



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

March 5, 1998

Mr. David K. Ullerich
535 Broadway
Post Office Box 2522
Paducah, Kentucky 42002-2522

Re: Moon Bay Harbor Resort

Dear Mr. Ullerich:

Commission Staff has received your letter of December 10, 1997 in which you request an opinion on the jurisdictional status of a proposed wastewater treatment facility.

Your letter states the following facts: Moon Bay Harbor Environmental, LLC ("Moon Bay"), is constructing a condominium project in Marshall County, Kentucky. As part of this project, Moon Bay intends to construct a wastewater treatment facility to serve the members of the condominium. The members of the condominium will not contract directly with Moon Bay for wastewater treatment service, but through a property owners association. This association will be the sole customer of the proposed wastewater treatment facility. Moon Bay does not intend to provide service to any person other than the proposed property owner's association.

Your letter poses the following issue: Based upon its ownership of the proposed wastewater treatment facility, is Moon Bay a public utility subject to the regulation of the Public Service Commission?

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

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 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.

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

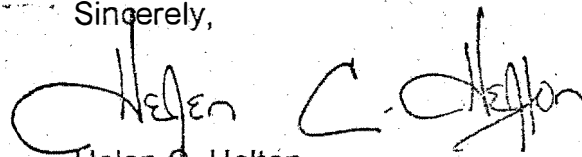
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According to the majority view, the characterization of a service as public or private "does not depend . . . upon the number of persons by whom it is used, but upon whether or not it is open to the use of the public who may require it, to the extent 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 rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 148 S.E.2d 100, 109 (N.C. 1966).

Based upon the facts presented in your letter, it appears that the proposed wastewater treatment facility will not be serving the public. Its owners intend to serve only one customer, not the public. Commission Staff, therefore, believes that Moon Bay will not be a public utility subject to the jurisdiction of the Public Service Commission and that Moon Bay's construction and operation of the proposed wastewater treatment facility does not require a certificate of public convenience and necessity.

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. Any questions concerning this opinion should be directed to Gerald Wuetcher, Commission counsel, (502) 564-3940, Extension 255.

Sincerely,



Helen C. Helton
Executive Director