



Steven L. Beshear  
Governor

Leonard K. Peters  
Secretary  
Energy and Environment Cabinet

Commonwealth of Kentucky  
**Public Service Commission**  
211 Sower Blvd.  
P.O. Box 615  
Frankfort, Kentucky 40602-0615  
Telephone: (502) 564-3940  
Fax: (502) 564-3460  
psc.ky.gov

David L. Armstrong  
Chairman

James W. Gardner  
Vice Chairman

Daniel E. Logsdon, Jr.  
Commissioner

August 27, 2015

## PSC STAFF OPINION 2015-012

Mr. James F. Duttweiler  
Director, Directorate of Public Works  
Department of the Army  
Installation Management Command, Atlantic Region  
Headquarters, United States Army Garrison, Ft. Campbell  
39 Normandy Boulevard  
Fort Campbell, Kentucky 42223-5617

Re: U.S. Army Garrison-Fort Campbell, Kentucky Phase I/Phase II Natural Gas Main Projects Kentucky Public Service Commission (Federal Military Installation/Enclave Jurisdiction).

Dear Mr. Duttweiler:

This letter responds to your letter of July 15, 2015, in which you requested an opinion regarding Fort Campbell's current plan to temporarily provide the transport and sale of natural gas to the City of Hopkinsville, Kentucky, through its Sewerage and Water Works Commission, dba Hopkinsville Water Environment Authority ("HWEA") and Fort Campbell's future plan to purchase natural gas transportation service from HWEA. 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 an earlier telephone conversation with Mark Linkous, Utilities Branch, Water/Wastewater/Natural Gas of your office, Commission Staff understands that your request pertains to two separate HWEA natural gas main projects that involve Fort Campbell. You state that "On November 3, 2014, the Hopkinsville Water Environment Authority, (HWEA), of Hopkinsville, Kentucky, began construction of 6.3 miles of 12" HDPE natural gas main along US41A from Fort Campbell's Gate 5 to Crenshaw Boulevard . . . ." You state that this project is commonly referred to as "Phase I" and that it is currently under construction and expected to be placed into

service on or before August 15, 2015. Finally, you state that this project is vitally important to the City of Hopkinsville since it will provide natural gas service to customers in the City of Hopkinsville's Southpark Industrial Park and will support the potential development of the Tennessee Valley Authority's I-24 Mega-Site.

You also state that "[O]n August 4, 2014, the United States Army Corps of Engineers of Huntsville, AL, awarded to HWEA a design/build construct in order to construct 7.9 miles of 8" steel natural gas main beginning near the intersection of Pembroke Road and US41, extending South along US41S to Crenshaw Boulevard." You maintain that this project is commonly referred to as "Phase II" and is currently under design and expected to be placed into service on or before December 31, 2016. You state that

Fort Campbell plans to temporarily provide the transport and sale of natural gas to HWEA for the Phase I project in order for HWEA to provide service to three (3) customers in the City of Hopkinsville's Southpark Industrial Park. Once the Phase II project is complete and placed into service, Fort Campbell would no longer provide service to HWEA, but would in turn become a transport customer of HWEA and receive service at Gate 5 via the Phase I project.

....

These projects are vitally important to Fort Campbell's mission and energy security since they will ultimately provide a redundant supply of natural gas service at Gate 5 and will also provide the added benefit of improving the quality of life for our Soldiers, families and civilians who live and work in our community. Additionally, we have coordinated with the Federal Energy Regulatory Commission (FERC) for this limited term and they have expressed no concerns.

Commission Staff understands the issues to be the following: 1) If Fort Campbell temporarily provides the transport and sale of natural gas to HWEA for the Phase I project in order for HWEA to provide service to three (3) customers in the City of Hopkinsville's Southpark Industrial Park, would this arrangement subject Fort Campbell to the Commission's authority or jurisdiction? 2) If Fort Campbell becomes a transport customer of HWEA and receives service at Gate 5 via the Phase I project once the Phase II project is complete and placed in service, would this arrangement subject Fort Campbell to the Commission's authority or jurisdiction?

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 by KRS 278.010(3) as...

any person<sup>1</sup> except . . . for purposes of paragraphs (a), (b), (c), (d), and (f) of this subsection, a city, who owns, controls, operates or manages any facility used or to be used for or in connection with: (emphasis added)

. . . .

The production, manufacture, storage, distribution, sale, or furnishing of natural or manufactured gas, or a mixture of same, to or for the public, for compensation, for light, heat, power, or other uses. (Emphasis added).

KRS 278.010(3)(b).

The transporting or conveying of gas, crude oil, or other fluid substance by pipeline to or for the public, for compensation. (Emphasis added).

KRS 278.010(3)(c).

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

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<sup>1</sup> KRS 278.010(2) defines a “person” as including “natural persons, partnerships, corporations, and two (2) or more persons having a joint or common interest.

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).

Fort Campbell is a federal military enclave located in both Kentucky and in Tennessee and is operated by the United States through its Department of Defense (“DOD”) and the Department of the Army (“the Army”), a DOD subdivision. HWEA is a five-member commission created by the Hopkinsville, KY Code of Ordinances which operates, monitors and administers the natural gas distribution system.<sup>2</sup> HWEA was created by and functions as a component of the city of Hopkinsville, Kentucky.

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<sup>2</sup> The City of Hopkinsville, Kentucky, through its Code of Ordinances, has vested the Sewerage and Water Works Commission, dba Hopkinsville Water Environment Authority (HWEA) with exclusive supervision, management and control of the business and affairs of the natural gas distribution system. Hopkinsville, KY., Code of Ordinances §§ 57.01 and 57.02 (2011).

Commission Staff is of the opinion that neither of the two proposed arrangements between Fort Campbell and HWEA, as outlined in your letter, would place Fort Campbell or HWEA within the statutory definition of a utility or subject either entity to Commission jurisdiction or regulation regarding rates and service.

In the first proposed action, Fort Campbell will temporarily provide the transport and sale of natural gas to HWEA, one specific, defined customer, will not provide natural gas "to or for the public" as defined above and will not be within the statutory definition of a utility, subject to Commission regulation. In the second proposed action HWEA will provide service to Fort Campbell at Gate 5 via the Phase I project once the Phase II project is complete and placed in service. As noted earlier, KRS 278.010(3) specifically exempts cities from the definition of a utility and therefore HWEA will not be a utility subject to the Commission's jurisdiction.

Based upon the above analysis, neither of the two projects envisioned would make either Fort Campbell or HWEA a utility subject to Commission jurisdiction regarding rates and services. It should be noted, however, that pursuant to KRS 278.495(2)(a), the Commission does have the authority to regulate the safety of natural gas facilities that are owned or operated by any public utility, county or city, and used to distribute natural gas at retail. The Commission "may exercise this authority in conjunction with, and pursuant to, its authority to enforce any minimum safety standard adopted by the United States Department of Transportation pursuant to 49 U.S.C. sec. 60101 et seq., or any amendments thereto, and may promulgate administrative regulations consistent with federal pipeline safety laws in accordance with KRS Chapter 13A as are necessary to promote pipeline safety in the Commonwealth." Further communication may be necessary to determine the extent, if any, of the Commission's safety jurisdiction.

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, Staff Attorney, at (502) 782-2584.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeff Derouen", is written over the typed name and title.

Jeff Derouen  
Executive Director