COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CHRIS WARNER AND CHARLES NORTON	)	
	)	
COMPLAINANTS	)	
	)	CASE NO.
VS.	)	99-205
	)	
	)	
VERNA HILLS NEIGHBORHOOD ASSOCIATION, INC.	)	
	)	
DEFENDANT	)	

O R D E R

This matter is before the Commission on the Complaint of Chris Warner and Charles Norton ("Complainants"), in which they allege that the Verna Hills Neighborhood Association, Inc. ("Association") improperly increased its sewer charges to the members of the Association. Complainants allege, among other things, that the Association Board has acted in an arbitrary and capricious manner and that the parties to this case have been involved in litigation concerning Complainants' refusal to renew their membership in the Association.

The threshold issue is whether the Commission has jurisdiction to investigate the allegedly unreasonable increase. The parties to this case filed briefs on this issue on November 15, 1999, and the issue is ripe for Commission decision.

The Positions of the Parties

The Association contends that the Commission lacks jurisdiction because the Association does not offer service to the public at large. Instead, it serves "only

'members' and the by-laws define membership as only those persons or entities who own property in the specific geographical boundary of the platted subdivision."[1] As the Association aptly points out, this Commission has specifically held that, as the Association serves its members, rather than the public at large, it is not a "utility" pursuant to KRS 278.010 and is therefore not subject to Commission jurisdiction.[2] The Association contends that it has taken no action since the Commission's Order in Case No. 93-315 to change its jurisdictional status.

In response, Complainants argue that the Association should never have been given an "exemption" from Commission jurisdiction;[3] that Commission jurisdiction over "all utilities in the state" pursuant to KRS 278.040(2) gives the Commission jurisdiction over the Association; and that there is no Kentucky exemption for "privately owned utilities."[4] The Complainants contend that the Commission's exemption of the Association is based on a "creative argument" regarding the "meaning of terms like 'public utility' – a term which is not even in the statutes."[5] The Complainants also contend that the Association has acted outside the "exemption" provided by the Commission in continuing to provide service to the Complainants even after the

[1] Defendant's Brief on Jurisdiction Issue ("Defendant's Brief"), filed November 15, 1999, at 5.

[2] Case No. 93-315, The Application of Verna Hills Neighborhood Association, Inc. for an Order Authorizing Verna Hills Ltd. to Transfer its Assets to Applicant and for Determination of Jurisdictional Status. (Order dated September 16, 1993), at 3.

[3] Co-Complainants' Brief, filed November 15, 1999, at 5.

[4] Co-Complainants' Brief at 5 – 8.

[5] Co-Complainants' Brief at 9.

membership in the Association was withdrawn.[6] Complainants allege that both they and the Association believe that if all property owners do not maintain membership in the Association, then the sewage treatment plant automatically becomes subject to Commission jurisdiction. This common belief, they declare, is their reason for withdrawing their membership.[7]

Discussion

The Commission sees no reason to revisit its decision in Case No. 93-315 that an entity owned by a specific group of people to provide service to themselves rather than to a more indefinite "public" is not a utility pursuant to KRS 278.010 and therefore is not subject to Commission jurisdiction. Complainants' argument concerning alleged distinctions drawn by the Commission between "public" and "private" utilities appears to be based upon a misunderstanding of the Commission's Order in Case No. 93-315. The Commission drew no distinction between "private utilities" and "public utilities," and it did not base its jurisdictional finding on any analysis of the term "public utility."[8] The conclusion of that Order was that, because the Association would not serve the public, it was not a "utility" as defined by KRS 278.010. [9] The issue in Case No. 93-315 was whether the entity in question *serves* the "public." If it does not, it is not a "utility" under KRS 278.010, and it is not subject to Commission jurisdiction pursuant to KRS 278.040.

[6] Co-Complainants' Brief at 8 – 9.

[7] Co-Complainants' Brief at 9.

[8] The Commission notes that it has jurisdiction over numerous privately-owned utilities that do provide service "to the public."

[9] Order, Case No. 93-315, at 3.

In order to find that an entity provides service "to the public" pursuant to KRS 278.010, this Commission must find that the entity in question provides service to, or stands ready to provide service to, "an indefinite public (or portion of the public as such) which has a *legal right to demand and receive its services or commodities.* There must be a dedication or holding out, either express or implied … of services to the public as a class." 64 Am.Jur.2d Public Utilities, Section 1 (emphasis added). See also North Carolina ex rel. Utilities Comm'n v. Carolina Tel. & Tel Co., 148 S.E.2d 100, 109 (N.C. 1966) ("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"). The Association has never held itself out as a utility prepared to provide services "to the public as a class" or to "all who apply up to the capacity of [its] facilities." To the contrary: its by-laws specifically state that the Association will not provide service to the general public and will, instead, serve only members of the corporation. In its brief, the Association states that it has never offered service to anyone who resides outside its geographical boundary, and that it has never planned to expand its services to anyone outside that boundary. It has been, and remains, "wholly owned and operated by its members who control it and who are limited to a defined, privileged, limited group of persons who own real estate on platted subdivision property."[10]

In summary, the Commission did not, in Case No. 93-315, grant an "exemption" to the Association. It found, instead, that the Association is not a "utility" pursuant to KRS 278.010 for the reasons discussed above. The Commission reaffirms that analysis

[10] Defendant's Brief at 5.

here. Persons who reach agreement among themselves to provide service to themselves do not, by that agreement, form a "utility" as defined by KRS 278.010.

Complainants' second argument is that provision of sewage service to them after they withdrew their membership in the Association automatically rendered the Association a "utility" in any event, since service to them, as non-members, constitutes service "to the public." [11] They do not, however, offer any legal authority to support this contention. Nor do they explain why they, as persons who agreed to become members of the Association, and who own residences within the Association's designated geographic area, do not remain materially different, for Association purposes and for purposes of the law, from members of the "public at large."

A dedication of private property to public use "is never presumed without evidence of unequivocal intention." Wilhite v. Public Service Comm'n, 149 S.E.2d 273, 281 (W.Va. 1966). No such intention is even implied here. The mere fact that the Association did not immediately terminate service when Complainants withdrew their membership does not mean that the Association thereby "unequivocally "dedicated its facilities to the "public" service. There is not even the slightest indication in the record that the Association intended to serve the Complainants as members of "the public." Instead, the Association sought to require the Complainants to remain members, bringing suit in Clark District Court for that very purpose.[12] The merits of the suit before Clark District Court are not before this Commission; however, the fact that the suit was

[11] Co-Complainants' Brief at 9.

[12] Complaint at 4, citing Verna Hills Neighborhood Association, Inc. v. Chris Warner (Clark District Court, Case No. 99-S-0028); Verna Hills Neighborhood Association, Inc. v. Charles Norton (Clark District Court, Case No. 99-S-0029).

brought provides further evidence that the Association intends to serve only its membership.

Based on the foregoing analysis, the Commission, having been sufficiently advised, HEREBY ORDERS that this case is dismissed for lack of jurisdiction.

Done at Frankfort, Kentucky, this 8th day of May, 2000.

By the Commission

ATTEST:

Executive Director