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COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

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September 5, 1995

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GENERAL COUNSEL

Mr. David M. Bowles
Monarch Engineering, Inc.
1009 Twilight Trail
Frankfort, Kentucky 40601

Dear Mr. Bowles:

I apologize for the delay in responding to your letter of June 15, 1995 regarding the jurisdictional status of a proposed water distribution and sewage treatment system.

Your letter presents the following facts: Lake Cumberland Resort, Inc. is proposing to develop an area in southern Pulaski County, Kentucky. As part of this development, it proposes to construct a water distribution and sewage treatment system to supply potable water and to treat wastewater for approximately 300 to 500 new homes and condominiums.

You pose the following questions: 1) Will the proposed water and sewer facilities be subject to the jurisdiction of the Public Service Commission? 2) If Lake Cumberland Resort assesses a maintenance fee which covers, inter alia, water and sewer service, street maintenance and security, will the water and sewer facilities be subject to Public Service Commission's jurisdiction?

KRS 278.040 provides that the "jurisdiction of the [C]ommission shall extend to all utilities in this state." KRS 278.010(3) defines a utility as

any person except a city, who owns, controls or operates or manages any facility used or to be used for or in connection with:

...

(c) The diverting, developing, pumping, impounding, distributing or furnishing of water to or for the public, for compensation;

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(f) The treatment of sewage for the public, for compensation, if the facility is a subdivision treatment facility plant, located in a county containing a city of the first class or a sewage treatment facility located in any other county and is not subject to regulation by a metropolitan sewer district.

Regardless of how the fees for water and sewage treatment services are assessed, Lake Cumberland Resort's proposed operations fall within this definition as it will manage and operate facilities which provide service to "the public, for compensation."

According to the majority view, the characterization of a service as public or private "does not depend . . . upon the number of persons by whom it is used, but upon whether or not it is open to the use of the public who may require it, to the extent of its capacity." Ambridge v. Pub. Serv. Comm'n of Pennsylvania, 165 A. 47, 49 (Pa. Super. 1933). See 64 Am. Jur. 2d Public Utilities §1 (1972). Stated another way, "[o]ne offers service to the 'public' . . . when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial . . . that his service is limited to a specified area and his facilities are limited in capacity." North Carolina ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 148 S.E.2d 100, 109 (N.C. 1966).

"Compensation" is defined as:

Indemnification; payment of damages, making amends; making whole; giving an equivalent or substitute of equal value. That which is necessary to restore an injured party to his former position. Remuneration for services rendered, whether in salary, fees, or commissions. Consideration or price of a privilege purchased.

Black's Law Dictionary 256 (5th ed.1979) (emphasis added).

Where utility services are provided in exchange for legal tender, they are obviously being provided for compensation. A service, however, may be provided for compensation even where no fee or charge is directly assessed. In Chala v. Gordon, 26 PUR3d 47 (Cal. P.U.C. 1958), for example, the California Public Utilities Commission found a merchant operating a transportation service between his store and a labor camp to be operating that service for compensation even though he charged no fare. The Commission held that a

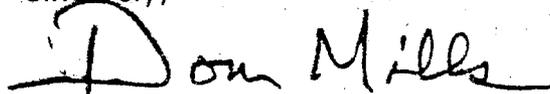
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requirement that passengers be permitted to board a vehicle for the return ride only if they had purchased merchandise at his store constituted compensation for the transportation service.

Similarly, where a tenant's rental payments cover the cost of utility service being provided him and no fee directly attributable to utility service is assessed, the utility service is still being provided for compensation. In Drexelbrook Associates v. Pennsylvania Pub. Util. Comm'n, 212 A.2d 237 (Pa. 1965), the Public Utility Commission argued that a landlord would not be a public utility where the cost of utility service was included in a flat rental, unitemized, rather than in a separate charge based on individual usage. Rejecting this argument, the Pennsylvania Supreme Court stated that "it is apparent that whether or not the utility charge is included in the flat rental fee or determined through submetering, it still constitutes compensation to the landlord." Id. at 240. Other courts have expressed similar sentiments. See, e.g., Pub. Serv. Comm'n of Maryland v. Howard Research and Development Corp., 314 A.2d 682 (Md. 1974).

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Gerald Wuetcher, Commission counsel, at (502) 564-3940, Extension 259.

Sincerely,



Don Mills
Executive Director

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