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August 25, 2009

Mr. Daniel C. Higgins  
Burns, Day & Presnell, P.A.  
2626 Glenwood Avenue  
Suite 560  
Raleigh, North Carolina 27608

Re: Need for Certificate of Public  
Convenience and Necessity for  
Landfill gas powered small power  
production facility.

**PSC Advisory Opinion: 2009-011**

Dear Mr. Higgins:

Commission Staff acknowledges receipt of your letter of July 17, 2009, in which you request an advisory opinion regarding whether the Commission will require your client to obtain a Certificate of Public Convenience and Necessity ("CPCN") prior to constructing and operating a landfill gas-powered small power production facility.

Based upon your letter, Commission Staff understands the facts as follows:

You represent a client (we are assuming this client is not a Kentucky regulated utility) who wishes to construct and operate a landfill gas-powered small power production facility. This client has developed a number of landfill gas projects in several states. Your client is proposing to operate and construct a 4.8 megawatt facility which will fuel Caterpillar 3520 landfill gas engines. It is also the intention of your client to sell all of the energy produced from this facility to American Electric Power ("AEP") or one of its subsidiaries. Your concern is whether or not your client must seek any regulatory approval from the Kentucky Public Service Commission ("Commission") prior to the construction and operation of this facility.

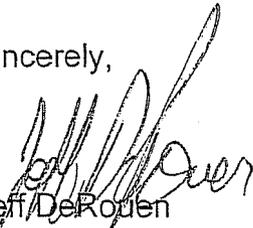
Your letter presents the following question: Is a CPCN or other approval from the Commission necessary prior to the construction and operation of a landfill gas-powered small power production facility?

It is the position of Commission Staff that, since your client is not a Kentucky regulated utility, an application for a Certificate of Public Convenience and Necessity is not necessary in this case. The Commission's jurisdiction is found in KRS 278.040, which states that the Commission will regulate utilities<sup>1</sup> and the Commission has exclusive jurisdiction over rates and services. Assuming that your client is not a Kentucky regulated utility, your client is not required to obtain either a CPCN under KRS 278.020(1) or a Site Compatibility Certificate under KRS 278.216.

Furthermore, KRS 278.704 requires any person constructing a merchant electric generating facility to apply for and obtain a construction certificate for the facility from the Kentucky State Board on Electric Generation and Transmission Siting prior to commencing construction. KRS 278.700(2) defines a merchant electric generating facility as one that is capable of operating at more than 10 megawatt capacity and sells its electricity at wholesale rates not regulated by the Commission. Therefore, as long as your client's operating capability for the facility remains below 10 megawatts, then KRS 278.704 would not apply.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented and based on the assumption that your client is not a Kentucky regulated utility. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions regarding this opinion should be directed to Allyson Honaker, Staff Attorney, at (502) 564-3940, extension 265.

Sincerely,



Jeff DeRouen  
Executive Director

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<sup>1</sup> KRS 278.010(3)(a) defines an electric utility as "any person . . . who owns, controls, operates, or manages any facility used or to be used for or in connection with: (a) The generation, production, transmission, or distribution of electricity to or for the public, for compensation, for lights, heat, power, or other uses."