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Ronald McCloud,
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May 26, 1999

Michael L. Kurtz, Esq.
Boehm, Kurtz & Lowry
2110 Society Bank Center
36 East Seventh Street
Cincinnati, Ohio 45202-4452

Re: Lakewood Homeowner's Association, Inc.

Dear Mr. Kurtz:

Commission Staff has received your letter of May 17, 1999 in which you request an opinion on the jurisdictional status of the Lakewood Homeowner's Association.

Your letter states the following facts:

The Lakewood Valley Development ("Development") is a closed community located in Ohio County, Kentucky. The Lakewood Homeowner's Association ("Association") owns all of the common property within the Development. The Association is a non-profit corporation organized pursuant to KRS Chapter 273. Membership to the Association is limited to RNA Farms LLC (the Development's developer), and persons owning a lot within the Development. Membership runs with the ownership of a lot and passes automatically with the transfer of legal title to a lot.

The Association has contracted with the City of Whitesville, Kentucky for water service for the Development. Under this arrangement, the Association will receive water through a master meter and then distribute water to the lots within the Development. The Association will be responsible for operating the distribution system within the Development and will bill each member an amount equal to his or her pro rata share of the cost of the monthly water service bill on a volume use basis. The Association's charges are intended only to recover the cost of service and will not contain a profit component.

Your letter poses the following issue: Based upon its proposed arrangement with the City of Whitesville, is the Association a public utility subject to the regulation of the Public Service Commission?



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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 diverting, developing, pumping, impounding, distributing, or furnishing of water to or for the public, for compensation;

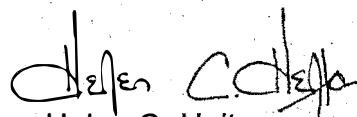
KRS 278.010(3)(d) (emphasis added).

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 Association will not be serving the public. It intends to serve only its members, not the public. Its membership is well defined and limited. Several courts have recognized that an association's rendering of service to its members is not service to the "public." City of Millbrook v. Tri-Community Water System, 692 So.2d 866 (Ala. Civ. App. 1997); Lockwood Water Users Association v. Anderson, 542 P.2d 1217 (Mont. 1975). But see Anchor Point, Inc. v. Shoals Sewer Company, 418 S.E.2d 546 (S.C. 1992); Lewandowski v. Brookwood Musconetcong River Property Owners Ass'n, 181 A.2d 506 (N.J.1962). Commission Staff, therefore, believes that the Association will not be a public utility subject to the jurisdiction of the Public Service Commission.

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 259.

Sincerely,



Helen C. Helton
Executive Director