COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AMERICOAL CORPORATION	)	
	)	
COMPLAINANT	)	CASE NO. 90-108
	)	
VS.	)	
	)	
BOONE COUNTY WATER AND SEWER DISTRICT	)	
	)	
DEFENDANT	)	

O R D E R

Before the Commission is the motion of Boone County Water and Sewer District ("Boone District") to dismiss for lack of jurisdiction. This motion presents the question of whether Boone District's ownership and operation of sewer collector lines falls within the statutory definition of a utility and thus subjects the rates and service of such lines to Commission jurisdiction. We answer this question in the affirmative and deny Boone District's motion.

Americoal Corporation ("Americoal"), which owns and operates a trailer park in Florence, Kentucky, has filed a complaint against Boone District alleging, inter alia, that Boone District is assessing a "sewer tap-in fee" of $1,000 per lot to provide sanitary sewer service to that park, that this fee has not been authorized by the Commission, and that it is excessive and unreasonable.

In its answer, Boone District admitted providing sanitary sewer service to Americoal and charging the fee in question. It,

however, denied that the Commission has any regulatory jurisdiction over this service. Contending that it is not a utility when providing sanitary sewer service to Americoal and that such service is outside Commission jurisdiction, Boone District moved on August 22, 1990 for dismissal of Americoal's complaint.

KRS 278.010(3), in relevant part, defines a utility as

> [A]ny person except a city, who owns, controls or operates or manages any facility to be used for or in connection with. . . [t]he treatment of sewage for the public, for compensation, if the facility is a subdivision treatment facility plant, located in a county containing a city of the first class or a sewage treatment facility located in any other county and is not subject to regulation by a metropolitan sewer district. . . .[emphasis added]

Boone District asserts that the facilities providing sanitary sewer service to Americoal neither treat sewage nor are used in connection with its treatment. They merely collect Americoal's raw sewage and transport it to the treatment facilities of Sanitation District No. 1 of Kenton and Campbell Counties ("Sanitation District No. 1"). Boone District maintains that, as "[m]ere collection does not entail treatment, it is not a utility." Boone District's Motion at 3. In support of its position, it refers to an Attorney General opinion addressing Commission jurisdiction over a private water association's sewer collector lines in which the Attorney General declared that, "[s]ince the corporation intends to establish only sewer collector

lines, and not 'sewage treatment facility' (sic) as envisioned in KRS 278.010(3)(f), the corporation in the sewer line business would not be subject to the regulatory authority of the PSC." OAG 79-156.

Boone District further contends, that despite the fact that its collector lines facilitate Sanitation District No. 1's treatment of Americoal's sewage, they cannot be considered as facilities used in connection with the treatment of sewage. It contends that a "facility" as defined by KRS 278.010(9) covers only property used in connection with the business of a utility. Because a sanitation district organized under KRS Chapter 220 is not a utility as defined by KRS 278.010(3),[1] Boone District's

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[1] On April 5, 1988, the Commission advised all sanitation districts within the Commonwealth of the following:

> [Recent] events. . . have prompted the Commission to consider whether the legislature intended that the PSC have any statutory authority over sanitation districts. After reexamining KRS Chapter 278, the Commission concludes that the failure of the legislature to make specific reference to sanitation districts within Chapter 278 is persuasive evidence that the legislature intended to deny the Commission jurisdiction over sanitation districts. By comparison, KRS Chapter 278 has been amended to bring under Commission jurisdiction both water associations organized pursuant to KRS Chapter 273 (KRS 278.012), and water districts organized pursuant to KRS Chapter 74 (KRS 278.015). Based upon this analysis, the Commission has concluded that sanitation districts are not utilities within the meaning of KRS 278.010(3)(f), and are therefore exempt from regulation by the Public Service Commission.

Letter from Forest M. Skaggs to Sanitation Districts (April 5, 1988) (discussion of Commission jurisdiction) at 3.

facilities "cannot, by definition, be used in connection with the business of a utility as the statute requires." Boone District's Motion at 3.

These arguments are unpersuasive. Sewer collector lines are an integral part of any sewage treatment system. They are the means of disposal and transportation of sewage waste from customers receiving sewer service. The Commission finds that collection is the initial stage of the treatment process.

Despite Boone District's arguments to the contrary, the weight of authority supports this position. The Commission has previously found sewer collector lines to be facilities used in the treatment of sewage and their owners to fall within the statutory definition of a utility.[2] The Commission currently exercises jurisdiction over and establishes rates for several entities whose only facilities are sewer collector lines.[3]

By its prior actions, furthermore, Boone District has conceded Commission jurisdiction over the facilities in question.

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2 See, e.g., Case No. 7692, Complaint of Mr. Fred Pfannenschmidt, Louisville, Kentucky against Highview Sewer District, Inc., Order dated July 24, 1980; Case No. 90-265, Application of City of Maysville Kentucky, for Authority to Acquire and Operate the Sewerage System of Sanico, Inc. in Maysville, Mason County, Kentucky, Order dated September 28, 1990.

3 See, e.g., Case No. 8773, Notice by Sanico, Inc. to Increase Its Sewage Rates and for Approval to Finance Plant Additions, Order dated August 11, 1983; Case No. 9274, Application of Alton Water District, Order dated April 2, 1986; Case No. 10247, An Investigation into the Alleged Ownership of a Utility by W. C. Hundley, Order dated October 20, 1988.

In Case No. 9340,[4] Boone District sought a Certificate of Public Convenience and Necessity to construct sewer collector lines which would connect its customers to the facilities of Sanitation District No. 1 and the city of Florence, Kentucky. In the same case, it also requested Commission approval of the rates associated with those collector lines. In Case No. 9495,[5] it filed a joint application with Sanitation District No. 1 for a Certificate of Public Convenience and Necessity to construct the very sewer collector lines which serve Americoal. Since January 1986, Boone District has had on file with the Commission the rates and charges associated with these sewer collector lines. Boone District has presented no evidence nor made any argument to explain the Commission's sudden loss of jurisdiction.

The Commission further finds that Boone District's reliance on the Attorney General's opinion to be misplaced. Such opinions

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4 Case No. 9340, Application of Boone County Water and Sewer District, Boone County, Kentucky, for Authority to Construct and Operate a General Sewer District Pursuant to KRS Chapter 74 in Boone County, Kentucky, and Application of Boone County Water and Sewer District, Boone County, Kentucky, for an Order Approving Suggested Rates to Be Charged to Customers of the General Sewer District of Boone County Water and Sewer District in Boone County, Kentucky.

5 Case No. 9495, Joint Application of Boone County Water and Sewer District (Sewer Division) and Sanitation District No. 1 of Campbell and Kenton Counties for a Certificate of Public Convenience and Necessity to Construct Approximately 12,800 Feet of Gravity Sewer Line.

are advisory in nature and have no binding authority. The Attorney General's pronouncement on Commission jurisdiction, furthermore, was ancillary to the issue for which an opinion was requested. Finally, as the Commission is the administrative agency mandated to interpret and enforce the provisions of KRS Chapter 278 and as it interprets these provisions more frequently than the Attorney General, the Commission's interpretation is entitled to greater weight. See Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969) ("[T]he. . . venerable principle that the construction of the statute by those charged with its execution shall be followed unless there are compelling reasons that it is wrong."); Grantz v. Granman, Ky., 302 S.W.2d 364, 367 (1957) ("Practical construction of an ambiguous law by administrative officers continued without interruption for a very long period is entitled to controlling weight.").[6]

We also find Boone District's argument that its collector lines do not meet the statutory definition of "facility" and

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6 In its motion, Boone District refers to two letters issued by the Commission's Secretary concerning Sanitation District No. 1 of Perry County which stated that sewer collector lines were outside the Commission's jurisdiction. While the Commission does not dispute the existance of such letters, we fail to see their significance. The Commission "acts and speaks only through its written orders." Union Light, Heat & Power Co. v. Pub. Serv. Comm'n, Ky., 271 S.W.2d 361, 365 (194). The letters of the Commission's Secretary cannot be considered as written orders. See Bee's Old Reliable Shows, Inc. v. Kentucky Power Co., Ky., 334 S.W.2d 765 (1960). Furthermore, the Commission's General Counsel in 1982 issued a letter to the same entity advising that it was a jurisdictional utility. See Exhibit A to this Order.

therefore cannot be subject to Commission jurisdiction to be devoid of merit. KRS 278.010(9) states:

> 'Facility' includes all property, means and instrumentalities owned, operated, leased, licensed, used, furnished or supplied for, by or in connection with the business of any utility [emphasis added].

Unlike other sections of KRS 278.010, the word "includes," not "means," is used to define "facility." This usage makes the definition merely illustrative, not exhaustive. "Facility" may, therefore, be reasonably interpreted to include the property used in connection with the business of non-jurisdictional utilities, such as sanitation districts, which do not meet the statutory definition of "utility" but treat sewage.

Accordingly, the Commission finds that Boone District, by virtue of its ownership and operation of sewer collector lines, is a utility as defined by KRS 278.010(3)(f) and that the rates and service of such lines are subject to Commission jurisdiction. The Commission further finds that Boone District's motion to dismiss should be denied and that a new procedural schedule in this matter established.

IT IS THEREFORE ORDERED that:

1. Boone District's motion to dismiss is denied.

2. A formal hearing in this matter shall be held in Hearing Room 1 of the Commission's offices at 730 Schenkel Lane, Frankfort, Kentucky, beginning at 9:00 a.m., Eastern Standard Time, on January 9, 1991, and continuing until completed.

3. Each party may, on or before November 7, 1990, serve upon any other party a request for production of documents and

written interrogatories to be answered by the party served within 10 days of service.

4. Each party may, on or before December 10, 1990, take the testimony of any person by deposition upon oral examination pursuant to notice or by agreement.

5. Each party may, on or before December 10, 1990, serve upon any other party a written request for admission, for purposes of this proceeding only, of the truth of any matter relevant to this proceeding set forth in the request that relates to statements or opinions of fact or of the application of law to fact. The matter is admitted unless within 10 days after service of the request, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection. The form of the request for admission and the answer or objection thereto shall otherwise be governed by Kentucky Civil Rule 36.

6. Each party shall, on or before December 21, 1990, serve upon the other parties a written summary of the testimony of those witnesses which it expects to call at the formal hearing, copies of all exhibits to be introduced at that hearing, and all preliminary motions and objections except objections to exhibits. All exhibits shall be appropriately marked.

7. Copies of all documents served upon any party shall be served on all other parties and filed with the Commission.

Done at Frankfort, Kentucky, this 30th day of October, 1990.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ATTEST:

Executive Director

COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION
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(502) 564-3940

April 28, 1982

Mr. Jerry W. Hensley, CPA
Hensley, Allen & Company
1389 Alexandria Drive
Lexington, Kentucky 40504

Dear Mr. Hensley:

In response to your recent inquiry to Mr. Richard Heman, the Secretary of our Commission, I am providing the following information regarding the jurisdictional status of Sanitation District No. 1 of Perry County.

KRS 278.010(5)(c) states in relevant part as follows:

> "Non-energy utility" means any person except a city who owns, operates or manages any facility used or to be used in connection with * * * the treatment of sewage for the public, for compensation * * *. (Emphasis supplied.)

Since Sanitation District No. 1 of Perry County collects sewage and transports it through its lines to the City of Hazard for treatment, Sanitation District No. 1 is clearly operating facilities "used in connection with" the treatment of sewage for the public. According to the latest report on file with this Commission, Sanitation District No. 1 collected approximately $93,000 from 350 customers in 1980. Accordingly, Sanitation District No. 1 also fulfills the "for compensation" requirement of the statutory definition of a utility.

For all of these reasons, it is my conclusion that Sanitation District No. 1 of Perry County is a utility as defined by KRS 278.010(5)(c), and the District should, accordingly, file a copy of its current tariff and an annual report for 1981 with the Secretary of this Commission. The PSC has recently held a similar (although privately-owned) "collection system

EXHIBIT A

only" to be subject to our jurisdiction under this same statutory provision. 1/

If you have more specific questions regarding this matter, please feel free to contact me at any time.

Very truly yours,

William M. Sawyer

William M. Sawyer
General Counsel

cc: Richard D. Heman, Jr.

1/ Pfannenschmidt v. Highview Sewer Company., Case No. 7692, issued July 24, 1980.