COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION OF THE RATES, CHARGES, BILLING PRACTICES AND PROVISION OF UTILITY SERVICE BY ENVIROTECH UTILITY MANAGEMENT SERVICES	)))))	CASE NO. 96-448

O R D E R

At the request of the Attorney General ("AG"), the Commission initiated this proceeding to investigate various operational aspects of Envirotech Utility Management Services ("Envirotech"). The AG contends that Envirotech is a "utility" as defined by KRS Chapter 278 and is providing services and charging rates that are not contained in any filed rate schedule. Finding that Envirotech fails to meet the statutory definition of a "utility" and thus is not subject to Commission jurisdiction, we dismiss the Complaint and close our investigation.

PROCEDURE

On September 12, 1996, the AG filed a complaint with the Commission in which he alleged that Envirotech was "distributing and furnishing water to or for the public for compensation"[1] and was therefore a utility subject to Commission regulation. He further alleged that Envirotech was charging rates which were not set forth in any filed rate

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1 AG's Complaint at 2.

schedule. He requested that the Commission initiate an investigation into Envirotech's "rate, charges, billing practices and provision of service."[2]

On September 27, 1996, the Commission granted the AG's request and opened an investigation into Envirotech's operations. We further directed Envirotech to respond to the allegations contained in the AG's Complaint. After receipt of Envirotech's Answer, the Commission then directed Envirotech to furnish additional information regarding its operations. We also permitted the Kentucky-American Water Company ("Kentucky-American") and the Lexington-Fayette Urban County Government ("LFUCG") to intervene in this matter.

On February 6, 1997, the Commission ordered all parties desiring a hearing in this matter to submit written requests for such hearing. The only party requesting a hearing was Kentucky-American. Finding that the issues which Kentucky-American wished to address involve solely legal issues that do not require a hearing, the Commission by this Order denies the request and proceeds to a decision.

STATEMENT OF THE CASE

Envirotech is a Florida corporation[3] which provides utility billing services to apartment buildings throughout the southeastern United States. It has entered an agreement with Mid-America Apartment Communities, Inc. ("Mid-America") to provide

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2 Id.

3 Envirotech Utility Management Services is the assumed name for DBK, Inc. DBK incorporated in Florida in 1992.

billing services to Lakepointe Apartments, a 115-unit apartment complex which is located in Lexington, Kentucky. Mid-America owns the Lakepointe Apartments.

Under the terms of the agreement, Envirotech reads the water meter[4] of each unit monthly and bills the unit occupant for water and sewer service. It collects all billed amounts and remits its collections to Mid-America with a monthly report on collections and individual unit water consumption. Envirotech bills Mid-America a monthly service fee of $3.25, plus the cost of postage, per unit for its services. This fee decreases as the number of units billed increases and is deducted directly from Envirotech's collections before any monies are remitted to Mid-America.

The rates charged to Lakepointe Apartment residents differ from those of Kentucky-American, the public utility that provides water service to Lakepointe Apartments. Envirotech currently charges a rate of $5.85 per 1,000 gallons of water consumed for water service and a rate of $7.23 of water consumed for sewer service. Kentucky-American generally assesses its residential customers[5] a monthly service charge of $6.62 and a rate of $2.01145 per 1,000 gallons of water consumed.[6]

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4 These meters register the consumption of hot water only. The plumbing configuration of the Lakepointe Apartments prevented the metering for total water consumption. Envirotech Utility Management Services' Response to the Commission's Order of January 15, 1997, Item 4(b).

5 See Kentucky-American Water Co. (P.S.C. No. 6) Twentieth Revised Sheet No. 50. As most residential customers are served through a 5/8-inch water meter, the Commission has used the service charge associated with service provided through a 5/8-inch meter.

6 LFUCG provides sanitary sewer service to Lakepointe Apartments. The Commission exercises no jurisdiction over that governmental entity.

According to Envirotech, Mid-America advises all Lakepointe Apartment residents prior to the execution of any lease agreement that they will be billed for water and sewer services. The lease agreement contains a notice that all residents will be charged for these services by separate billing. If requested, Envirotech will provide to any Lakepointe Apartment resident a copy of its rates.

Envirotech's services are strictly limited to billing and collection. It did not install the metering which is used to measure the water consumption of Lakepointe Apartment residents. It does not own, operate, or maintain any of that metering equipment or any facilities used for water distribution or sewage treatment. It has no responsibility for terminating the service of delinquent Lakepointe Apartment residents or for purchasing water service from Kentucky-American. Mid-America contracts directly with Kentucky-American for water service. Kentucky-American bills Mid-America for that service and Mid-America is responsible for payment of those bills. Kentucky-American provides water service to the apartment complex through a single meter which it owns.

DISCUSSION

KRS 278.010(3)(d) and (f) define a utility as

> any 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 diverting, developing, pumping, impounding, distributing, or furnishing of water to or for the public, for compensation . . . or [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.

As it neither owns, controls, operates, nor manages any facilities used for the distribution of water or treatment of sewage, Envirotech clearly is not a utility. Envirotech's sole function is the provision of billing and collection services. These services are not mentioned in KRS 278.010(3)(d) or (3)(f).

We further note that none of the services for which Lakepointe Apartment residents are charged involve services to or for the public. 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. Serv. Comm'n of Pennsylvania, 165 A. 47, 49 (Pa. Super. 1933). See 64 Am. Jur. 2d Public Utilities §1 (1972). 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 real. Utilities Comm'n v. Carolina Tel. & Tel. Co., 148 S.E.2d 100, 109 (N.C. 1966).

If 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), local utility companies sought the approval of the Pennsylvania Public Utility Commission to transfer certain distribution, service-supply and metering equipment to the owners of an apartment complex. Upon the transfer of the equipment, the complex owners would purchase the utility service from the utility companies and

then resell it to its tenants. The apartment complex was a garden-type apartment village with 90 buildings, containing 1,223 residential units, 9 retail stores, various public areas, and a club with a dining room, swimming pool, skating rink, and tennis courts. The Commission dismissed the application, holding that the owners of the apartment complex would become a public utility upon completion of the transfer of equipment and must, therefore, obtain Commission approval to furnish utility services first.

The owners of the apartment complex appealed to the Pennsylvania Supreme Court which reversed. In its decision, the Court 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 . . . .
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> . . . .
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> 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.

In City of Sun Prairie v. Wisconsin Pub. Serv. Comm'n, 154 N.W.2d 360 (Wis. 1967), the City of Sun Prairie sought a declaratory ruling from the Wisconsin Public Service Commission on whether the owner of a multiple apartment building was a public utility and thus required a certificate of convenience and necessity to construct certain facilities. The owner proposed to construct and operate four natural gas-fired generators

to provide electricity to his tenants. He additionally proposed to provide water, light, heat and power to them. Such service would not, however, be provided to adjoining landowners or to the public generally. The rents paid by tenants were to cover the expense of utility services. No separate charge would be assessed. The city contended the owner was a public utility insofar as he would be providing utility service to the public.[7] The Commission disagreed.

On appeal to the Wisconsin Supreme Court, the ruling was affirmed. 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.

In Pub. Serv. Comm'n of Maryland v. Howard Research & Development Corp., 314 A.2d 682 (Md. 1974), the furnishing of utility service by a landlord to his tenants was also held not to be "to the public." A landlord of a large shopping center purchased

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[7] The Wisconsin statute provided:

> 'Public utility' means and embraces every corporation, company, individual . . . town, village, or city that may own, operate, manage or control . . . any part of a plant or equipment, within the state . . . for the production, transmission, delivery, or furnishing of light, heat, water, or power either directly or indirectly to or for the public.

electricity from Baltimore Gas & Electric ("BG&E"), reduced the voltage with its own equipment, and sold it to its tenants at a profit. Following an investigation by the Maryland Public Service Commission, the landlord was ordered to modify its billing method so that its billings did not exceed the cost of electricity purchased or, in the alternative, allow BG&E to directly bill its tenants for electric service. A lower court reversed the Commission's order.

On appeal to the Maryland Court of Appeals, the Commission argued, inter alia, that because the landlord was supplying over one hundred tenants with electricity, the service was public, not private. Noting that the Commission was charged with regulating all "public service companies" engaged in operating a "utility business," the Court rejected the Commission's contentions with the explanation that the landlord was making a private sale limited to its tenants and made as an incident to the business of renting commercial space.

Other courts have also rejected the notion that the sale of utility service by a landlord to his tenants is to the public and transforms the landlord into a utility. Story v. Richardson, 198 P. 1057 (Cal. 1921); Antique Village Inn, Inc. v. Pacitti, Robins & Anglin, Inc., 390 A.2d 681 (N.J. 1978); Griffith v. New Mexico Pub. Serv. Comm'n, 520 P.2d 269 (N.M. 1974); Jonas v. Swetland Co., 162 N.E.45 (Ohio 1928); Baker v. Pub. Serv. Co. of Oklahoma, 606 P.2d 567 (Okla. 1980). Regulatory commissions have

similarly recognized this rule. See, e.g., Procedures Governing Sales of Electricity for Resale, 85 PUR3d 107 (Fla. P.S.C. 1970).[8]

SUMMARY

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that:

1. Envirotech is not a "utility" as defined in KRS 278.010(3) and is not within the Commission's jurisdiction.

2. No further proceedings are required. This investigation should be closed and removed from the Commission's docket.

3. Kentucky-American's motion for a hearing in this matter should be denied.

IT IS THEREFORE ORDERED that:

1. Kentucky-American's motion for a hearing is denied.

2. This investigation is closed and is removed from the Commission's docket.

Done at Frankfort, Kentucky, this 29th day of April, 1997.

PUBLIC SERVICE COMMISSION

Linda K Breathitt
Chairman

Vice Chairman

ATTEST:

Don Mills
Executive Director

B. J. Helton
Commissioner

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8 See also Fairhaven Mobile Home village Sewage Treatment Plant, Case No. 90-169 (Ky.P.S.C. Jun. 22, 1990).