA is responsible for constructing, installing and maintaining, at POWA’s expense, a 2-inch master meter sized to provide a flow rate of two hundred (200) gallons per minute intended for POWA’s Domestic Usage, including piping, valving, and appurtenance thereto at the Delivery Point. POWA hereby acknowledges that the aforesaid flow rate is not adequate to meet flow rates that it needs for firefighting purposes, that it is solely responsible for providing water from other sources for said purposes; and that HSVPOA is not responsible for providing flows needed for said purposes hereunder and thus is not liable for any losses or damages whatsoever to POWA or its customers, or any other party resulting either directly or indirectly from inadequacies in connection therewith.

3.2 HSVPOA does not guarantee any specific pressure at the Delivery Point. Notwithstanding, POWA hereby acknowledges that the pressure will likely vary widely depending on water usage by HSVPOA customers, usage for firefighting, equipment.
breakdown, power outages and other system operational factors, and from time to time, be too low to provide flow through the meter and such variations are not deemed a breach of this Agreement.

ARTICLE 4  POWA’S OBLIGATIONS

4.0 During the term hereof, and under the terms and conditions set forth herein, POWA agrees to purchase a monthly usage of at least ten thousand (10,000) gallons of water from HSVPOA, and will receive the water at the Delivery Point. POWA agrees not to diminish the quantity of water it purchases from HSVPOA below the aforesaid average quantity during the term hereof for any reason, including other sources of supply becoming available to it, except in response to reduction in demand resulting from the consensual transfer of POWA’S customers to another Community Public Water System as a result of agreements relating to their expansion and transfer of customers pursuant thereto. POWA agrees to pay HSVPOA for the aforesaid minimum quantity usage per month notwithstanding its actual usage being less.

4.1 POWA is responsible for constructing and maintaining, at its expense, all improvements to its water system, including but not limited to, water mains, pumping facilities, pressure reducing devices, storage facilities, and system controls downstream of the Delivery Point meter required to transport water from the Delivery Point into its water system. In addition, POWA shall install and maintain a reduced pressure backflow preventer conforming to applicable Arkansas Health Department standards and meeting the approval of HSVPOA immediately downstream of the of the Delivery Point meter. Further, POWA, at its expense, shall have the backflow preventer inspected and tested by a testing technician licensed by the Arkansas Department of Health at least one time per year or more frequently as may be required by said Department.

4.2 If the Delivery Point is not adequate to provide the aforesaid maximum usage flow HSVPOA, at POWA’S written request, will evaluate the feasibility of additional delivery point(s) and if deemed feasible by HSVPOA, in its sole discretion, will allow an additional delivery point predicated on POWA’S agreement to pay all costs in connection with the construction of all improvement required in connection therewith including any improvements to HSVPOA’s water system.

ARTICLE 5  RATES, BILLING AND METERING

5.0 The water rate in effect during the two year period following the Commencement Date shall be ______dollars and ______cents ($______) per one thousand (1,000) gallons. At the beginning of each year of the term thereafter HSVPOA, in its sole discretion, may increase the rate in an amount equal to the percentage increase in the rate for its customers during the previous year or the increase in the Consumer Price Index-All Urban Consumers for the previous year. HSVPOA shall give POWA at least one hundred twenty (120) days notice prior to the effective date of all such increases.
5.1 HSVPOA will send an invoice to POWA on a bimonthly billing cycle for water usage during the preceding two months and POWA agrees to pay HSVPOA no later than twenty (20) calendar days after receipt. Payments paid after the due date are considered delinquent and shall be subject to a late payment charge of six (6%) percent per month or part thereof. HSVPOA shall have the right to discontinue service upon thirty (30) days written notice in the event payments are delinquent for a period exceeding forty five (45) calendar days.

5.2 Metering

(1) The quantity of water delivered by HSVPOA to POWA shall be based upon the Deliver Point meter readings taken jointly by representative of HSVPOA and POWA on or about the first day or each month.

(2) The Delivery Point meter shall be calibrated prior to placement in service unless new and the accuracy has been certified by the manufacturer to the satisfaction of both parties hereto and each year thereafter during the term of this Agreement by an independent technician having training and experience in the calibration of meters of the type installed and whose engagement meets the approval of both parties hereto. The cost thereof shall be shared equally by the parties. In addition POWA and HSVPOA shall each be entitled to calibrate the aforesaid meter on a more frequent basis than annually, provided, however, that the cost of such more frequent calibration shall be borne by the party requesting the calibration unless the calibration results in an adjustment of greater than three (3%) percent in which case the cost of the calibration shall be shared equally. All calibration results shall be shared by the parties.

ARTICLE 6 CURTAILMENT OF WATER USAGE

6.0 In the event of an extended shortage of water, or the supply of water available to HSVPOA is otherwise diminished over an extended period of time, the supply of water to the POWA'S consumers shall be similarly reduced or diminished. The POWA shall utilize all reasonable and necessary means to curtail its usage and demand for water during the time of such a shortage. HSVPOA will notify POWA by the most practical means available of any temporary or partial failure to deliver water as soon as it practically can do so.

6.1 In the event it becomes necessary for HSVPOA to impose usage restrictions on its customers due to excess demand on HSVPOA'S water system, then POWA agrees to likewise take similar steps to reduce its water demand from HSVPOA'S system.
ARTICLE 7

NOTICES

All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed given on the date such notice is delivered by hand or facsimile transmission or three days after the date mailed by registered or certified mail, postage prepaid, to the parties at the following addresses:

HSVPOA:  Hot Springs Village Property Owners Association
          Attn: Director of Public Works
          895 DeSoto Blvd.
          Hot Springs Village, Arkansas 71909

POWA:  Paron-Owensville Water Authority
        Attn: System Manager
        P.O. Box 68, 24000 Highways 9, Paron, AR 72122

ARTICLE 8

FORCE MAJEURE

8.0 The provisions of this Article shall control over any other provisions in this Agreement which may be construed as contradictory or inconsistent with the provisions of this Article. If HSVPOA or POWA is forced to suspend, reduce, or interrupt water service because of any emergency conditions, reasonably beyond the control of either party including without limitation, floods, fires, ice, wind, storms, lightning, equipment failure, strikes, lockouts, Acts of God or of the public enemy, or acts, orders or directives of the Federal or State or local governmental agencies or Court, then the performance of their respective obligations hereunder are excused provided the parties take reasonably practicable action to eliminate or otherwise overcome the causes therefor.

ARTICLE 9

GENERAL PROVISIONS

9.0 The water supplied under this Agreement is supplied upon the express condition that after it passes the Delivery Point meter, it becomes the property of POWA and HSVPOA shall not be liable for low or high pressure or damage to any person or property whatsoever resulting directly or indirectly from the use, misuse or presence of said water on POWA premises, or elsewhere, except where such loss or damage can be shown to have been the direct result of gross negligence on the part of HSVPOA, its agents or employees.

9.1 HSVPOA does not guarantee that the supply of water hereunder will be free from interruption, and it is agreed that interruption of HSVPOA’S service occasioned by any of the causes mentioned shall not constitute a breach of this Agreement on the part of HSVPOA, and HSVPOA shall not be liable to POWA for damages resulting there from. In the event of interruption to service, HSVPOA will restore the service as soon as it can reasonably do so, and will at all times exert itself toward the end of supplying as nearly constant service as is reasonably practical. In case of impaired quantity or quality of service, POWA shall
immediately give notice to HSVPOA by telephone, confirming such notice in writing on the same date as such notice is given. HSVPOA agrees to notify POWA whenever practical of planned interruptions necessary for the maintenance or operation of its facilities. Likewise, POWA agrees to make available any excess water supply under its control to assist HSVPOA customers during times of outage within HSVPOA water service territory under similar conditions.

9.2 It is expressly understood and agreed that the water delivered hereunder is solely for the use of and consumption by POWA and its retail customers.

9.3 Each party assumes all responsibility on its side of the Delivery Point for the water supplied or taken as well as for all of its water system facilities and shall indemnify and save harmless the other party from and against all claims for injury or damage to persons or property occasioned by, or in any way resulting from, such service or the use thereof on its respective side of the Delivery Point. However, if there is any loss of water by POWA which is the direct and proximate result of the actions of HSVPOA, then HSVPOA agrees not to charge POWA for such water loss.

ARTICLE 10 WAIVERS

10.0 Any waiver at any time by either of the parties hereto of its rights with respect to a default under this Agreement shall not be deemed a waiver with respect to any subsequent default or matter. Any delay short of the statutory period of limitation in exerting or enforcing any right shall not be deemed a waiver of such right. Nothing herein contained, however, nor any action taken by either of the parties as a remedy for breach of this Agreement by the other party shall impair any other remedy which such party may have at law or in equity for any breach of this Agreement.

10.1 Severability. Even if one or more provisions of this Agreement is found to be invalid by a Court of competent jurisdiction, all other conditions and covenants herein shall remain in full force and effect. Provided, that no provision or requirement of this Agreement shall be understood or interpreted to require or cause either of the parties to do or suffer to be done any act which would adversely affect the tax exempt status for federal income tax purposes of any bond financing or other debt instrument issued by such party. If in the opinion of a firm of nationally recognized municipal bond counsel selected by HSVPOA or POWA any provision of this Agreement, or the application of any provision of this Agreement to a particular fact of circumstance, would adversely affect the tax exempt status of any bond financing or other debt instrument previously issued or to be issued in the future, such provision shall be deemed to be amended, modified, nullified or changed to the extent necessary, but only to the extent necessary, to avoid such adverse effect to the tax exempt status of such financing or debt instrument. Each party to this Agreement agrees that it will do, or cause to be done, such acts and will execute such documentation as may reasonably be request by the other party to preserve the tax exempt status for federal income tax purposes of any bond financing or other debt instrument previously issued by either of the parties or which may be issued by either of the parties during the term of this Agreement or any renewal hereof.
ARTICLE 11

ASSIGNMENT

The provisions hereof shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns. Neither party may assign this Agreement, except with the written consent of the other party, and only to a person, firm, or corporation acceptable to the other party, and at the time of such assignment capable of performing, and which shall assume performance of the assigning party’s obligations hereunder. Neither party shall use these requirements to unreasonably preclude assignment by the other party. Upon such assignment and assumption, the assigning party shall be discharge from its obligation hereunder and shall not be responsible for any failure of performance on the part of the assignee.

ARTICLE 12

ENTIRE AGREEMENT

This Agreement constitutes the Entire Agreement between parties hereto with reference to the subject matter hereof and supersedes all previous understandings and agreements whether written or oral. This Agreement may not be amended without a written mutual agreement of both HSVPOA and POWA.

ARTICLE 13

DISPUTE RESOLUTION

This Agreement shall be covered by and construed according to Arkansas law.

PARON OWENSVILLE WATER AUTHORITY

Curt Malone, President

Witness

HOT SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION

David Twiggs, General Manager

Witness