Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

David L. Armstrong
Chairman

James W. Gardner
Vice Chairman

Linda Breathitt
Commissioner

September 18, 2012

David Samford, Esq.
Goss Samford, PLLC
2365 Harrodsburg Road, Suite B-130
Lexington, Kentucky 40504

Re: Alma Land Company **PSC STAFF OPINION 2012-020**

Dear Mr. Samford:

Commission Staff acknowledges receipt of your requests for opinion regarding the jurisdictional status of a wastewater treatment facility located in the Drift community of Floyd County, Kentucky ("Drift WWTP").

This letter responds to those requests and represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and is not binding on the Commission should the issues herein be formally presented for Commission resolution

Based upon your letter, Commission Staff understands the facts as follows:

> Alma Land Company ("Alma") purchased forty-nine tracts of land in 1993. The Drift WWTP is located on one parcel. Alma was allegedly unaware of the plant's existence and/or ownership at the time of purchase. The plant serves approximately nine residences. Alma has never undertaken to operate the facility or charge for services rendered through the plant. The Drift WWTP has been maintained by the resident homeowners. Alma has unknowingly paid the facility's power bills as the plant draws electric power through a nearby warehouse that Alma owned. Alma did not learn of its ownership of the plant until it was notified by the Kentucky Division of Water ("DOW") consequent to DOW's inspection of the facility in February 2011. DOW has taken the position that Alma is the facility's owner because the facility is located on Alma's property.

> The Commission has no record of the Drift WWTP. There are no rate schedules on file with the Commission regarding any rate or fee that may have been assessed for sewage collection or treatment services that the plant provided. The Commission has no record of any request for transfer of ownership or control of the facilities to Alma.

Your letter presents the following question: Is the Drift WWTP a utility as defined by KRS 278.010(3)(f) and therefore any acquisition of ownership or control of that facility subject to Commission review and approval?

KRS § 278.010(3)(f) defines "utility" as

> any person except . . . a city, who owns, operates, controls, operates, or manages any facility used or to be used for or in connection with … [t]he collection, transmission, or treatment of sewage for the public, for compensation, if the facility is a subdivision collection, transmission, or treatment facility plant that is affixed to real property and is located in a county containing a city of the first class or is a sewage collection, transmission, or treatment facility that is affixed to real property, that is located in any other county, and that is not subject to regulation by a metropolitan sewer district or any sanitation district created pursuant to KRS Chapter 220.

Alma contends that the Drift WWTP is a utility by virtue of its provision of sewage collection and treatment service to the homeowners. It asserts that compensation was provided to enable the plant's construction and continued operation. Because the Commission did not approve the utility's transfer as KRS 278.020(5) and (6) provides, any attempted transfer is ostensibly void and the facility's ownership purportedly remains with the previous possessor. In the alternative, Alma states that the original owner may have attempted to abandon the property in contravention of Commission protocol.

While sewage treatment operations are unquestionably conducted at the Drift WWTP, it does not appear that service is being provided for compensation. Compensation is not a term of art and is generally defined as remuneration for services performed. *Fletcher Properties, Inc. v. Florida Pub. Serv. Com'n*, 356 So.2d 289, 292 (Fla. 1978); Black's Law Dictionary 322 (9th ed. 2009). Here, Alma was not compensated, monetarily or otherwise, for any wastewater service over the course of its nineteen year ownership of the facility. Fees also do not appear to have been paid to any other individual or entity. Regular bills were neither tendered nor paid. Alma did not collect any fees from the homeowners that could be considered compensation. *See contra State ex rel. Utilities Com'n v. Carolina Water Services, Inc.*, 598 S.E.2d 179, 184 (N.C. App. 2004) (holding tap fees a sufficient form of compensation to deem the water supplier a utility). Although, the homeowners' communally paid for the treatment

facility's upkeep, the shared allocation of maintenance costs does not compel a finding that the service was "for compensation." *Austin v. City of Louisa*, 264 S.W.2d 662, 664 (Ky. 1954). Instead of being compensated in any capacity, Alma appears to have expended resources through unknowingly paying for the facility's electricity for nearly two decades without reimbursement from the resident homeowners.

In lieu of regular monetary payments, Alma suggests that compensation must have been provided to the original builder of the Drift WWTP for the initial construction and that such compensation placed Drift WWTP within the statutory definition of "utility." Having become a utility, Drift WWP could not be unilaterally dissolved. That a builder or contractor was presumably paid for the plant's construction, however, is not compensation for sewage treatment services as is contemplated by the statute. *Id.* In this context, service entails the provision of a service, specifically collection and treatment of wastewater. *See* Black's Law Dictionary 1491 (9th ed. 2009). Building a treatment facility itself does not involve the actual treatment of sewage. It is the actual operation and services of the plant for collection, treatment or transmission of sewage that is of import, not the original construction costs. KRS 278.010(3)(f).

Based upon this analysis, Commission Staff concludes that, in the absence of any form of regular compensation for actual sewage collection and treatment services, the Drift WWTP is not a utility subject to the Commission's jurisdiction and that Alma's operation of the Drift WWTP is not subject to the provisions of KRS Chapter 278.

As to Alma's assertion that the previous owner should be deemed to have attempted to improperly abandon the facility, this assertion is not correct for reasons previously iterated. While a utility may not be abandoned without prior Commission approval, the instant treatment plant is not a utility. KRS 278.020(5). Accordingly, the Commission's approval need not have been sought as a condition precedent to abandoning the facility.

In your letter, you presented a second question: If Alma assesses a fee or charge to the adjacent property owners, would it meet the statutory definition of "utility"?

Commission Staff is of the opinion that under those circumstances, the Drift WWTP would be providing sewage treatment and collection services to the public and would be subject to the provisions of KRS Chapter 278. To constitute a public utility, some aspect of the plant or equipment must be put to public use. *See City of Sun Prairie v. Wisconsin Pub. Serv. Comm'n,* 154 N.W.2d 360, 362 (Wis. 1967). There is no indication that the instant waste services are limited to a specific subset of individuals. As the Drift WWTP serves all those within its service area, without any identified qualifications, the facility operates for public use. *See North Carolina ex. rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.,* 148 S.E.2d 100, 109 (N.C. 1966).

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and is not binding on the Commission should the issues herein be formally presented for Commission resolution.

Questions concerning this opinion should be directed to Jonathan Beyer, Commission Counsel, or Gerald Wuetcher, Executive Advisor/Attorney, at (502) 564-3940.

Sincerely,

Jeff Derouen
Executive Director

Cc: Mary Stephens
Michael Kroeger
Lisa C. Jones