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November 2, 2023

Linda C. Bridwell  
PSC Executive Director  
Public Service Commission  
211 Sower Blvd.  
Frankfort, KY 40601

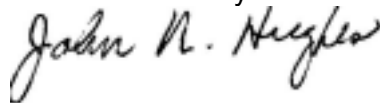
Re: Case No. 2023-00195

Dear Ms. Bridwell:

Atmos Energy Corporation submits its Response pursuant to the Order of October 20, 2023. I certify that the electronic documents are true and correct copies of the original documents.

If you have any questions about this filing, please contact me.

Submitted By:



John N. Hughes

Attorney for Atmos Energy Corporation

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

In the Matter of:

Electronic Application of Pennyriple Regional	)	
Energy Agency for a Declaratory Order	)	Case No. 2023-00195
Regarding the Jurisdiction of the Public	)	
Service Commission	)	

**ATMOS ENERGY CORPORATION RESPONSE**  
**TO ORDER OF OCTOBER 20, 2023**

Atmos Energy Corporation (“Atmos Energy” or “Company”), by counsel, files this Response pursuant to the Order of October 20, 2023.

**I. PREA IS NOT A CITY OR AGENCY OF A CITY**

The basis for Pennyriple Regional Energy Agency’s (“PREA”) assertion of exemption from Commission jurisdiction is that it is a city pursuant to KRS 278.010(3). Although the two current members of PREA are cities, the proposed Interlocal Agreement (“Agreement”) allows additional members. The purpose of PREA as stated in its Preamble acknowledges that the initial city Members intend to include other “public agencies”:

WHEREAS, municipalities and public agencies in the Pennyriple Region may need to develop infrastructure services and systems (hereinafter “Projects”), to meet the demands of Pennyriple residents and businesses; and ...

New Members in the Agreement include agencies other than cities:

Section 7.08. New Members. Any Public Agency meeting the requirements of the Act may become an additional Member of the Agency by (i) taking any appropriate official action to adopt this Agreement, ...

Public agency is defined as:

**65.230 Definitions for KRS 65.210 to 65.300.**

As used in KRS 65.210 to 65.300, unless the context otherwise requires: ...

(3) "Public agency" means:...

**(a) Any local government;**...

**(f) Any interlocal agency;**

Based on the stated intention of the two current Members, PREA expects to expand its scope to include other public agencies. Because Membership is not limited to cities, PREA cannot claim to be or be deemed to be a city. The Applicants assert that governmental entities that form an interlocal agreement retain their status as governmental entities. In the *Bretagne, LLC v. Multi-County Recreational Board, Inc.*, 467 F.Supp.3d 501 (E.D. Ky.2020), cited in paragraph 15 of the Application, the Court merely recognized that county governments have sovereign immunity based on their governmental status regardless of their participation in an interlocal agreement. The apparent analogy is that the two applicant cities also retain their governmental status as well. This analogy is false. In this Application the issue is whether a specific statute – KRS 278.010(3) – is limited to a city as statutorily formed and historically defined by this Commission, whether an entirely new entity composed of cities and any other public agency meets that definition and whether the terms of the Agreement alter the status of the cities of the proposed Interlocal Agency. The answers to these issues clearly negate the notion that PREA is a “city” for purposes of KRS 278.010(3). The Commission’s statutory exemption of cities is limited. It does not include agencies associated with cities or a combination of a city and another governmental agency.

**278.010 Definitions for KRS 278.010 to 278.450, 278.541 to 278.544, 278.546 to 278.5462, and 278.990.**

As used in KRS 278.010 to 278.450, 278.541 to 278.544, 278.546 to 278.5462, and 278.990, unless the context otherwise requires:

- (1) "Corporation" includes private, quasi-public, and public corporations, and all boards, agencies, and instrumentalities thereof, associations, joint-stock companies, and business trusts;
- (2) "Person" includes natural persons, partnerships, corporations, and two (2) or more persons having a joint or common interest;
- (3) "Utility" means any person except a regional wastewater commission established pursuant to KRS 65.8905 and, 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: ...**

The terms of the Agreement confirm that PREA can include agencies other than cities and act independently of any city and without control of a city. The Agreement reflects the scope of its intended operations by reference to PREA being a “public agency”, not a city.

**Section 1.01. Establishment of Interlocal Agency.** An interlocal agency, constituting a **legal public agency** with the purposes and powers hereinafter set forth, is hereby created under the authority of the Act, to be known as the Pennyryle Regional Energy Agency (hereinafter referred to as the “Agency”). The undersigned parties and any other public agencies added as parties to this Agreement in accordance with Section 7.08 hereof shall be known as the “Members” of the Agency.

**Section 1.03 Nature of the Agency and this Agreement.** (a) The **Agency shall be an interlocal agency** created by this Agreement pursuant to the Act. The Agency is not intended to be, shall not be deemed to be, and shall not be treated as, a general partnership, limited partnership, joint venture, corporation, investment company, joint stock association, joint stock company or common law trust.

These sections define PREA as a public agency, not a city. The reason is obvious - PREA is open to membership by any public agency. Rather than being exempt under KRS 278.010(3), it is jurisdictional under KRS 278.010(2) as a “Person”, which includes two or more persons having a joint or common interest.

The “Agency” created by the Agreement is governed by a non-city board of directors:

**Section 3.01. Board of Directors.** The governing body of the Agency shall be the Board of Directors, the membership of which shall be determined as hereinafter provided. The number of Directors shall initially be seven (7) and shall thereafter be fixed from time to time by resolution of a majority of the voting Directors then in office, provided, however, that the number of voting Directors shall in no event be less than seven. Subject to additional Directors added to the Board as provided in this Section 3.01, the Agency shall be governed by a Board composed of the following:

- (a) one Director designated by the governing body of each Member of the Agency, who shall serve at the pleasure of the Member designating him;
- (b) the County Judge/Executive of Todd County or his designee, who shall serve as a Director for so long as the County Judge/Executive holds office; and
- (c) four at-large Directors, each of whom shall have his principal residence in Todd County, Kentucky, to be chosen by the governing bodies of the Members from a list of nominees of not less than three names submitted by the Board.

The four at-large Directors shall serve for a four-year term, with the first four at-large Directors to have pre-determined staggered terms to provide for an orderly rotation of directorships...

If a new Member is added to the Agency, the new Member shall appoint one Director designated by the governing body of the new Member, who shall serve at the pleasure of the Member designating him.

Based on this method of appointing Directors, no city governs PREA. Members of PREA could be the minority in the Agency subjecting them to control by the remaining Members. Regardless of the makeup of the Members, the city members are subject to control by the Board. As such, PREA’s claim of being a city or controlled by a city is undermined by its conditions of Membership. Allowing a group of unrelated public agencies to define itself as a city distorts the statutory definition of city and of the Commission’s express limitation of exemption under KRS 278.010(3).

In contrast to PREA's Board of Directors, a city is governed by a board of commissioners and specific statutory procedures and powers:

**83A.010 Definitions for chapter.**

As used in this chapter, unless the context otherwise requires:

- (1) "Board" means the board of commissioners in any city organized and governed under the city manager plan.
- (3) "Commission" means the city commission in any city organized and governed under the commission plan.
- (5) "Council" means the city legislative body in any city organized and governed under the mayor-council plan.
- (10) "Officer" means any person elected to a position by the voters or any person appointed to a position which (a) is created by the Constitution, the General Assembly, or a city; (b) possesses a delegation of a portion of the sovereign power of government; (c) has powers and duties to be discharged which are conferred directly or by implication by the city; (d) has duties performed independently and without control of a superior power other than law; (e) has some permanency; (f) requires an official oath; (g) is assigned by a commission or other written authority; and (h) provides for an official bond if required by proper authority.

PREA has given itself authority to act independently of its city members and without ultimate legislative oversight or control by the cities.

**Section 2.01. General.** The Agency is formed to allow the **Members** to effectively collaborate to do all things necessary or convenient to serve the current and future **needs of the Members** to acquire, construct and install Projects for the benefit of residents and business in the Pennyriple region of the Commonwealth and surrounding states and to otherwise provide assistance to the Members related to the development of a Natural Gas System. The Agency may do and perform such acts and things as in its sole judgment and discretion are necessary and proper for conducting the affairs of the Agency or promoting the interests of the Agency and its Members. The enumeration of any specific power or authority herein shall not be construed as limiting the aforesaid general power or authority or any specific power or authority.

PREA can act for the benefit of some, but not all of its "Members", some of which could be agencies other than cities.

**Section 2.08. Designation of Projects.** To establish or undertake, from time to time, **specific projects for the benefit of one or more of its Members** (each a "Project"), the Board shall adopt a resolution

authorizing said Project, designating it as a Project of the Agency, and identifying the Members who may be interested in participating in the Project.

If fewer than all of the Members of the Agency are interested in participating in a Project, a Project Committee shall be established in accordance with Section 3.05.

Unless a Member elects to participate in a particular Project, that Member shall not be liable to the Agency, any other Member of the Agency or any other person, company, organization or entity for the operation, maintenance, construction, development, acquisition, performance, funding, financing, costs, or expenses of the Project, or for claims, demands, causes of action, obligations or liabilities of any kind arising out of, or related to, the Project.

If a project is approved that does not include a Member city, PREA could be acting on behalf of entities that are not exempt from KRS 278.010(3), negating its alleged jurisdictional exemption. Those actions can be taken even if opposed by a member city, based on the membership of the Board of Directors. See Section 3.01 above. Because PREA can act independently of the cities that are members, it is not a “city” as defined by relevant statutory provisions. As such, the facilities relevant to PREA’s operations are not owned, controlled or operated by a city as required by KRS 278.010(3). This creates an issue of whether each of the proposed projects must be reviewed by the Commission as exempt if a city participates or non-exempt if a city does not participate.

## **II. KRS 65.240 LIMITS THE AUTHORITY THAT CAN BE GRANTED TO OR ASSUMED BY AN AGENT OF A CITY**

The Agreement creating PREA includes powers that are not granted to a city for the purpose of providing natural gas service. KRS 65.240 excludes natural gas facilities from inclusion in Interlocal Agreements.

**65.240 Joint exercise of power by state agencies with other public agencies --Permissible agreements among private institutions of higher education, county school districts, and independent school districts.**

(3) **Any public agency** may enter into agreements with another public agency or agencies pursuant to KRS 65.210 to 65.300 to acquire by purchase or lease, any real or personal property, or any interest, right, easement, or privilege therein, **outside of its municipal or jurisdictional boundaries, in connection with the acquisition, construction, operation, repair, or maintenance of any water, sewage, wastewater, or storm water facilities,** notwithstanding any other provision of the Kentucky Revised Statutes restricting, qualifying, or limiting their authority to do so, except as set forth in KRS Chapter 278.

The proposed Agreement contains the following provisions related to natural gas:

**Section 1.4 Definitions.**

“Pennyriple Region” shall mean area known as the Pennyriple region in the Commonwealth of Kentucky and the State of Tennessee, and adjoining areas.

“*Natural Gas System*” means the acquisition, construction, installation and operation of certain joint distribution systems for natural gas and any and all facilities, including all equipment, structures, machinery, and tangible and intangible property, real and personal, for the distribution, storage or transmission of natural gas...

**Section 2.01. General.** The Agency is formed to allow the Members to effectively collaborate to do all things necessary or convenient to serve the current and future needs of the Members to acquire, construct and install Projects for the benefit of residents and business in the **Pennyriple region of the Commonwealth and surrounding states** and to otherwise provide assistance to the Members related to the development of a **Natural Gas System.**

The key elements of these sections of the Agreement are the formation of a natural gas system created and designed to serve the Pennyriple Region, Tennessee and “adjoining areas.”

KRS 65.240 restricts an agreement related to services outside a city’s jurisdiction to water, sewage and storm water. No mention of natural gas is included in the powers authorized by this statute. Any expansion of a city’s or PREA’s powers related to natural gas service beyond the city’s borders conflicts with this limitation. While KRS 96.170 allows a city to extend natural



gas service beyond its borders, neither of the two cities that are participants of the Agreement are acting as a city. Each is acting as a collective participant of an Interlocal Agreement, which by its terms restricts those participants to activities allowed by KRS 65.240.

Furthermore, the attempt by PREA to exercise its authority beyond Kentucky borders negates the statutory exemption of the member cities from the definition of “city” in KRS 278.010(3). “A municipality operating beyond the boundaries of the sovereignty creating it, is universally regarded as a private corporation with respect to such operations.”<sup>1</sup> This principle has also been adopted by the Commission.<sup>2</sup>

Regardless of the statement in the Application that the current members of PREA do not intend to extend facilities into Tennessee, the Agreement defines its “Region” as including Tennessee. It must be assumed that the inclusion of Tennessee in its “Region” was purposeful. As new members are added, those members could approve such an extension of its facilities. That extension of facilities to Tennessee would nullify the exemption from Commission regulation predicated on the definition of “city”.

Because the Agreement contains powers that exceed those statutorily granted to cities, it violates KRS 65.240. PREA cannot claim to be an agent of a city due to the extra-legal authority contained in the Agreement. Its purported powers disqualify it from the protections afforded by the relevant statutes. As such, PREA is not exempt from Commission jurisdiction or regulation.

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<sup>1</sup> *City of Cincinnati, Ohio v. Commonwealth ex rel. Reeves*, Ky., 167 S.W.2d 709, 714 (1942).

<sup>2</sup> Case No. 2001-361 *Application of Mountain Water District for A Certificate Of Public Convenience And Necessity To Construct A Wastewater Project And For A Declaration Of Jurisdiction And Approval Of A Wastewater Treatment Contract Pursuant To KRS 278.020 And 278.300* (Ky. PSC Nov. 19, 2001), Order at 4.

### III. PREA MUST OBTAIN COMMISSION APPROVAL OF INITIAL OPERATIONS

The Commission has jurisdiction over this agreement pursuant to KRS 278.020. Regardless of whether the Commission ultimately determines that PREA is not jurisdictional for rates and service, it is jurisdictional for review of its initial operations and construction of facilities. PREA must obtain a certificate of public convenience and necessity from the Commission pursuant to KRS 278.020.

Assuming PREA qualifies as an exempt city for purposes of KRS Chapter 278, cities do not have complete immunity from Commission regulation. KRS 278.020(1) and (2) make clear that **any person** seeking to construct or control a utility must first acquire approval from the Public Service Commission. Therefore, a city - and in this case PREA - which claims to be acting on behalf of a city - seeking control of a utility must request approval under this provision.

**278.020 Certificate of convenience and necessity required for construction provision of utility service or of utility -- Exceptions -- Approval required for acquisition or transfer of ownership -- Public hearing on proposed transmission line -- Limitations upon approval of application to transfer control of utility or to abandon or cease provision of services -- Hearing -- Severability of provisions.**

(1) (a) 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, except:...

**278.010 Definitions for KRS 278.010 to 278.450, 278.541 to 278.544, 278.546 to 278.5462, and 278.990.**

As used in KRS 278.010 to 278.450, 278.541 to 278.544, 278.546 to 278.5462, and 278.990, unless the context otherwise requires:

- (1) "Corporation" includes private, quasi-public, and public corporations, and all boards, agencies, and instrumentalities thereof, associations, joint-stock companies, and business trusts;
- (2) "**Person**" includes natural persons, partnerships, corporations, and **two (2) or more persons having a joint or common interest;**

The Commission has previously ruled that a city is a person for certain purposes of KRS

Chapter 278:

Newport, as a municipal corporation, clearly meets the statutory definition of a "person".<sup>3</sup>

4. KRS 278.010(2) defines a person as including "natural persons, partnerships, corporations, and two or more persons having a joint or common interest (emphasis added)." In *City of Georgetown v. Pub. Serv. Comm'n*, 516 S.W.2d 842 (Ky. 1974) the Kentucky Supreme Court held that the term "person" as it appears in KRS 278.020(1) did not include cities. This interpretation has never been extended to the rest of KRS Chapter 278. Were the Commission to now adopt such an interpretation it would prohibit any city, including those which are customers of public utilities, from intervening in Commission proceedings. Such a result would conflict with the clear purpose and intent of KRS Chapter 278.

This requirement for Commission approval extends to any entity. For example, in *Application of Tower Access Group, LLC, For Declaratory Ruling as To Jurisdiction Over A 190-Foot Monopole Constructed on The Campus of Eastern Kentucky University*, Case No. 2015-00090, the Commission held that:

A high quality telecommunications tower is a facility that, under KRS 278.010(3), is "used or to be used for or connection with" furnishing for the public the telecommunications service enumerated in KRS 278.010(3)(e). Therefore, construction of a communications tower, if outside the jurisdiction of a local planning and zoning commission, **should not begin without prior Commission approval, regardless of whether the entity constructing the communications tower is a utility as defined by KRS 278.010(3)(e)**. Although neither KRS 278.020(1) nor KRS 278.650 requires that a utility be the applicant for construction of a facility, they require that a CPCN be issued prior to the beginning of construction.<sup>4</sup>

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<sup>3</sup> Case No. 90-020, *Investigation Into the Feasibility of Merging Kenton County Water District and Campbell County Kentucky Water Districts and Boone County Water and Sewer District* Case No. 90-020 (Ky. PSC April 12, 1990) Order at 4.

<sup>4</sup> Case No. 2015-00090, *Application of Tower Access Group, LLC, For Declaratory Ruling as To Jurisdiction Over A 190-Foot Monopole Constructed on The Campus of Eastern Kentucky University* (Ky. PSC May 5, 2023), Order at 13.

KRS 278.020(5) also makes clear that any person seeking to purchase or control a utility must first acquire approval from the Commission.

KRS 278.020(5) states in part:

No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or **other entity** (an "acquirer"), whether or not organized under the laws of this state, shall **acquire control**, either directly or indirectly, of any utility furnishing utility service in this state, **without having first obtained the approval of the commission.**

KRS 278.010 (2) broadly and without limit defines "person" as including "natural persons, partnerships, corporations, and two (2) or more persons having a joint or common interest." There is no exception for cities. Regardless that a city is not a "person" for the purposes of Commission jurisdiction for rates and service, KRS 278.020 provides that a city is not exempt from initial approval from the Commission. This interpretation has been reviewed and affirmed in "Opinion of the Attorney General" 02-001, copy attached as Exhibit A.

#### **IV. APPROVAL OF AGREEMENT BY OFFICER OR AGENCY REQUIRED.**

KRS 65.300 states:

If an agreement made pursuant to KRS 65.210 to 65.300 deals in whole or in part with the provisions of services or facilities over which an officer or agency of the state government has constitutional or statutory powers of control, the agreement shall, **as a condition precedent** to its entry into force, be submitted to the state officer or agency having that power of control and shall be approved or disapproved by the officer or agency as to all matters within the jurisdiction of the officer or agency in the same manner and subject to the requirements governing the action of the Attorney General pursuant to subsection (2) of KRS 65.260. The requirement of this section shall be in addition to and not in substitution for the requirement of submission to and approval by the Attorney General under subsection (2) of KRS 65.260.

Because this Agreement involves utility facilities regulated by the Commission, the Agreement must be approved by the Commission.

### **CONCLUSION**

The Commission is being asked to declare that PREA is exempt from regulation based on the current membership of two cities. Those cities are proposing to act collectively in conjunction with other “public agencies” yet to be determined and which may not be cities. The Agreement not only provides for but anticipates new members that are not cities. PREA is not a finalized organization due to its ability to add members. Its membership remains subject to change. Because its ultimate structure is not and cannot be known, it cannot be designated as a “city”. Its membership is unknown and unlimited as to the types of “public agencies” that may participate, consequently, the Commission cannot with certainty declare PREA a city.

The request for a declaration is for exemption of PREA as an entity defined in its Interlocal Cooperation Agreement. That Agreement is not limited to the two applicant cities. Approval of the request for declaration by the Commission will exempt PREA as it may be formulated in the future, not just as it is formulated now. A declaration will only be speculative as to its ongoing operations.

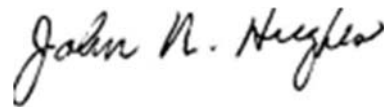
Because PREA is a statutorily created entity, it is limited to the powers granted in its relevant statutes. One of those limitations is the scope of operations, which explicitly excludes natural gas. The sole purpose of PREA is to provide a service that cannot be provided by participants of an Interlocal Agreement. The Commission should recognize this limitation, which in and of itself is a basis for denial of the requested declaration.

PREA is organized as a board governed by directors specified in Section 3 of the Agreement. This governing board is not a city and is not controlled by a city. Even if the two

current members of the Agreement are the only members, the governing board is composed of non-city members. PREA cannot claim to be a city when its governing body is not a city. PREA is not created as a city, is not operating as a city and is not governed as a city. It is an entity composed of public agencies with specific powers which are distinguishable from those of a city. If the Commission allows the definition of city to include other public agencies, the exception of KRS 278.010(3) will become meaningless.

For these reasons, Atmos Energy asserts the Commission should issue an order finding PREA subject to regulation pursuant to KRS Chapter 278.

Submitted By:



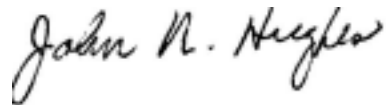
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**CERTIFICATE OF SERVICE**

This is to certify that foregoing electronic filing was transmitted to the Commission on November 2, 2023; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that pursuant to prior orders of the Commission, no paper copies of the filing will be made.



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*Counsel for Atmos Energy Corporation*

**Kentucky Attorney General Opinions  
2002.**

**OAG 02-001.**

February 7, 2002

OAG 02-1

Subject: Municipal utilities: extension outside city limits and regulation by the Public Service Commission and fiscal courts

Requested by: R.T. Daniel, Johnson County Judge Executive

Written by: Scott White, Assistant Deputy Attorney General

Syllabus: Absent statutory authority, a city may not extend its facilities to provide extra-territorial service, however, city-owned utilities may allow non-resident access to surplus utilities.

Statutes construed: KRS 67.083, KRS 96.150, KRS 96.190, KRS 96.265, KRS 96.542, KRS 278.010 and 278.020

OAGs cited: OAG 79-346

***Opinion of the Attorney General***

We have been asked by the Johnson County Judge Executive, R. T. Daniel, several questions relating to the operation of a city owned gas utility. It is well accepted that a city may extend its water system and furnish and sell water to customers beyond the city's corporate limits. This power is expressly granted by the legislature and is codified in KRS 96.150 and KRS 96.265. KRS 96.542 expressly permits cities to extend **artificial** gas systems beyond the city limits; however, this statute does not include a grant of authority to furnish and sell artificial gas beyond the corporate limits. Chapter 96 does not expressly mention natural gas or other utilities besides water and artificial gas as being able to be distributed by cities, outside city boundaries.

The statutory authority relating to water service has not always been present. Under a predecessor to the current version of KRS 96.150, there was no authority to extend service. Several cases from this period hold that a city may not extend its facilities in order to provide for extra-territorial service. The city may sell surplus, but it may not extend facilities. For example, in *Dyer v. City of Newport*, 123 Ky. 203, 94 S.W. 25 (1906), the court makes the following statement:



OAG 02-001 (February 7, 2002) (Kentucky Attorney General  
Opinions, 2002)

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In *Henderson v. Young*, 83 S.W. 583, 26 Ky. Law Rep. 1152, and *Rogers v. City of Wickliffe* (decided last week) 94 S.W. 24, 29 Ky. Law Rep., we held that where a municipality owns and operates its own electric light plant, or its own waterworks, it may legally sell any excess of its product to outsiders. We adhere to that opinion. But in each of these cases the outside purchasers took the product from the plant as constructed and operated by the city, and the latter was not bound or permitted to extend its facilities beyond the corporate limits in order to accommodate such purchasers. If Clifton had constructed, or a private concern had constructed a plant of mains, pipes, etc., in Clifton to supply its citizens with water, Newport might lawfully sell them any of its surplus water from its plant.

The court's holding from this line of cases is clear. Absent statutory authority, a city may not extend its facilities to provide extra-territorial service.

A city may not rely upon these provisions relating to water service or artificial gas as a basis to also conclude that it may construct additional facilities and works to provide natural gas service to non-residents. To the extent there is a surplus of natural gas, the city may lawfully allow non-residents the opportunity to access the surplus. This access must be consistent with the rules set forth in common law, as outlined above. In addition, the power under the common law framework is not as broad as the power under KRS 96.150. Also, it is important to remember that the permission given to a city in KRS 96.190 to maintain utility facilities outside the city boundaries does not give express authority for distribution of utilities by cities to non-residents. As a result, unless authority is specifically given by statute to a specific utility type (such as water or artificial gas), common law holds that city-owned utilities may only sell surplus utilities to non-residents and thus may not distribute those utilities through additional city-owned facilities dedicated to non-resident customers.

We turn next to the issue on PSC regulation of city owned utilities. Municipally owned utilities are generally excluded from regulation by the Public Service Commission (PSC), except for 1) initial approval when a municipality commences service or acquires control of a utility or 2) when a city contracts with a PSC-regulated entity to provide utilities.

KRS 278.010 (3) is clear that municipalities are excluded from the jurisdiction of the Public Service Commission:

(3) "Utility" means any 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:**

OAG 02-001 (February 7, 2002) (Kentucky Attorney General  
Opinions, 2002)

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- (a) **The generation, production, transmission, or distribution of electricity** to or for the public, for compensation, for lights, heat, power, or other uses;
- (b) **The production, manufacture, storage, distribution, sale, or furnishing of natural or manufactured gas**, or a mixture of same, to or for the public, for compensation, for light, heat, power, or other uses;
- (c) **The transporting or conveying of gas, crude oil, or other fluid substance** by pipeline to or for the public, for compensation;
- (d) **The diverting, developing, pumping, impounding, distributing, or furnishing of water** to or for the public, for compensation;
- (e) The transmission or conveyance over wire, in air, or otherwise, of any message by telephone or telegraph for the public, for compensation; or
- (f) **The 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.

KRS 278.010 (3) (emphasis added).

In addition, Kentucky case law holds that cities are exempt from Public Service Commission regulation and jurisdiction regardless of whether the city operates utilities inside or outside the city limit boundaries. *McClellan v. Louisville Water Company*, Ky., 351 S.W. 2d 197 (1961). The exemption extends to KRS 278.020(1). A city is not required to seek a certificate for new construction. *City of Flemingsburg v. Public Service Commission*, Ky., 411 S.W. 2d 920 (1966).

Cities do not, however, have complete immunity from Public Service Commission regulation. KRS 278.020(5) makes clear that **any person seeking to purchase or control a utility must first acquire approval from the Public Service Commission**. Therefore, a city seeking control of a utility must request approval under this provision. KRS 278.020(5) states in part:

**No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity** (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing

utility service in this state, **without having first obtained the approval of the commission** (emphasis added).

In addition, KRS 278.010 (2) broadly and without limit defines "person" as including "natural persons, partnerships, corporations, and two (2) or more persons having a joint or common interest." Case law has held, however, that a city is not a "person" for the purposes of bringing municipalities under Public Service Commission jurisdiction when expanding utilities beyond the city boundaries. *City of Georgetown v. Public Service Commission*, Ky. App., 516 S.W.2d 842 (1974). Thus, the Public Service Commission does not necessarily have to approve entrance by a city into an adjacent territory, but when a city contracts with a utility subject to PSC regulation, this exemption is waived.

Notwithstanding *City of Georgetown*, KRS 278.020, as it now reads, broadens the definition of which entities require approval for acquiring or controlling a utility. **No utility, whether privately held or city owned, is exempt from initial approval from the Public Service Commission.** This can be read to include cities, without the debate over whether the city is a "person" for purposes of PSC regulation of utility acquisitions. In a more recent decision, the Kentucky Supreme Court held that when a city contracts with another utility, the city loses its exemption from PSC regulation for that transaction. *Simpson County Water District v. City of Franklin*, Ky., 872 S.W.2d 460 (1994). Also, KRS 96.190(1) provides that the provision of telecommunications service by a city of the fourth class is subject to the regulation of the Public Service Commission. Therefore, cities seeking to contract with a utility to provide a service will cause that particular transaction to fall within PSC jurisdiction.

Kentucky statutes are clear that the Public Service Commission must approve a purchase, control or acquisition of a utility by a municipality. However, the statute also states that city owned utilities do not fall under the traditional regulatory jurisdiction of the PSC. As a result, most municipal utility operations fall outside the regulatory powers of the PSC, unless the city contracts with a PSC-regulated entity.

The last issue we address is the ability of fiscal courts to regulate municipal utilities. We conclude for the reasons that follow, that fiscal courts are limited in their oversight and regulation of municipally owned utilities.

In 1979, we issued an opinion which held that fiscal courts had the authority to regulate utilities in so far as they entered onto and potentially conflicted with public rights of way controlled by the county. We said, A. . .the right of the fiscal court to reasonably supervise and control such county public ways generally, and as affecting occupying utilities remains." OAG 79-346. The

OAG 02-001 (February 7, 2002) (Kentucky Attorney General  
Opinions, 2002)

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opinion stated that while some regulation of how utilities are to be constructed along rights of way is proper by fiscal courts, the "enfranchisement" of certain utilities by counties is reserved to the Commonwealth.

Currently, Kentucky statutes make clear what powers the fiscal court has in regulating utilities. KRS 67.083 states (emphasis added):

...

(3) The fiscal court shall have the power to carry out governmental functions necessary for the operation of the county. Except as otherwise provided by statute or the Kentucky Constitution, **the fiscal court of any county may enact ordinances, issue regulations,** levy taxes, issue bonds, appropriate funds, and employ personnel **in performance of the following public functions:**

...

(r) Provision of **water and sewage** and garbage disposal service **but not gas or electricity;** including management of onsite sewage disposal systems;

(s) Licensing or franchising of **cable television;** . . .

Therefore, it is clear that fiscal courts may generally regulate water, sewer and cable television services in the county, but are restricted from governing the use of gas or electricity. As stated in the opinion above, this type of regulation by fiscal courts often involves a utility's use of county right-of-way and public access. Of course, most utilities, other than municipal utilities, still fall under the main regulatory jurisdiction of the Public Service Commission.

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