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September 30, 2011

Kipley J. McNally, Esq.  
2527 Nelson Miller Parkway  
Suite 104  
Louisville, Kentucky 40223

Re: Prestonsburg City's Utilities Commission      **PSC STAFF OPINION 2011-008**  
Service to Dewey Lake Subdivision

Dear Mr. McNally:

Commission Staff acknowledges receipt of your letter of June 8, 2011 in which you requested on behalf of Prestonsburg City's Utilities Commission ("PCUC") an opinion regarding the need to obtain Public Service Commission approval to provide water service to the Dewey Lake Subdivision in Floyd County, Kentucky.

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

PCUC is a municipally owned utility created pursuant to KRS Chapter 58. A three-member Board of Commissioners manages PCUC. The Mayor of the City of Prestonsburg appoints each member of this Board. As of June 1, 2011, PCUC provided water service to approximately 7,751 customers. Among the areas to which PCUC provides water service is the Dewey Lake Subdivision of Floyd County, Kentucky.

Dewey Lake View, Incorporated, a Kentucky corporation, began development of the Dewey Lake Subdivision in the late 1960s. As part of this development, it installed a water distribution system that included water mains, pumps, and underground water storage tanks. On November 1, 1990, the Kentucky Secretary of State administratively dissolved Dewey Lake View Incorporated.

Lakeview Association is an unincorporated homeowner's association which is composed of persons who own real property in the Dewey Lake Subdivision of Floyd County,

Kentucky. It purchases water from PCUC for resale to its members. All twenty-three personal residences within Dewey Lake Subdivision are members of Lakeview Association and purchase their water from Lakeview Association. For calendar year 2010, Lakeview Association sought exemption from federal income taxes under 26 U.S.C § 528. Lakeview Association provides water service to its members only.

PCUC proposes to directly serve Lakeview Association's members. To provide direct service, PCUC proposes to construct facilities, including pumps, a water storage tank, and water distribution mains. Upon PCUC's construction of these facilities, Lakeview Association will abandon its existing facilities and cease providing water service to its members.

Your letter presents the following question: Must PCUC obtain Commission approval before constructing the facilities necessary to directly serve Lakeview Association members or providing water service to those members?

As to the construction of new water distribution facilities and the initial provision of water service, KRS 278.020(1) is generally applicable. It provides:

No person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010, except retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction.

While the language of KRS 278.020(1) seemingly suggests that Commission approval of PCUC's proposed action is required, see e.g., *City of Vanceburg v. Plummer*, 275 Ky. 713, 122 S.W.2d 772 (1938), the contrary is true. The Commission's jurisdiction extends only to the rates and service of "utilities" in the Commonwealth of Kentucky. See KRS 278.040(2). As the definition of "utility" specifically excludes facilities that a city owns, see KRS 278.010(3),<sup>1</sup> however, municipal utilities are not subject to Commission jurisdiction. *McClellan v. Louisville Water Co.*, 351 S.W.2d 197

1

"Utility" means any person except . . . a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with . . . [t]he diverting, developing, pumping, impounding, distributing, or furnishing of water to or for the public, for compensation.

(Ky. 1961). The only exception to this general rule is the case in which a municipal utility provides wholesale utility service to a public utility. See *Simpson County Water Dist. v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994).

Based upon the statutory exclusion, Kentucky courts have found that KRS 278.020(1) is not applicable to municipal utilities and does not require municipal utilities to obtain a Certificate of Public Convenience and Necessity before constructing facilities or providing service. *City of Georgetown v. Public Service Commission*, 516 S.W.2d 842 (Ky. 1974) ("It is our view that the plain intent of the General Assembly as expressed in KRS 278.010(1) should prevail and should not be circumscribed by a strained reasoning process bringing into play KRS 278.020(1)."); *City of Flemingsburg v. Public Service Commission*, 411 S.W.2d 920 (Ky. 1966). Accordingly, PCUC is not required to obtain a Certificate of Public Convenience and Necessity.

Furthermore, neither KRS 278.020(5) nor KRS 278.020(6) requires PCUC to obtain Commission approval of PCUC's facilities displacement of Lakeview Association's water distribution facilities. KRS 278.020(5) provides:

No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.

KRS 278.020(6) provides:

No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission. Any acquisition of control without prior authorization shall be void and of no effect.

~~Assuming that Lakeview Association met the definition of "utility,"<sup>2</sup> the displacement of Lakeview Association's facilities by PCUC's facilities would not constitute a transfer of control or ownership of Lakeview Association's facilities. The facts as presented do not suggest that PCUC will acquire any ownership interest in Lakeview Association's facilities or will control the operation or management of those facilities. Ownership and control of those facilities will apparently remain with Lakeview~~

<sup>2</sup> The Commission has previously held that a homeowners' association does not meet the statutory definition of "utility" as it does not provide service to the public. See, e.g., *B.B. Shepherd Sanitary Sewage Corp.*, Case No. 9014 (Ky. PSC July 3, 1984); *Huntington Woods Neighborhood Ass'n*, Case No. 99-515 (Ky. PSC June 14, 2000); *Doe Valley Utilities, Inc.*, Case No. 2003-00360 (Ky. PSC May 19, 2004).

Kipley J. McNally, Esq.

Page 4

September 30, 2011

Association. Without PCUC's acquisition of control or ownership of these facilities, the requirements of KRS 278.020(5) and KRS 278.020(6) for Commission approval are not triggered.

In summary, Commission Staff is of the opinion that, based upon the facts presented in your letter of June 8, 2011, PCUC does not require Commission approval to construct facilities to serve persons residing within the Dewey Lake Subdivision or to begin water service to those persons.

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, Executive Advisor/Attorney, at (502) 564-3940, Extension 259.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Derouen", written over a printed name and title.

Jeff Derouen  
Executive Director

Cc: Julie Roney