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June 1, 2015

**PSC STAFF OPINION 2015-009**

Mr. BJ Murray  
Executive Director  
YMCA Camp Piomingo  
1950 Otter Creek Park Rd.  
Brandenburg, KY 40108

Re: YMCA Camp Piomingo and Otter Creek Outdoor  
Recreation Area Water Use Situation

Dear Mr. Murray:

This letter responds to your letter of January 30, 2015, in which you requested an opinion regarding the water use situation that currently exists between the YMCA Camp Piomingo ("Camp Piomingo") and the Otter Creek Outdoor Recreation Area ("Otter Creek"), which is operated by the Kentucky Department of Fish and Wildlife Resources. According to your letter, Camp Piomingo is located within Otter Creek's boundaries and Otter Creek currently has one water meter that measures all water entering into the park and Camp Piomingo has another meter that measures all water usage within its camping facilities. This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Commission should the issues herein be formally presented for Commission resolution.

Based upon your letter and a follow-up telephone conversation, Commission Staff understands that Otter Creek purchases its water from Meade County Water District ("Meade County"), as measured by a meter located at the outside of the park which Meade County installed and maintains. Either Otter Creek or Camp Piomingo has installed underground piping to the camp site and installed a second meter that measures all water usage within Camp Piomingo (located at 1950 Otter Creek Park Rd., Brandenburg, KY). Currently, Camp Piomingo is paying Otter Creek a set monthly stipend for the water provided, but the amount of the stipend is not determined by water usage. Otter Creek and Camp Piomingo would like to modify this arrangement to permit Camp Piomingo to reimburse Otter Creek for its measured water usage at the same rate Otter Creek pays to Meade County. This arrangement would not include any profit component but would be designed solely to compensate Otter Creek for the actual

cost of the water used by Camp Piomingo. You state that the hope of both organizations is that by taking the measurement of water usage by Camp Piomingo we can reimburse Otter Creek for its use from the total water bill at the same rate Otter Creek uses to pay the water bill as a whole. Currently this is not the case as the concern has been that giving money to Otter Creek represents Otter Creek selling water to Camp Piomingo.

Both organizations are looking for an opinion from the PSC as to the legality of a new reimbursement situation. Technically, it would not be the selling of water as Otter Creek stands to make no profit from this, only payment for what Camp Piomingo has used.

Commission Staff understands the issues to be the following: 1) If Camp Piomingo pays Otter Creek for the measured quantity of water it uses based upon the rate that Otter Creek pays to Meade County, would this arrangement subject either Otter Creek or Camp Piomingo to the Commission's jurisdiction as a utility?; 2) Would this proposed arrangement be considered the selling or reselling of water?; and 3) Would this proposed arrangement be legal?

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

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.**

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

Meade County is engaged in the distribution and sale of water to the public, is a public utility, as defined above, and, is subject to the jurisdiction of the Commission. It currently provides water service to approximately 4,489 customers,<sup>1</sup> including Otter Creek,<sup>2</sup> in Meade County, Kentucky.

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<sup>1</sup> Annual Report of Meade County Water District to the Kentucky Public Service Commission for the Year ended December 31, 2013 at 53.

<sup>2</sup> Case No. 2007-00034, *Application of Meade County Water District for 1) Approval of a Proposed Increase in Rates for Water Service, 2) Approval of An Increase in Non-Recurring Charges, and 3) Approval of a Revised Tariff* (Ky. PSC Dec. 13, 2007). TFS 2007-00979 at Sheet No. 4 (Ky. PSC Filed Dec. 26, 2007); Letter from Dennis Brent Kirtley, Tariff Branch Manager, Public Service Commission, to Joe Bartley, Meade County Water District (May 13, 2008).

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. Service Comm’n of Pennsylvania, 165 A. 47, 49 (Pa. Super. 1933). See 64 Am. Jur. 2d Public Utilities § 2 (2004). 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). If a utility service is limited to a specific privileged class, that service is not to the public.

Utility service provided by landlords to their tenants is considered as being to a specific class. In Drexelbrook Associates v. Pennsylvania Public Service Commission, 212 A. 2d 237 (Pa. 1965), the Pennsylvania Supreme Court, rejecting arguments that a landlord reselling utility service to its tenants was providing service to the public, declared:

In the present case the only persons who would be entitled to and who would receive service are those who have entered into or will enter into a landlord-tenant relationship with appellant. Here . . . those to be serviced consist only of a special class of persons--those to be selected as tenants--and not a class open to the indefinite public. Such persons clearly constitute a defined, privileged, and limited group and the proposed service to them would be private in nature . . . .

. . . .

We hold, therefore, that the proposed service which appellant would render in the present case would not constitute it a public utility within the meaning of §2 of the Public Utility Law since such service would not be furnished “to or for the public.”

Id. at 240, 241.

Similarly in City of Sun Prairie v. Wisconsin Pub. Serv. Comm’n, 154 N.W.2d 360 (Wis. 1967), the Wisconsin Supreme Court refused to hold a landlord operating natural gas fired generators used to provide electric service to his tenants was a utility. Finding that a landlord providing service to his tenants was not providing service to the public, the Court stated:

The use to which the plant, equipment or some portion thereof is put must be for the public in order to constitute it a public utility. But whether or not the use is for the public does not necessarily depend upon the number of customers . . . . The tenants of a landlord are not the public . . . . The word 'public' must be construed to mean more than a limited class defined by the relation of landlord and tenant.

Id. at 362.

Regulatory commissions, including the Kentucky Public Service Commission have similarly recognized this rule. See, e.g., *Envirotech Utility Management Services*, Case No. 96-448 (Ky. PSC April 29, 1997); *Fairhaven Mobile Home Village Sewage Treatment Plant*, Case No. 90-169 (Ky. PSC June 22, 1990); *Procedures Governing Sales of Electricity for Resale*, 85 PUR 3d 107 (Fla. P.S.C. 1970).

Based upon the discussion above, Commission Staff is of the opinion that the arrangement proposed in your letter would not place either Otter Creek or Camp Piomingo within the statutory definition of a utility or subject either entity to Commission jurisdiction. Although Otter Creek would be engaging in distributing or furnishing water to Camp Piomingo for compensation, it would not be providing service "to the public" (emphasis added).

Although the proposed arrangement does not appear to fall within the jurisdiction of the Commission, it may still conflict with provisions in Meade County's tariff,<sup>3</sup> which is on file with the Commission, pertaining to the reselling of water, use of meters, and the extensions of service. Meade County's tariff specifically provides that "[n]o customer is allowed to resell water except under the terms of a special contract executed by the utility and approved by the Public Service Commission."<sup>4</sup> It also provides that "[u]nder no circumstances will a customer be allowed to resell or give away water except under the terms of a special contract executed by the utility and approved by the Public Service Commission. Failure to comply with this rule will constitute grounds for termination of service."<sup>5</sup> While the "resale" of utility service is generally considered to involve the assessment of a charge designed to recover revenues in excess of the cost

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<sup>3</sup> Case No. 2007-00034, *Application of Meade County Water District for 1) Approval of a Proposed Increase in Rates for Water Service, 2) Approval of An Increase in Non-Recurring Charges, and 3) Approval of a Revised Tariff* (Ky. PSC Dec. 13, 2007). TFS 2007-00979 (KY. PSC Filed Dec. 26, 2007); Letter from Dennis Brent Kirtley, Tariff Branch Manager, Public Service Commission, to Joe Bartley, Meade County Water District (May 13, 2008).

<sup>4</sup> TFS 2007-00979 (KY. PSC Filed Dec. 26, 2007) at Sheet No. 8.B.4. Letter from Dennis Brent Kirtley, Tariff Branch Manager, Public Service Commission, to Joe Bartley, Meade County Water District (May 13, 2008).

<sup>5</sup> *Id.* at Sheet No. 23(d)(6).

of the supplied service or commodity, see, e.g., Procedures Governing Sales of Electricity for Resale, 85 PUR 3d 107 (Fla. P.S.C. 1970), Meade County may take a differing position.

In addition to the issue of selling or reselling water as discussed above, there are other provisions in Meade County's tariff which prescribe how water service is delivered and how it is measured. Commission Staff recommends that Otter Creek and Camp Piomingo review these additional provisions in order to ascertain whether the existing situation, as well as the arrangement proposed, would be in compliance. Several of these provisions are cited below:

- The utility will furnish and install at its own expense for the purpose of connecting its distribution system to the customer's premises that portion of the service connection from its main to and including the meter and meter box. The utility will recoup this expense from the customer in accordance with KRS 278.0152.<sup>6</sup>
- All meters will be installed, renewed, and maintained at the expense of the utility, and the utility reserves the right to approve the size and type of meter used.<sup>7</sup>
- All taps and connections to the mains of the utility must be made by and/or under the direction and supervision of utility personnel and will incur a meter connection/tap-on charge, an amount that has been approved by the Public Service Commission. Payment of this fee is for the privilege of connecting to the water system and the payment of the fee does not constitute the purchase of a water meter.<sup>8</sup>
- The service connection supplied by the District has a definite capacity, and no addition to the equipment or load connected thereto will be allowed except by consent of the District.<sup>9</sup>
- With the exception of existing connections, the existence of a special contract, or unusual circumstances requiring approval of the utility, a single meter can serve no more than one residential or commercial unit . . . .<sup>10</sup>

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<sup>6</sup> *Id.* at Sheet No. 29.T.1.  
<sup>7</sup> *Id.* at Sheet No. 30.T.12.  
<sup>8</sup> *Id.* at T.13.  
<sup>9</sup> *Id.* at Sheet No.31.T.15.

<sup>10</sup> TFS 2010-00478 (KY. PSC Filed Aug. 19, 2010) at Sheet 9.4(b). Letter from Dennis Brent Kirtley, Tariff Branch Manager, Public Service Commission, to Joe Bartley, Meade County Water District (Oct. 1, 2010).

- Any extension or additions to an existing service connection that have not been approved by the utility will be considered theft of service and will constitute grounds for termination of service.<sup>11</sup>

Given the current and proposed arrangement between Otter Creek and Camp Piomingo and Meade County's tariff provisions, it would be advisable if you have not already done so, to engage in discussions with Meade County in an effort to negotiate a special contract that expressly authorizes the water arrangement that you seek.

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 Virginia Gregg at (502) 782-2584.

Sincerely,



Jeff Derouen  
Executive Director

VGph

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<sup>11</sup> TFS 2007-00979 (KY. PSC Filed Dec. 13, 2007) at Sheet No. 22 (d)(3). Letter from Dennis Brent Kirtley, Tariff Branch Manager, Public Service Commission, to Joe Bartley, Meade County Water District (May 13, 2008).