COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF DOE VALLEY UTILITIES, INC. FOR DETERMINATION AS TO JURISDICTIONAL STATUS OF DOE VALLEY UTILITIES, INC. AND ADDITIONAL OR ALTERNATIVE DETERMINATIONS	)	CASE NO. 2003-00360

O R D E R

On September 19, 2003, Doe Valley Utilities, Inc. ("Doe Valley") filed a petition with the Commission in which it requested the Commission to determine the jurisdictional status of Doe Valley. The petition also sought a ruling upon the disposition of certain customers and a question of financing for future projects. Doe Valley operates both water and wastewater treatment facilities for the Doe Valley community in Meade County, Kentucky. The Doe Valley community is a planned, gated, residential community surrounding Doe Valley Lake. Doe Valley, incorporated in April 1974, is subject to Commission jurisdiction under KRS 278.010(3)(d), as it provides service "to the public."[1] Doe Valley Association, Inc. ("DVA") is the property owners' association that wholly owns Doe Valley.

In its petition Doe Valley raises three issues. The first is whether Doe Valley is a "utility" as defined in KRS 278.010 and is therefore jurisdictional to the Commission. The second is whether, if Doe Valley is currently jurisdictional, the Commission will permit Doe

[1] Case No. 1992-00467, The Joint Application of F.D.I.C. and Doe Valley Assoc. (Order dated December 17, 1992).

Valley to cease service to certain customers not members of the DVA, while retaining Vulcan Materials, Inc. ("Vulcan") as a commercial customer and, based on the cessation of service to these customers, determine that Doe Valley is not a jurisdictional "utility." The third is whether Doe Valley should be required to obtain a Certificate of Public Convenience and Necessity ("CPCN") to construct water treatment facilities if the DVA provides the entire financing for such projects.

Vulcan and Doe Valley Real Estate Corporation both requested and were granted intervention and were made parties to this matter. The DVA has also been made a party to this case.

On March 1, 2004, Doe Valley filed a motion for summary judgment requesting that the Commission grant its petition and rule that it is a non-jurisdictional utility. Doe Valley's motion contains affidavits from affected customers and evidence of recent and proposed corporate action by the DVA. It is the contention of Doe Valley that it has taken all the steps necessary to be found a non-jurisdictional utility pursuant to the analysis set forth in our ruling in Case No. 1992-00467.

In that case we found that Doe Valley was jurisdictional to the Commission. Doe Valley was found to serve not only the residents of the community, but also to render service to six nonresidents of the community. We said that homeowners' associations which provide utility service only to their members, as specifically set forth in their by-laws, do not fall within the statutory definition of a utility and are not within the Commission's jurisdiction. We found in Case No. 1992-00467 that the association had not indicated it would amend its by-laws to include the six nonresidents of the community as members of the homeowners' association.

In its motion Doe Valley argues that it has complied with all requirements contained in the prior ruling and should now be found not to be providing utility service "to the public." Doe Valley points to the corporate resolutions, Shareholder Consent and Amendments of the DVA Articles, Exhibits D - G, in support of its argument. The DVA contends that the amended by-laws, as contained in Exhibit G, will be adopted, specifically restricting service only to members of the DVA, with the existing six outside customers "grandfathered in" for utility service, and given relevant voting rights. Article VI(a) of the amended by-laws provides that the six customers shall have voting rights for directors with jurisdiction over utility service and said voting rights shall not be modified or eliminated by subsequent by-laws. Section (c) of that Article states that the corporation shall continue to provide water to the six outside customers "as long as the outside customers need water and as long as Doe Valley Association, Inc. is providing water."

Doe Valley states that since 1992 it has not exercised any powers of a public utility, borrowed money, or extended any service to any other customer outside of the original six. It also asserts that it does not intend to extend service to anyone outside the DVA.

Doe Valley has filed as Exhibits A and B affidavits from the residential customers in support of its motion. In the filed testimony of Fred Buckner, Area Operations Manager for intervenor Vulcan, he states that Vulcan supports Doe Valley's petition to become non-jurisdictional. Buckner testified that Vulcan receives its service from a meter located within the subdivision boundary and owns the service line from the meter to its property.

We note that Doe Valley also operates a sewer system in conjunction with its water utility. Our decision as to the jurisdiction of Doe Valley in this matter applies equally to both the water and sewer systems.

In our Order dated February 2, 2004, we gave notice that any party to the proceeding may request a public hearing on the issues addressed in Doe Valley's motion for summary judgment. No such request for a hearing has been filed by any party. Accordingly, this matter has been submitted to the Commission for a decision.

FINDINGS OF FACT

We find that, pursuant to Exhibit G of the motion filed by Doe Valley, the DVA has indicated it will take the necessary steps to amend its corporate by-laws to bring the six outside customers within the DVA as set out in our Order in Case No. 1992-00467. We further find that the by-laws as amended include the six outside customers within the DVA and grant them certain rights and guarantees of water service similar to other DVA members. We find that the six outside customers agree to the actions taken by the DVA and have filed no objection to being included within the DVA for utility service under the amended by-laws.

We find that Doe Valley's non-jurisdictional status must be conditioned upon the implementation of the amendment to the DVA by-laws as contained in Exhibit G of the motion.

CONCLUSIONS OF LAW

KRS 278.010(3) defines a "utility" as:

> [A]ny person except, for purposes of paragraphs (a), (b), (c), (d), and (f) of this subsection, a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with: (d) The diverting, developing, pumping, impounding, distributing, or furnishing of water to or for the public, for compensation;

KRS 278.020(1) states that:

> No person, partnership, public or private corporation, or combination thereof shall commence providing utility service to

> or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010.

We have held in cases addressing questions concerning whether a homeowners' association is a public utility that the determining factor for "service to or for the public" depends upon the exclusivity of the association's membership.

In Wilhite v. Public Service Commission, 149 S.E. 2d 273, 64 P.U.R. 3d 505 (1966), the West Virginia court said:

> The test as to whether or not a person, firm or corporation is a public utility is that to be such there must be a dedication or holding out either express or implied that such person, firm or corporation is engaged in the business of supplying his or its product or services to the public as a class or any part thereof as distinguished from the serving of only particular individuals; and to apply this test the law looks at what is being done, not to what the utility or person says it is doing. The mere fact that a product which is usually dispensed by or sold by a utility to the public is being furnished does not make every person, firm or corporation selling such product a public utility. If such product is sold under private contract and the seller does not hold himself out to sell such product to the public or render some service to the public he is not a public utility.

We believe that this test may be applied in the case of an association of homeowners seeking to restrict service, both to service being contemplated and service presently being provided.

Since we have determined that Doe Valley's motion to be a non-jurisdictional utility should be granted and the six customers are to be properly included in the DVA, the remaining issues as to the alternative arrangements for six customers and the question of a CPCN for any future construction of plant are rendered moot. However, until such time as the condition imposed by the Commission is met, Doe Valley remains a jurisdictional utility and cannot be transferred or dissolved without prior Commission approval.

IT IS THEREFORE ORDERED that:

1. The motion of Doe Valley to be declared a non-jurisdictional utility is granted subject to the condition as set forth in this Order.

2. Doe Valley and the DVA shall file within 5 days of the corporate action a true copy of the Articles of Amendment, as set out in Exhibit G of its motion, certified by an officer of the corporation. The change of the status of Doe Valley shall not occur unless such documents are timely filed with the Commission.

3. Doe Valley shall file with the Commission an annual report to reflect the period up to and including the end of the month subsequent to the filing of the approved amendments to the DVA by-laws.

Done at Frankfort, Kentucky, this 19th day of May, 2004.

By the Commission

ATTEST:

Executive Director