COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF METROPOLITAN SEWER DISTRICT FOR APPROVAL TO ACQUIRE AND OPERATE THE FAIRHAVEN MOBILE HOME VILLAGE SEWAGE TREATMENT PLANT	))))	CASE NO. 90-169

O R D E R

The Louisville-Jefferson County Metropolitan Sewer District ("MSD") has applied for Commission approval to provide wastewater treatment and disposal for Fairhaven Mobile Home Village. For reasons stated herein, the Commission finds that the transaction does not require Commission approval and dismisses the application.

Fairhaven Mobile Home Village is a trailer park in southern Jefferson County, Kentucky. The park has approximately 225 tenants, all of whom rent mobile home pads. A sewage treatment plant is located at the park site and provides sewer service to the park's tenants. It serves no other persons. The park and its sewage treatment facility are owned and operated by A. B. Schlatter.[1]

MSD and Mr. Schlatter have tentatively agreed that Mr. Schlatter will discontinue the operation of the Fairhaven Mobile

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[1] Case No. 8192, Fairhaven Mobile Home Village Sewage Treatment Plant, Transcript of Evidence ("T.E.") at 9-11.

Home Village Sewage Treatment Plant and MSD will connect its sewer mains to the park's sewage collector system and divert the park's wastewater directly into MSD's wastewater system. Under the terms of the proposed, MSD will charge Mr. Schlatter for sewer service and Mr. Schlatter is free to continue billing the park's tenants for sewer service. MSD now seeks Commission approval of this agreement.

MSD's application poses the following issue: Does the Commission have jurisdiction over either party to the agreement or the proposed transfer of responsibility for treatment of the park's wastewater?

KRS 278.040 provides that the "jurisdiction of the commission shall extend to all utilities in this state." KRS 278.010(3)(f) defines a utility as:

> [A]ny person except a city, who owns, controls or operates or manages any facility used or 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.

MSD does not fall within the statutory definition of "utility." Metropolitan Sewer District is a public body corporate organized pursuant to KRS Chapter 76 and charged with the duty of developing a comprehensive sewer and wastewater treatment system for Jefferson County. KRS 278.010(3)(f) expressly excludes MSD by requiring that the sewage treatment facilities <u>not</u> be subject to regulation by such a district.

Mr. Schlatter's status is not as clear. The Commission has previously found that he is "a public utility and is subject to the jurisdiction and regulations of this Commission."[2] Because Mr. Schlatter's facilities provide sewer service only to his tenants, however, he does not appear to meet the statutory requirement of providing service to the "public." This aspect of Mr. Schlatter's operations has never been addressed.[3]

"One 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).

Utility service limited to a specific class of persons is not service to the public. A landlord providing such service only to his tenants would not be considered a utility. In City of Sun Prairie v. Wisconsin Pub. Serv. Comm'n, 154 N.W.2d 360 (Wis. 1967), the Wisconsin Supreme 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

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2 Case No. 8192, supra, Order dated October 2, 1981 at 6.

3 Commission Staff initially questioned the Commission's jurisdiction over the plant but focused solely on whether the plant was a "subdivision treatment facility plant." T.E. at 5.

> 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. Other courts have reached similar conclusions. See, Pub. Serv. Comm'n of Maryland v. Howard Research and Development Corp., 314 A.2d 682 (Md. 1974); Baker v. Pub. Serv. Co. of Oklahoma, 606 P.2d 567 (Okla. 1980); Drexelbrook Associates v. Pennsylvania Pub. Util. Comm'n, 212 A.2d 237 (Pa. 1965).

Mr. Schlatter's plant serves only his tenants. No private landowners are served by the system. No one outside the park is served. Accordingly, Mr. Schlatter does not serve the public and cannot, therefore, be considered within the statutory definition of a utility.

As neither MSD nor Mr. Schlatter is a utility within the meaning of KRS 278.010(3)(f), the Commission lacks jurisdiction over them and their agreement. MSD's submission of this agreement for Commission approval, furthermore, does not grant the Commission the authority to stamp our imprimatur upon it. Additional powers cannot be conferred on an administrative agency by consent of the parties. Borough of Glen Rock v. Village of Ridgewood, 135 A.2d 506 (N.J. 1957). Simply put, the Commission has no authority to approve the proposed agreement nor is its approval required.

IT IS THEREFORE ORDERED that:

1. MSD's application is dismissed.

2. A. B. Schlatter d/b/a Fairhaven Mobile Home Village Sewage Treatment Plant shall be removed from the Commission's records as a utility.

Done at Frankfort, Kentucky, this 22nd day of June, 1990.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ATTEST:

Executive Director