



Paul E. Patton, Governor
Ronald B. McCloud, Secretary
Public Protection and
Regulation Cabinet

Thomas M. Dorman
Executive Director
Public Service Commission

COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION
211 SOWER BOULEVARD
POST OFFICE BOX 615
FRANKFORT, KENTUCKY 40602-0615
www.psc.state.ky.us
(502) 564-3940
Fax (502) 564-3460

Martin J. Huelsmann
Chairman

Edward J. Holmes
Vice Chairman

Gary W. Gillis
Commissioner

September 26, 2000

Mr. Richard L. White
Cliffview Resort LLC
Post Office Box 65
Rogers, Kentucky 41365

Dear Mr. White:

Commission Staff acknowledges receipt of your letter regarding the jurisdictional status of the water distribution system that serves Cliffview Resort community.

In your letter and in telephone conversations between your staff and Commission Staff, the following facts were presented:

Cliffview Resort, LLC ("Cliffview Resort"), is a Kentucky Limited Liability Company that manages a resort community in Wolfe and Lee Counties, Kentucky. It purchased and developed the real estate upon which the resort community is located and then sold tracts of this real estate. Cliffview Resort also constructed a water distribution main to serve the tracts within the resort community and installed meters to measure the water usage of each tract. Cliffview Resort purchases water from the City of Campton, Kentucky and then transports it through this main to individual lots. It assesses each tract a fee based upon actual usage. The fee recovers only the cost of purchased water. It does not include any component for administrative, maintenance or operation costs or profit.

Your letter presents the following issue: Is Cliffview Resort a public utility subject to the regulation of the Public Service Commission?

The Public Service Commission regulates the rates and services of all public utilities. See KRS 278.040(2). A utility is

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



AN EQUAL OPPORTUNITY EMPLOYER M/F/D

with . . . [t]he diverting, developing, pumping, impounding, distributing, or furnishing of water to or for the **public**, for **compensation**;

KRS 278.010(3)(d) (emphasis added).

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).

Where utility services are provided in exchange for legal tender, they are being provided for compensation. Compensation is not synonymous with profit. Courts have generally rejected any attempt to equate it with profit or a profit-making motive. "We do not agree that 'compensation' as used in the statutory definition, necessarily involves an element of profit. On the contrary it may under some circumstances involve merely reimbursement for expenses of operation." Schenley Distillers Corp. v. United States, 61 F.Supp. 981, at 987-988 (D. Del. 1945). See also Shippers Cooperative, Inc. v. ICC, 308 F.2d 888 (9th Cir. 1962); Keller Industries, Inc. v. United States, 311 F.Supp. 384 (N.D. Fla. 1970), aff'd 449 F.2d 163 (5th Cir. 1971); Studna v. United States., 225 F.Supp. 973 (W.D. Mo. 1964).

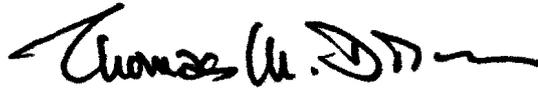
Based upon the facts presented, it appears that the Cliffview Resorts is serving the public for compensation. Cliffview Resort makes water service available to all tracts within the development regardless of its relationship to the tract. Service is not limited to those who contract with it to manage their properties. Membership in a defined, limited group is not a requisite for such service. Moreover, Cliffview Resorts clearly collects compensation for the water service that it provides.

Commission Staff, therefore, believes that Cliffview Resorts is a public utility subject to the jurisdiction of the Public Service Commission and should take immediate action to comply with KRS Chapter 278. It should apply to the Commission within the next 45 days for a certificate of public convenience and necessity to operate within Kentucky and should file with the Commission a schedule of its rates. If you have questions about an application for certificate of public convenience and necessity or the preparation and filing of rate schedules, Commission Staff is available to provide assistance.

Mr. Richard White
September 26, 2000
Page 3

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 or requests for Commission Staff assistance should be directed to Gerald Wuetcher, Assistant General Counsel, at (502) 564-3940, Extension 259.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Dorman", with a long horizontal flourish extending to the right.

Thomas M. Dorman
Executive Director

cc: Donna C. Drury