

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF HUNTINGTON WOODS)
NEIGHBORHOOD ASSOCIATION, INC.)
FOR TRANSFER OF OWNERSHIP) CASE NO. 99-515
OF THE SEWAGE TREATMENT PLANT)
OWNED BY JOHN AND MARLENE FEHSAL)
LOCATED IN HUNTINGTON WOODS)
SUBDIVISION)

O R D E R

On December 30, 1999, Huntington Woods Neighborhood Association, Inc. ("Applicant") applied to the Commission for authority to transfer ownership of the sewage treatment facilities located in the Huntington Woods Subdivision in Frankfort, Franklin County, Kentucky. Finding that the application did not meet the minimum filing requirements, the Commission informed the Applicant that the filing would have to be brought into compliance before the application would be considered filed. On March 3, 2000, the Applicant filed the required information, and the case was docketed. On May 26, 2000, the Applicant requested approval of the financing required for the acquisition of the sewage treatment facilities.

After review of the Applicant's Articles of Incorporation submitted with the application, Commission Staff requested information from the Applicant regarding its corporate charter. The Applicant responded to Staff's inquiry on May 24, 2000 by filing with the Commission the Articles of Amendment to the Articles of Incorporation that it had caused to be filed in the Office of the Secretary of State that same date. To

provide the Commission adequate time to review the information filed, the Applicant agreed to grant the Commission an extension of time to and including June 16, 2000 to render its decision in this proceeding.

KRS 278.020(4) prohibits any person from acquiring or transferring ownership or control of any utility under the jurisdiction of the Commission without having received prior approval. KRS 278.020(5) prohibits any entity from acquiring control of any utility under the jurisdiction of the Commission without prior approval. The Commission finds that KRS 278.020(4) and (5) apply to the transaction proposed in the application and that Commission approval is necessary. Therefore, the Commission has before it two questions to be addressed in this Order. The first question is whether the proposed transfer of the sewage treatment facility to Applicant should be approved. The second question is whether, upon completion of the transaction, the Applicant will be a "utility" as defined by KRS 278.010.

John and Marlene Fehsal ("the Fehsals") currently own and operate the utility at issue in this proceeding. The Fehsals' subdivision treatment facility plant provides sewer service for compensation to the residents of the Huntington Woods Subdivision of Franklin County, Kentucky and to the Fast Break Shell station adjacent to the subdivision. Applicant is a non-profit corporation organized under the provisions of KRS Chapter 273 and functioning as a neighborhood association for the Huntington Woods Subdivision.

The Fehsals have completed development of the subdivision and desire to sell the sewage treatment facilities to the Applicant as evidenced by the Asset Purchase Agreement entered into by the parties on December 23, 1999. Under the terms of the

Agreement, Applicant agrees to pay the Fehsals \$60,000 payable in 80 equal monthly installments of \$750 each at no interest unless the Internal Revenue Service charges interest against the loan to the sellers. The debt is to be secured by a mortgage on the real property being conveyed.

The residents of Huntington Woods Subdivision and the Fast Break Shell station depend upon the sewage treatment facilities for sewer service and have a significant financial interest in their maintenance and operation. The Applicant has the authority to assess its members for expenses related to the maintenance and operation of these facilities. This ability to assess its members is adequate evidence of its financial integrity to ensure continuity of service. No third party beneficiary agreement is required. 807 KAR 5:071, Section 3(1)(a).

In order to ensure proper operation of the sewage treatment facilities, the applicant has retained Noel Norton, a certified wastewater treatment plant operator, to operate the sewage treatment facilities.

Based upon the foregoing, it appears that Applicant possesses the financial, technical and managerial capabilities necessary to provide reasonable service. The next issue to be considered is whether, after the transfer is complete, the facilities transferred will remain within this Commission's jurisdiction. In other words, will the Applicant's operation of the facilities constitute service "to the public" pursuant to KRS 278.010?

The characterization of service as public depends "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). "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.” North Carolina ex. rel. Utilities Comm’n v. Carolina Tel. & Tel. Co., 148 S.E. 2d 100, 109 (N.C. 1966).

The Applicant stipulates that it will not extend service to any person or commercial entity outside the boundaries of the Huntington Woods Subdivision other than the Fast Break Shell station the Fehsals permitted to access the plant. In addition, the Applicant states that the Fast Break Shell will be allowed to become a full member of the Huntington Woods Neighborhood Association. The Association will be, therefore, an association of persons providing service to themselves rather than “to the public.”

After reviewing the application and being otherwise sufficiently advised, the Commission finds that:

1. The proposed transaction is consistent with the public interest, and it will take place in accordance with law and for a proper purpose. KRS 278.020(5).
2. The application demonstrates the Applicant possesses the financial, technical and managerial abilities to provide reasonable service. KRS 278.020(4).
3. After the proposed transfer is completed, the sewage treatment facilities will serve a defined, privileged, and limited group rather than the public. Therefore, the Applicant will not be a “utility.” KRS 278.010.
4. No approval by the Commission is required for the financing of the acquisition since the Applicant has been determined to be non-jurisdictional.

IT IS THEREFORE ORDERED that:

1. The proposed transfer of the sewage treatment facilities from Fehsals to the Applicant is approved as outlined in the Asset Purchase Agreement.

2. Within 10 days of the date of completion of transfer, the Applicant shall advise the Commission in writing of its completion.

3. Until the transfer has occurred, the sewage treatment facilities shall remain under the Commission's jurisdiction.

4. Within 30 days of the completion of transfer, the Fehsals shall submit a complete and accurate annual report for the period from January 1, 2000 to the date of the transfer.

5. Upon completion of the transfer, the Applicant will not be a utility subject to Commission jurisdiction. However, any subsequent change in the Applicant's membership policies or its provision of service to persons or entities other than those stipulated by the Applicant to this Commission, may subject the Applicant to Commission jurisdiction.

Done at Frankfort, Kentucky, this 14th day of June, 2000.

By the Commission

ATTEST:


Executive Director