COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

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

REPLY

The Pennyrile Regional Energy Agency ("PREA"), by counsel, respectfully submits the following Reply in response to Atmos Energy Corporation's ("Atmos Energy") Response filed on November 2, 2023.

As will be discussed herein, PREA is an interlocal agency comprised exclusively of two member cities. The Interlocal Cooperation Act extends interlocal agencies with the same powers, privileges, and authority as their underlying members. KRS 278.010 explicitly exempts cities from the definition of utilities and, by extension of KRS 278.040, exempts cities from the Public Service Commission's general jurisdiction over the rates and service of utilities. None of the arguments presented by Atmos Energy are supported by Kentucky law. Accordingly, the Commission should issue an order declaring that PREA is not a "utility" as defined by KRS 278.010(3) and, therefore, that the Commission does not have general jurisdiction over PREA's rates and services.

I. Background[1]

PREA is an interlocal agency created by the Cities of Guthrie and Trenton, Kentucky, pursuant to the Interlocal Cooperation Act, KRS 65.210 to 65.300. It was created to utilize

[1] The following factual background is drawn from PREA's Application for Declaratory Order, filed on June 19, 2023, which included a verification of the accuracy of the facts contained herein.

mutual advantages of the Cities to foster development in the region through the creation of a natural gas system.

The region's access to natural gas supply is limited. Areas near Guthrie currently receive natural gas through a small pipeline from Clarksville, Tennessee. Recent development has virtually exhausted this supply, which inhibits industrial development and expansion by large gas users such as Novellis.

The Commonwealth has recognized the need for such a project through its allocation of $30 million dollars to PREA in the budget adopted by the General Assembly in 2022.

PREA plans to construct an intrastate natural-gas pipeline, composed of a 16-inch line that will run for 53 miles along the I-24 corridor north of the Tennessee state line. PREA will not extend its pipeline into another state. PREA plans to have the pipeline in service by the end of 2025 or early 2026.

In addition to the pipeline, PREA will provide natural gas service to unserved and underserved areas of Todd, Christian, Trigg, Caldwell, and Lyon Counties, Kentucky. PREA plans to tap the Pipeline Company's 30-inch pipeline in Lamasco, Kentucky and to transport and sell gas along the 53-mile pipeline that will terminate in Guthrie, Kentucky.

II. PREA is exempt from the definition of "utility" in KRS 278.010.

As an interlocal agency comprised exclusively of two city members, PREA is exempt from the definition of "utility" under KRS 278.010(3). The term "utility" is defined as "any person except . . . a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with . . . 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."[2] Kentucky courts have interpreted this statutory provision as a general exemption to Commission regulation of cities, unless there is a specific statutory exception to that exemption such as the one found in KRS 278.200.[3] For example, the Court of Appeals has clearly stated: "In summary, the PSC does not have jurisdiction over utility services furnished by a municipality except to the extent that those services are rendered pursuant to a contract with a utility which is regulated by the PSC."[4]

The general exemption to Commission regulation extends to PREA by way of the Interlocal Cooperation Act (KRS 65.210 to 65.300)**.** Pursuant to KRS 65.240, interlocal agencies like PREA may exercise and enjoy "any power or powers, privileges or authority" that the underlying municipalities likewise exercise. Because PREA is comprised exclusively of two city members, KRS 65.240 dictates that PREA has the "powers, privileges, or authority" of those cities, which would include the general exemption to Commission regulation of cities.[5]

A federal court has addressed a related argument on whether an interlocal agency comprised of counties would be entitled to sovereign immunity.[6] In that case, four eastern Kentucky counties formed an interlocal agency, known as the Multi-County Recreational Board ("MCRB"). The court held that the interlocal agency was cloaked with sovereign immunity.[7] Logic dictates a similar result for PREA. If an interlocal agency comprised of county members

[2] KRS 278.010(3)(b).
[3] PREA does not anticipate providing service to a jurisdictional utility and, thus, will not be subject to Commission regulation under the holding of *Simpson Cnty. Water Dist. v. City of Franklin*, 872 S.W.2d 460, 461 (Ky. 1994). PREA's request for a declaratory order is based on the understanding that PREA will not provide service to a utility under Commission jurisdiction.
[4] *City of Greenup v. Public Service Com'n*, 182 S.W.3d 535, 538 (Ky. App. 2005). Another statutory exception to the general exemption is found in KRS 278.495, but it does not appear that any court has addressed that statute.
[5] Atmos Energy argues that PREA cannot be considered a city because a non-city *could possibly* join PREA as a member. The possibility of a non-city joining PREA in the future is not within the scope of PREA's Application for Declaratory Order. PREA is requesting confirmation from the Commission that PREA—as an interlocal agency comprised exclusively of city members—is generally exempt from Commission regulation on rates and service.
[6] *Bretagne, LLC v. Multi-County Recreational Board, Inc*., 467 F.Supp.3d 501 (E.D. Ky.2020)
[7] *Id.* at 508-09.

retains sovereign immunity from its county parents, an interlocal agency comprised of city members should retain its exemption from Commission regulation from its City parents.[8]

Atmos Energy's interpretation of *Bretagne* is simply wrong. Atmos Energy asserted that "the Court merely recognized that county governments have sovereign immunity based on their governmental status regardless of their participation in an interlocal agreement."[9] The interlocal agency in that case, MCRB, maintained that it was entitled to sovereign immunity by virtue of the fact that it was comprised of four county members and KRS 65.240 extended the privilege of sovereign immunity to the interlocal agency.[10] The Court agreed, stating: "The defendants assert that they are sovereignly immune from the plaintiff's request for injunctive relief because such relief is not available against state agencies in the federal courts. They are correct in this regard."[11] The Court could not have held that MCRB was entitled to sovereign immunity without agreeing that KRS 65.240 extended the county members' privilege of sovereign immunity to MCRB.

Atmos Energy's argument[12] that PREA is not an agency of a city is similarly wrong. In fact, it is contrary to explicit statutory language. KRS 65.243 states: "An interlocal agency created by the interlocal agreement ***shall constitute an agency and instrumentality of the public agencies*** party to the interlocal agreement . . . ." (Emphasis added.)

KRS 65.243 also confirms that the makeup of PREA's board of directors does not change PREA's status as an agency of its city members. Pursuant to KRS 65.243, the interlocal agency is an agency of its member cities. Separately, KRS 65.250(1)(a) requires the agreement creating an interlocal agreement to include the terms and qualifications of the members of the governing

[8] *See also* OAG 79-502 (Sept. 18, 1979) (opining that an interlocal agency established by school boards would be subject to the doctrine of sovereign immunity). A copy of this opinion is attached as Exhibit 1.
[9] Atmos Energy's Response at 3.
[10] *See Bretagne*, 467 F. Supp. 3d at 503.
[11] *Bretagne*, 467 F. Supp. 3d at 508–09.
[12] Atmos Energy's Response at 1.

authority. If the General Assembly had intended that an interlocal agency would not be an agency of its members or that non-member affiliated directors would alter the interlocal agency's powers, privileges, or authority, the General Assembly would have enacted different terms in KRS 65.243 and 65.240.

Acceptance of Atmos Energy's argument that agencies of cities (or municipally-owned utilities with a governing body that is different than the city itself) are not exempt from the definition of "utility" in KRS 278.010 is contrary to Commission precedent and practice. As examples, KRS 96.230 to 96.315 authorizes a city of the first class to own all shares in a water company and to appoint an independent "board of waterworks." KRS 96.171 to 96.188 authorizes cities to create an electric and water plant board with a "board of public utilities." KRS 96.320 authorizes a city to establish a "Commissioners of Waterworks" who govern the municipal utility. KRS 96.550 to 96.900 authorizes a city to create a "board of public utilities." Numerous cities across the Commonwealth have established these agencies, boards, and commissions, which would include the Louisville Water Company, Frankfort Plant Board, Utility Commission of the City of London, and Bowling Green Utilities Board. The Commission has not asserted general regulatory oversight of rates and service for these types of entities beyond what is conferred under KRS 278.200 and *Simpson County*.[13]

But Atmos Energy's argument would result in Commission regulation of these municipal entities. Atmos Energy's argument is inconsistent with Kentucky law, which has been support by the Commission Staff. In PSC Staff Opinion Letter 2013-005, the Staff opined:

> Commission Staff is of the opinion that the [Paducah] Plant Board, being a municipal electric company, will not be subject to additional regulation by the Commission if the Plant Board engages in the

[13] *See, e.g., Louisville Water Co.*, Case No. 2002-00088; *Frankfort Plant Board*, Case No. 2008-00250; *Utility Commission of the City of London*, Case No. 2022-00126; *Bowling Green Utilities Board*, Case No. 2009-00190.

> proposed delivery of natural gas through its pipeline to a CNG filing station operator. As stated above, KRS 278.010(3), specifically exempts "a city" from the definition of "utility "for the purposes of paragraph . . . (b) . . . which explicitly references the ". . . distribution . . . of natural or manufactured gas . . . for compensation, for light, heat, power, or other uses." However, it remains subject to the jurisdiction of the Commission for gas pipeline safety.[14]

III. The Interlocal Agreement Act does not preclude an interlocal agency from providing natural gas service.

Through the Interlocal Cooperation Act, PREA has the authority to enter an interlocal agreement to serve the Pennyrile Region and surrounding areas with natural gas service. Atmos' argument[15] to the contrary simply does not abide the Commonwealth's statutory scheme around interlocal agreements or public agencies' authority to provide critical utility service to citizens within and outside jurisdictional boundaries.

The Interlocal Cooperation Act authorizes public agencies, which include cities as defined in KRS 65.230(2) and (3), to exercise all privileges a public agency may exercise independently or jointly with any other public agency within Kentucky or another state.[16] Pursuant to KRS 96.170 and 96.190, a city has statutory authorization to provide citizens with gas service by means of a city-operated natural gas utility. In addition, KRS 96.5375 explicitly authorizes a city to provide natural gas service outside of its city limits. Thus, a city or other public agency may provide natural gas services to customers both inside and outside city limits, and by extension of the Interlocal Cooperation Act, may extend natural gas service via an interlocal agreement with other public agencies to provide surrounding areas with natural gas service.

[14] A copy of this Staff Opinion Letter is attached as Exhibit 2.
[15] Atmos Energy's Response at 7-9.
[16] KRS 65.240(1).

Atmos attempts to argue that the Kentucky legislature's 2020 amendment to the Interlocal Cooperation Act, specifically the enumeration of water, sewer, and wastewater utilities in KRS 65.240(3), invalidates PREA's authority to enter into the proposed interlocal agreement to provide natural gas services to the Pennyrile region. Atmos is correct that KRS 65.240(3) provides that water, sewage, wastewater, and storm water facilities may be subject to interlocal agreements under the Interlocal Cooperation Act. However, its assertion that the enumeration of some utilities and the exclusion of other utilities in this statutory provision overrides a vast scheme of existing Kentucky statutes authorizing the operation of other utilities outside of the jurisdiction of a public agency simply ignores the canons of statutory construction and the practical implication of existing Kentucky law.

According to Atmos' logic, subsection (3) of KRS 65.240 would preclude cities or other public agencies from operating in conjunction to provide utility service outside of specific jurisdictional boundaries. For many years, Kentucky cities have had the authority to provide natural gas services to their citizens both inside and outside of city boundaries. The only limitation to this statutory authorization came in 2013 when the General Assembly, in a miscellaneous provision, limited a city's authority to provide natural gas services to citizens inside or outside city limits only if another natural gas utility was already providing natural gas utility services to customers in that area.[17]

In fact, other cities have previously entered arrangements similar to PREA. In 2007, the City of Carrollton, Kentucky and the City of Owenton, Kentucky entered an interlocal agreement to establish a natural gas distribution system to serve the combined residents of those cities.[18] This agreement is the natural extension of the Interlocal Cooperation Act allowing cities to extend their

[17] KRS 96.5375.
[18] This agreement is attached as Exhibit 3.

statutory exercise and enjoyment of KRS 96.170 to better serve citizens of their cities and surrounding areas with heat service. Atmos' limited reading of the Interlocal Cooperation Act would thwart the renewal of these agreements or preclude the creation of similar interlocal agreements that would provide critical heat utility services across the Commonwealth.

Gas utility service, however, is not the only utility service the legislature intended to allow public agencies to act cooperatively with each other. The Kentucky legislature has long expressly authorized cities to furnish electricity to any other cities by agreement.[19] The Interlocal Cooperation Act is silent as to the administration of electricity outside of jurisdictional boundaries, yet that cannot mean that a city's agreement to provide electricity must cease simply because it is not an enumerated utility service in the Interlocal Cooperation Act because KRS Chapter 96 has afforded cities the ability to provide extra-jurisdictional electricity service.

Further, KRS 65.240 makes no mention of other utilities such as broadband and telecommunications. Broadband utilities may operate under distribution cooperatives, as defined in KRS 278.5464, to provide broadband services to underserved areas in the Commonwealth – not limited to specific jurisdictional boundaries. Telecom providers have long entered interlocal agreements to provide telecommunication services to multiple jurisdictions. Wayne County and the City of Monticello have an existing interlocal agreement to create a telecommunications board and a correlating non-profit agency to serve that region with essential telecommunication services.[20] To apply Atmos' argument, the Monticello and Wayne County Telecommunications Board would cease to operate under the full authority of Kentucky law simply because the Interlocal Cooperation Act does not enumerate "broadband" or "telecommunications" as a category of utility subject to participate in an interlocal agreement. This would create a regional

[19] *See, e.g.*, KRS 96.120.
[20] This agreement is attached as Exhibit 4.

void of telecommunications access necessary for that region to function in modern society and would cause great harm to the citizens the Board serves.

Atmos Energy's reading of the Interlocal Cooperation Act severely limits Kentucky's public agencies to serve the public with necessary utility services: electricity, gas, broadband, and telecommunications. The Kentucky legislature's enactment of a complete statutory scheme allowing cities and other public agencies to enter agreements to provide public utility services to citizens outside of jurisdictional boundaries makes clear that the General Assembly has gone to great lengths to ensure that its citizens' basic, fundamental utility needs are met through both public and private service. An equitable society requires utility service to be tendered to all citizens, not those who are geographically located within a certain public agency's borders. Precluding PREA from forming an interlocal agreement to provide vital gas services simply frustrates the canon of Kentucky law and is an illogical and unequitable limitation of the purpose of the Interlocal Cooperation Act.[21]

In addition, there are several flaws in Atmos Energy's argument that PREA's actions outside of its member city limits converts the public agency to a private corporation. First and foremost, PREA verified in its Application that it will not extend its facilities into Tennessee or any other state.[22] Second, Kentucky case law confirms that a Kentucky city providing utility service outside its city limits maintains its municipal status. The highest court in Kentucky held that "the exemption provided therein [in KRS 278.010(1)] extends to all operations of a

[21] PREA has limited the focus to interlocal agencies providing utility services. Atmos Energy's argument, however, is seemingly limitless. It could be construed as precluding any public agencies from providing any service other than water, sewer, wastewater, or stormwater services outside its jurisdictional boundaries. This would completely eviscerate the intent of the Interlocal Cooperation Act, and eliminate the opportunity for an interlocal agency to provide services related to law enforcement, emergency services, tourism, and recreation.
[22] Application at ¶5.

municipally owned utility whether within or without the territorial boundaries of the city."[23] Third, the cases cited by Atmos Energy are distinguishable, as they involved municipalities outside of Kentucky seeking to provide services inside Kentucky.

IV. PREA is not required to obtain Commission approval of initial operations.

Contrary to Atmos Energy's argument,[24] KRS 278.020 does not require PREA to obtain Commission approval of initial operations and construction of facilities.[25] In fact, Kentucky case law mentioned in Atmos Energy's Response confirms this. In *City of Georgetown v. Public Service Commission*, Kentucky American Water Company challenged the City of Georgetown's provision of water services to areas outside its city limits.[26] The Court explained that "the plain intent of the General Assembly" provided an exemption of cities from the definition of 'utilities' and that KRS 278.020(1) did not cancel out the exemption.[27] It further confirmed this stating: "It is our view that the plain intent of the General Assembly as expressed in KRS 278.010(1) should prevail and not be circumscribed by a strained reasoning process bringing into play KRS 278.020(1)."[28] The Court, in part, relied on a previous decision involving the City of Flemingsburg, which held: "It would be entirely inconsistent with the *McClellan* ruling to require a municipal water plant to obtain a certificate from the Commission."

The Commission Staff reiterated this understanding on multiple occasions. In responding to the Mayor of Owenton, Staff quoted the exemption found in KRS 278.040(2) and explained,

[23] *McClellan v. Louisville Water Co*., 351 S.W.2d 197, 199 (Ky. 1961). The Court later held that KRS 278.200 provided an exception to that exemption in *Simpson County*, *supra*.
[24] Atmos Energy's Response at 10-12. In this section of Atmos Energy's Response, it assumes "PREA qualifies as an exempt city for the purposes of KRS Chapter 278."
[25] On page 10 of its Response, Atmos Energy references subsection (2) of KRS 278.020. This subsection relates to construction of an electric transmission line, which is not relevant to this matter.
[26] *City of Georgetown v. Pub. Serv. Comm'n*, 516 S.W.2d 842, 843 (Ky. 1974).
[27] *Id*. at 845
[28] *Id*.

"As the City of Owenton is going to own the gas system, it is not subject to any provisions of KRS Chapter 278 that apply to public utilities. However, it is subject to the jurisdiction of the Commission for gas pipeline safety."[29]

In response to another inquiry, the Staff also stated:

> Based upon the statutory exclusion, Kentucky courts have found that KRS 278.020(1) is not applicable to municipal utilities and does not require municipal utilities to obtain a Certificate of Public Convenience and Necessity before constructing facilities or providing service. *City of Georgetown v. Public Service Commission*, 516 S.W.2d 842 (Ky. 1974) ("It is our view that the plain intent of the General Assembly as expressed in KRS 278.010(1) should prevail and should not be circumscribed by a strained reasoning process bringing into play KRS 278.020(1)."); *City of Flemingsburg v. Public Service Commission*, 411 S.W.2d 920 (Ky. 1966). Accordingly, PCUC [Prestonsburg City Utilities Commission] is not required to obtain a Certificate of Public Convenience and Necessity.[30]

The Commission case cited by Atmos Energy involving Tower Access Group, LLC, is not relevant to this matter. In that case, Tower Access Group sought to construct a telecommunications tower, which the Commission explained would assist in providing "utility" services enumerated in KRS 278.010.[31] In contrast, PREA will not be providing "utility" services because it is exempt from being a "utility" under KRS 278.010. Moreover, Atmos Energy's strained reading of *Tower Access Group* and KRS 278.010 directly conflicts with the *Georgetown* and *Flemingsburg* cases discussed above.

[29] Letter from Thomas Doorman, PSC Executive Director, to D.M. Wotier, Mayor of Owenton at 1 (Mar. 25, 2003). A copy of this Staff Opinion Letter is attached as Exhibit 5.
[30] PSC Staff Opinion 2011-008 at 3 (Sept. 30, 2011). A copy of this Staff Opinion Letter is attached as Exhibit 6.
[31] *Tower Access Group, LLC*, Case No. 2015-00090, at 12-14 (Ky. PSC May 5, 2015).

Atmos Energy presents a similarly flawed argument related to KRS 278.020(7).[32] This provision relates to individuals and entities having to obtain Commission approval when they seek to acquire control of an exiting utility. PREA is not seeking to acquire control of an existing utility, and thus, this subsection has no relevance to this matter.

The Attorney General Opinion OAG 02-001 cited by Atmos Energy is likewise not controlling. Although the opinion includes the statement highlighted by Atmos Energy that "[n]o utility, whether privately held or city owned, is exempt from initial approval from the Public Service Commission," Atmos Energy seemingly takes that statement completely out of context. That section of the opinion discusses requirements for Commission approval when an individual or entity seeks to acquire control of a utility. As stated above, that is not the case in the present matter. Moreover, the opinion reiterates the points discussed above that "The exemption [for cities of Commission regulation] extends to KRS 278.020(1). A city is not required to seek a construction certificate for new construction."[33]

V. The interlocal agreement did not need to be approved by the Commission.

Contrary to Atmos Energy's argument, KRS 65.300 does not require Commission approval of PREA's interlocal agreement. Atmos Energy maintains that PREA's facilities would be regulated by the Commission and that, as such, KRS 65.300 would require Commission approval of the agreement as a condition precedent. As discussed at length above, PREA's facilities will not be utility facilities regulated by the Commission. Accordingly, the agreement does not need to be approved by the Commission.

[32] On page 12 of its Response, Atmos Energy references subsection (5) of KRS 278.020; however, the quoted statutory provision is found in subsection (7) of the current version of the statute.
[33] OAG 02-001 at 3 (citing *City of Flemingsburg v. Public Service Commission*, 411 S.W.2d 920 (Ky. 1966)).

A Staff Opinion supports this conclusion. In 1999, the Staff considered whether an interlocal agreement among Boone County Water District, the City of Florence, the Boone-Florence Water Commission, and the City of Cincinnati required Commission approval. The terms of the agreement generally required (a) Cincinnati to provide wholesale water service to Boone District and Florence through the Water Commission; (b) Boone District, Florence and the Water Commission to design, finance, build, own, maintain and operate the capital improvements for water distribution from the point of delivery where Cincinnati will sell the water to the Water Commission; and (c) Boone District and Florence to contract with the Water Commission as the exclusive water supplier for their water distribution system. In determining that the interlocal agreement did not need Commission approval, the Staff explained that "[n]one of the matters presented in the lnterlocal Cooperation Agreement appear within the Public Service Commission's jurisdiction," which would have been limited to Boone County Water District's rates and services.[34]

PREA's interlocal agreement likewise does not address any matters within the Commission's jurisdiction. Accordingly, the interlocal agreement need not be approved by the Commission.

VI. Conclusion

Simply put, none of the arguments presented by Atmos Energy are supported by Kentucky law. Cities and their agencies are exempt from the definition of KRS 278.010. PREA is an agency of its member cities, pursuant to the explicit language of KRS 278.243. The Interlocal Cooperation Act extends interlocal agencies with the same powers, privileges, and authority as their underlying

[34] Letter from Helen Helton, PSC Executive Director, to David A. Koenig (Aug. 26, 1999). A copy of this Staff Opinion Letter is attached as Exhibit 7.

members. Accordingly, PREA is exempt from general Commission regulation over PREA's future rates and service. Nothing in KRS 278.020, 65.230, or 65.300 alters this analysis.

For the reasons discussed above, PREA respectfully requests the Commission issue an order declaring that PREA is not a "utility" as defined by KRS 278.010(3) and, therefore, that the Commission does not have general jurisdiction over PREA's rates and services.

Respectfully Submitted,

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4863-4963-9316, v. 1

1978-1979 Ky. Op. Atty. Gen. 2-496 (Ky.A.G.), Ky. OAG 79-502, 1979 WL 33408

***1** Office of the Attorney General

Commonwealth of Kentucky
OAG 79-502
September 18, 1979

Mr. Harry P. Brown
Director
EKEDC
P. O. Box 1269
925 Winchester Avenue
Ashland, Kentucky 41101

Dear Mr. Brown:
As the Director of the Eastern Kentucky Educational Development Corporation (EKEDC), you have asked the Office of the Attorney General for an opinion regarding liability of the directors of EKEDC. Under the Interlocal Cooperation Act, KRS 65.210-65.300, EKEDC was formed as a separate legal entity and has thereby become a local educational agency. The EKEDC Board of Directors is composed of the superintendents from 32 local school districts which participate in EKEDC. With this background, you has asked this office the following:
"To what extent, if any, are the Superintendents and their respective Boards of Education liable for suits against EKEDC due to (1) Bodily Injury occurring on EKEDC premises, (2) Noncompliance with building procedures as specified by law, (3) misuse of EKEDC funds?"

As to the issue of liability of the respective local boards of education, the doctrine of sovereign immunity precludes recovery against the boards and school system as a body politic. See Knott County Bd. of Ed. v. Mullins, Ky. App., 553 S.W.2d 852 (1977). This does not mean that the Board of Education members, in their individual capacity, could not be sued and held individually liable for negligent actions. See Smiley v. Hart County Board of Education, Ky., 518 S.W.2d 785 (1975). Under the circumstances with EKEDC being a separate legal entity, the likelihood of negligent conduct by local school board members is remote.

Before we look at the potential for liability of the local superintendents, we believe there exists a legal question not explicitly asked by you but one we cannot ignore. That question is whether EKEDC, as an entity, enjoys sovereign immunity since it was formed through the legal device of an interlocal cooperation agreement by public agencies which are sovereignly immune. Looking narrowly and only at the agreement in question, we believe EKEDC, as a separate administrative entity, would be subject to the doctrine of sovereign immunity. EKEDC is an arm of the respective school systems. It was formed to conduct jointly what the local school systems have a right to do by themselves. Under KRS 65.240(1)
"Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state. . ."

The local school districts are not relieved of any responsibility imposed on it by law by entering into an interlocal agreement. KRS 65.260(1).

As to your questions relative to the potential liability of the local superintendents who comprise the Board of Directors of EKEDC, we believe each superintendent may be held liable for the commission of an act or omission to take action regarding EKEDC matters which is a legal cause of injury to another. That is, each superintendent would be subject to liability for negligent conduct or otherwise wrongful conduct for his personal actions and dealings with EKEDC affairs.
Sincerely,

***2** Robert F. Stephens
Attorney General

EXHIBIT 1

Robert L. Chenoweth
Acting Deputy Attorney General

1978-1979 Ky. Op. Atty. Gen. 2-496 (Ky.A.G.), Ky. OAG 79-502, 1979 WL 33408

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4871-4930-9076, v. 1

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March 19, 2013

Mr. David R. Clark
General Manager
Paducah Power System
1500 Broadway
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Paducah, KY 42002-0180

PSC STAFF OPINION 2013-005

RE: Electric Plant Board of the City of Paducah, Kentucky d/b/a Paducah Power System

Dear Mr. Clark:

Commission Staff acknowledges receipt of your letter of February 21, 2013, in which you request an opinion regarding whether providing the delivery of natural gas through the Electric Plant Board of the city of Paducah d/b/a Paducah Power System's ("Plant Board") pipeline to a private company that would provide compressed natural gas ("CNG") for vehicle fueling purposes would subject the Plant Board to additional regulation by the PSC under KRS 278.508(2).

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

The following facts are presented in your letter: The Plant Board is a municipal electric company created by ordinance of the City Commission of Paducah, Kentucky adopted in 1945. The Plant Board was organized and operates as a municipal corporation under the statutory scheme commonly referred to as the "Little TVA Act" (KRS 96.550 through 96.901). Currently, the Plant Board does not serve any retail or wholesale gas customers from its pipeline. The gas transmission line has been dedicated solely to delivering fuel to the Plant Board's peaking plant. Now the Plant Board is considering an arrangement for the delivery of natural gas through its pipeline to a private company that would provide CNG for vehicle fueling purposes at a location near the Plant Board's pipeline. However, the Plant Board wants to ensure that this

EXHIBIT 2

arrangement would not be subject to "any greater regulation by the PSC than is already the case."[1]

Your letter presents the following issues: (1) Would entering the proposed arrangement for delivery of natural gas to a CNG filing station operator subject the Plant Board to PSC regulation of its rates, terms of service, construction, financing, contract terms, accounting practices, periodic reporting and/or filings beyond the federal and state pipeline safety regulations and statutes than are already applicable to the Plant Board as an intrastate pipeline transmission company, and (2) Does KRS 278.508(2) require the Public Service Commission to regulate the Plant Board's transportation, distribution, and/or delivery of gas to the proposed CNG vehicle fueling facility in addition to the regulation already imposed on the Plant Board under federal and state pipeline regulation.

KRS 278.040(2) provides, in relevant part, that "[t]he jurisdiction of the commission shall extend to all utilities in this state." KRS 278.010(3)(b) defines "utility," in relevant part, as follows:

> "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 . . . (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.

Commission Staff is of the opinion that the Plant Board, being a municipal electric company, will not be subject to additional regulation by the Commission if the Plant Board engages in the proposed delivery of natural gas through its pipeline to a CNG filing station operator. As stated above, KRS 278.010(3), specifically exempts "a city" from the definition of "utility" "for the purposes of paragraph . . . (b) . . . which explicitly references the ". . . distribution . . . of natural or manufactured gas . . . for compensation, for light, heat, power, or other uses." However, it remains subject to the jurisdiction of the Commission for gas pipeline safety.

KRS 278.495(2) states in pertinent part:

> Notwithstanding any other provision of law, the commission shall have the authority to regulate the safety of natural gas facilities which are:

[1] Letter from David R. Clark, Paducah Power System to Jeff R. Derouen, Executive Director, Public Service Commission (February 21, 2013).

> (a) Owned or operated by any public utility, county, or city, and used to distribute natural gas at retail . . . .
>
> The commission may exercise this authority in conjunction with, and pursuant to, its authority to enforce any minimum safety standard adopted by the United States Department of Transportation pursuant to 49 U.S.C. sec. 60101 et seq., or any amendments thereto, and may promulgate administrative regulations consistent with federal pipeline safety laws in accordance with provisions of KRS Chapter 13A as are necessary to promote pipeline safety in the Commonwealth . . . .[2]

Your second question is whether KRS 278.508(2) would increase the Commission's regulation of the Plant Board, given its proposal to deliver natural gas through its pipeline to a private company that would provide CNG for vehicle fueling purposes. As you correctly stated, KRS 278.508(1) specifically exempts from Commission regulation the rates, terms, and conditions of service for the sale of natural gas to a CNG fueling station for use as a motor vehicle fuel. Commission Staff notes that while each section of KRS 278.508 references actions that may be taken by a "utility" and the regulations that may apply regarding those actions, as previously noted, the Plant Board is not a "utility" as defined by KRS 278.010(3)(b), and is not subject to the provisions that specifically apply to utilities.

Specific language in KRS 278.508(2) that does apply to the Plant Board's proposed project includes:

> The transportation, distribution, or delivery of natural gas to any compressed natural gas fuel station, retailer, or any end-user for use as a motor vehicle fuel, shall continue to be subject to regulation by the Kentucky Public Service Commission.

Even with this applicability, however, it is Commission Staff's opinion that "shall continue to be subject to regulation" by the Commission, describes the current authority of the Commission to regulate safety aspects of natural gas facilities, as provided for in KRS 278.495(2) and as previously discussed, rather than the imposition of any additional regulations on the Plant Board.

---

[2] KRS 278.992(1) provides penalties for violations of the federal pipeline safety laws or any regulation adopted and filed by the Commission governing the safety of pipeline facilities or the transportation of gas as those terms are defined in the Natural Gas Pipeline Safety Act, shall be subject to a civil penalty to be assessed by the Commission not to exceed one hundred thousand dollars ($100,000) for each violation for each day that a violation persists, not to exceed one million dollars ($1,000,000).

As stated earlier, this letter represents Commission Staff's interpretation of the law as applied to the facts presented. This Opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Aaron Ann Cole, Staff Attorney, at (502) 782-2591.

Sincerely,

Jeff Derouen
Executive Director

AAC/kar

INTERLOCAL COOPERATION AGREEMENT
BETWEEN THE CITY OF CARROLLTON, KENTUCKY
AND THE CITY OF OWENTON, KENTUCKY

THIS INTERLOCAL COOPERATION AGREEMENT ("Agreement") dated SEPTEMBER 4, 2007, is made and entered into by the public agencies of the Commonwealth of Kentucky that are parties to this Agreement, namely the Cities of Carrollton, Kentucky and Owenton Kentucky. The City of Carrollton, is a fourth class city organized under the laws of the Commonwealth of Kentucky, and the City of Owenton, is a fifth class city organized under the laws of the Commonwealth of Kentucky:

WHEREAS, the City of Carrollton ("Carrollton"), owns and operates a natural gas distribution system; and

WHEREAS, the City of Owenton ("Owenton"), desires to establish a natural gas distribution system to provide service to residential, commercial and industrial consumers and has obtained funding via certain grants and loans in order to construct a natural gas pipeline system and other appurtenances.

WHEREAS, Carrollton and Owenton (collectively as the "Parties") desire to enter into an Agreement whereby Carrollton will provide natural gas service to Owenton and the surrounding areas and will own operate and maintain the Owenton gas distribution system.

WHEREAS, the Parties contemplate that Phase I of the project shall be the construction of a natural gas pipeline from the interconnect owned by Carrollton Utilities on U.S. Hwy 42 in Gallatin County, Kentucky, to Owenton. It is contemplated that the Parties will enter into Phase II of the project which will be the construction of a natural gas pipeline to the southern city limits of Owenton as funds are available. At that time, Owenton will attempt to obtain funding through loans and grants to complete Phase II of the project. It is anticipated that Phase III of the project shall be the extension of the system to provide service to the entire City of Owenton by the construction of a complete gas distribution system to provide services to residential, commercial and industrial customers throughout the City of Owenton.

EXHIBIT 3

WHEREAS, the Parties desire to enter into this Agreement whereby the ownership of the gas distribution system herein defined will be transferred from Owenton to Carrollton and to further provide for the operation and maintenance of the entire system by the City of Carrollton.

NOW, THEREFORE, in consideration of mutual benefits, obligations, and covenants contained herein, it is hereby agreed upon by and between the Parties as follows:

1. Owenton has obtained funding to construct a natural gas line from the existing Carrollton natural gas line on U.S. 42 in Gallatin County, Kentucky to the Owenton Industrial Park ("the System"). Construction of this system has been funded by grants secured by Owenton and Phase I as defined herein is hereby transferred to the City of Carrollton. The total estimated cost of the project was approximately $5.1 million which has been funded by grant funds.

2. Since Phase I has been completed and Phase II and III are anticipated, it is agreed that if the cost of Phase II and III exceed the total grant funds that are available, or if additional loans are required for any future extensions to the System, including the completions of Phases II and III, the revenues to cover the principal and interest of any extensions to the System shall include the following:

   a. Carrollton Utilities will fund up to 50 percent (50%) of the principal and interest payments from Carrollton Utilities distribution charge not to exceed $5,750.00 annually.

   b. A debt service surcharge assessed to all customers of the System herein defined.

3. As an additional consideration of sale, Carrollton will assess all customers of the System herein defined a gross receipts fee not to exceed 3 percent (3%). The gross receipt fees and any surcharge shall be paid on gas sales between the connect point and Owenton. The City of Owenton will further grant to the City of Carrollton by franchise ordinance, an exclusive franchise for operation of a natural gas system within the City of Owenton and Carrollton will pay to Owenton a 3 percent (3%) franchise fee for the sale of gas to customers located within the City limits of the City of Owenton. The gross

receipts fee and the franchise fee shall apply to all charges exclusive of debt service charges that might be incurred as contained in paragraph 6 of this document.

4. Since Phase I has been completed, that portion of the project shall now be directly transferred to the City of Carrollton as soon as documents can be prepared and signed transferring that system to the City of Carrollton. At the end of the term of any loan, if a loan is required to complete Phase II and III, the City of Carrollton will make a final payment of One Dollar ($1.00) to Owenton and Owenton will, in consideration of the payment, convey any part of Phase II and Phase III by warranty deed or other legal document. The physical assets of Phase II and III of the project including, but not limited to, gas mains, pipes, meters and appurtenances to Carrollton in fee simple subject to any state or federal requirements. Should no loan be required for Phase II and III, Owenton will convey each phase of the System to Carrollton upon completion of the construction of that particular Phase.

5. Carrollton shall provide natural gas supply at the point of connection on U.S. 42 in Gallatin County.

6. Rates for customers of the System shall be promulgated by the Carrollton City Council. Owenton recognizes that the natural gas rate is established partially by the cost of natural gas supply and certain interstate pipeline transportation capacity charges that change from month to month or even day to day. Carrollton's monthly rate to customers changes each month based on recovery of these costs. The Distribution Charge Component of each customer bill shall be the same unit cost as that charged to "Out of Town" customers as defined in the Carrollton Natural Gas Rate Ordinance.

7. Owenton agrees to do whatever is necessary, including amendment of its ordinances, to ensure that the rates charged to customers connected to the System will be those rates promulgated by the Carrollton City Council. It is agreed that the restrictions contained in the ordinances and regulations promulgated by Owenton shall be no more restrictive than Carrollton has for its other customers.

8. Carrollton is hereby delegated the enforcement authority required to enforce payment of the natural gas charges, including any assessment fees that may be assessed and including the authority to discontinue service to non-paying customers.

9. The Parties agree that the customers of the System shall be subject to the duly promulgated and enacted gas ordinances and regulations of Carrollton and other ordinances and regulations of Carrollton pertaining to natural gas distribution.

10. Carrollton shall be responsible for the operation, maintenance, and repairs of the System, including gas distribution lines and meters.

11. Owenton shall be responsible for all design and construction costs of the System.

a. Carrollton shall review and approve plans prior to bidding.

b. Carrollton shall review and approve engineer's resident inspector.

c. Carrollton shall participate in all progress meetings during construction phase of the project and must approve all change orders.

12. Both parties agree to maintain a liability insurance policy with minimum limits of $5,000,000.00 to cover damages that might be caused by the negligence or actions of that particular party and to include the other party as an additionally insured entity on the insurance policy for claims arising from any claim on the System constructed under this contract.

13. As to the future extension of Phase II and III, the following outline of authority and responsibilities of both parties shall be as follows:

Responsibility of Owenton:

a. Responsible for hiring an engineer and for all subsequent fees.

b. Have the authority to direct the engineer on the requirements of the project. Owenton agrees to obtain input from CU on the design of the project and to direct engineer to incorporate suggestions.

c. Responsible for obtaining all rights of way, easements, encroachment permits, environmental permits, other state and federal permits. If condemnation is required, Owenton will pursue those legal remedies and be reimbursed from project funds.

d. Responsible for securing all funding including grants and any loans. It is anticipated that Owenton will need loan funds to complete the project. Owenton will be responsible for complying with all funding requirements.

e. Responsible for procuring construction services as per state procurement laws.

f. Have the authority to enter into contracts for materials, construction, and radiographic inspection.

g. Responsible for obtaining construction inspection services.

h. Have the authority to participate in monthly progress meetings to resolve any construction related problems, approve and process pay request.

i. Responsible for preparing a punch list of items for contractor at the end of the project.

j. Have the authority to release retainage only upon satisfactory completion of all restoration and approval.

k. Have the authority to require contractor to remedy any warranty items and restoration during warranty period of 1 year following substantial completion. If the project is completed without incurring debt, Owenton shall transfer ownership to Carrollton at startup. Owenton agrees to resolve any warranty items identified by Carrollton during warranty period.

l. Provide authority to CU to expand System in the future as funds allow.

m. Responsible for assignment all permits, rights of way, easements, railroad license, and other such documents to CU.

n. Responsible for rectifying any property claims along the pipeline route.

Responsibility of Carrollton:

a. Have the authority to review and approve the pipeline route prior to awarding project to contractor.

b. Have the authority to review and approve the project specifications prior to awarding project to contractor.

c. Have the authority to select the construction inspectors that will provide construction-monitoring services. Fee for construction monitoring will be paid from the project funds.

d. Have the authority to review and approve all material and equipment used on the project.

e. Have the authority to review and approve any change orders required.

f. Be responsible for selling gas at Out of Town rate.

g. Be responsible for funding up to $5750.00 of debt service annually out of Distribution Charge Component charges. Any debt service shall be paid to Owenton paid on a quarterly basis.

14. Term

This Agreement shall be effective from and after its execution by its members and issuance of a formal approval by the Governor's Office of Local Development followed by filing of a certified copy of same with the Clerk of the County where each of the initiating parties are located and with the Secretary of State of the Commonwealth of Kentucky pursuant to Section 65.290 of the Interlocal Act and the duration of this Agreement from and after said effective date shall be perpetual unless terminated pursuant to Section #15 of this Agreement.

15. Termination

This Agreement may be terminated by the mutual written consent of both parties. Termination of this instrument or this Interlocal shall not effect the transfer of assets as contemplated in Section #1 which shall be completed by signing of a Bill of Sale by both parties which will convey the pipeline and all the appurtenances thereto to the City of Carrollton.

DONE THIS THE 4th DAY OF SEPTEMBER, 2007.

David Wotier

David Wotier, Mayor
City of Owenton

ATTEST:

Freda C. Prather

City Clerk

Dwight Louden, Mayor
City of Carrollton

ATTEST:

Becky Pyles
City Clerk

APPROVED AS TO FORM AND LEGALITY BY

Department of Local Government

Date: 09/17/07

INTERLOCAL COOPERATION AGREEMENT

Cweston - Carrollton Gas System

Reviewed as to form and legality only:

Andrew Hartley
Staff Attorney
Governor's Office for Local Development

9.17.07
Date

#1044

RECEIVED

APR 0 9 2001

Commissioner's Office

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

ALBERT B. CHANDLER III
ATTORNEY GENERAL

SUITE 118
700 CAPITOL AVENUE
FRANKFORT, KY 40601-3449
(502) 696-5300
FAX: (502) 564-2894

April 6, 2001

Stella Pogue
911 Director
PO Box 631
Monticello, KY 42633

Dear Ms. Pogue:

This letter is to acknowledge receipt of your recent letter to this office dated March 27, 2001. Following a review of your letter, it was determined that our office would be unable to assist you. By copy of this letter, we are forwarding it to the Department of Local Government, 1024 Capital Center Drive, Suite 340, Frankfort, KY 40601-8204, for whatever action they deem necessary.

If you should need further assistance, please do not hesitate to contact this office.

Sincerely,

Scott White
Assistant Deputy Attorney General

TSW:sw

Cc: Department for Local Government

EXHIBIT 4

2001-772

181

MONTICELLO-WAYNE COUNTY 9-1-1 COMMUNICATIONS CENTER

♦♦♦

P.O. BOX 631 ♦ MONTICELLO KENTUCKY 42633
Phone (606) 348-9313 ♦ Fax (606) 348-6938
Stella M Pogue Director

03-27-2001

Honorable Ben Chandler, Attorney General

Enclosed is a copy of agreement between the City of Monticello and the Wayne County Fiscal Court establishing management control of our 911 dispatch center, and for the Link/Ncic terminals.

Your attention and consideration to this matter would be greatly appreciated.

Thanks,
Stella Pogue
Stella Pogue
911 Director.

Refer to DLG - they do interlocals now

COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR
DEPARTMENT FOR LOCAL GOVERNMENT
1024 CAPITAL CENTER DRIVE, SUITE 340
FRANKFORT, KENTUCKY 40601-8204
(502) 573-2382

PAUL E. PATTON
GOVERNOR

JODY A. LASSITER
COMMISSIONER

April 17, 2001

Ms. Stella Pogue
911 Director
Monticello-Wayne County 9-1-1 Communications Center
Post Office Box 631
Monticello, Kentucky 42633

RE: Monticello/Wayne Interlocal Cooperation Agreement

Dear Ms. Pogue:

Enclosed, please find the original of the above-executed agreement. The Department has retained a copy of the agreement for its file. This agreement must be filed with the Wayne County Clerk and the Secretary of State to have force of law, as per KRS §65.290. If you have any questions or comments, please contact me at (800) 346-5606.

Sincerely,

Richard J. Ornstein
Attorney

Enclosure

TDD (800) 247-2510
TOLL FREE (800) 346-5606

FAX: (502) 573-2512
WEB SITE: http://www.kylocalgov.com

RESOLUTION
WAYNE COUNTY FISCAL COURT

A RESOLUTION OF THE FISCAL COURT OF WAYNE COUNTY, KENTUCKY PROVIDING FOR THE CREATION OF THE MONTICELLO-WAYNE COUNTY COMMUNICATIONS CENTER CONTROL BOARD AND PROVIDING FOR RESPONSIBILITIES OF THE BOARD.

BE IT RESOLVED BY THE FISCAL COURT OF THE COUNTY OF WAYNE, KENTUCKY:

WHEREAS, in order to enhance public safety, and the safety and effectiveness of Law Enforcement and Criminal Justice agencies in Monticello and Wayne County, Kentucky, by obtaining direct computer access to the Law Information Network of Kentucky (LINK), and thereby, direct computer access to the National Crime Information Center (NCIC), and the National Law Enforcement Telecommunications System (NLETS); and,

WHEREAS, the use of information received from LINK telecommunications terminals is restricted to dissemination to law enforcement or criminal justice agencies, and control of the LINK terminal and personnel utilizing the LINK terminal are required to be under the management control of law enforcement or criminal justice members; and,

WHEREAS, management control is defined by the administrators of the LINK system as the authority to set and enforce (1) priorities, (2) standards for the selection, supervision, and termination of personnel, and (3) policy governing the operation of computers, circuits, and telecommunications terminals used to process criminal justice information. A written agreement between the City of Monticello and Wayne County Fiscal Court must be executed assuring that criminal justice or law enforcement has management control of the non-criminal justice agency operating the dispatch center; and,

WHEREAS, the Wayne County Fiscal Court desires to obtain the use of information received from the LINK, NCIC, and NLETS systems for the benefit of the criminal justice and law enforcement agencies within Monticello and Wayne County;

NOW, THEREFORE, BE IT RESOLVED by the Fiscal Court of Wayne County, Kentucky that responsibility for management control of the Monticello-Wayne County Dispatching Center is hereby designated to the Monticello-Wayne County Communications Center Control Board as provided in the attached Interlocal Agreement between the City of Monticello and the Wayne County Fiscal Court.

PUBLICLY, READ, APPROVED AND ADOPTED this 15 day of March, 2001.

Bruce Ramsey
Bruce Ramsey, Judge Executive

ATTEST:

Carol Jones
Carol Jones, County Clerk

RESOLUTION
CITY OF MONTICELLO

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MONTICELLO, KENTUCKY PROVIDING FOR THE CREATION OF THE MONTICELLO-WAYNE COUNTY COMMUNICATIONS CENTER CONTROL BOARD AND PROVIDING FOR RESPONSIBILITIES OF THE BOARD.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MONTICELLO, KENTUCKY:

WHEREAS, in order to enhance public safety, and the safety and effectiveness of Law Enforcement and Criminal Justice agencies in Monticello, Kentucky, by obtaining direct computer access to the Law Information Network of Kentucky (LINK), and thereby, direct computer access to the National Crime Information Center (NCIC), and the National Law Enforcement Telecommunications System (NLETS); and,

WHEREAS, the use of information received from LINK telecommunications terminals is restricted to dissemination to law enforcement or criminal justice agencies, and control of the LINK terminal and personnel utilizing the LINK terminal are required to be under the management control of law enforcement or criminal justice members; and,

WHEREAS, management control is defined by the administrators of the LINK system as the authority to set and enforce (1) priorities, (2) standards for the selection, supervision, and termination of personnel, and (3) policy governing the operation of computers, circuits, and telecommunications terminals used to process criminal justice information. A written agreement between the City of Monticello and Wayne County Fiscal Court must be executed assuring that criminal justice or law enforcement has management control of the non-criminal justice agency operating the dispatch center; and,

WHEREAS, the Monticello City Council desires to obtain the use of information received from the LINK, NCIC, and NLETS systems for the benefit of the criminal justice and law enforcement agencies within Monticello and Wayne County;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Monticello, Kentucky that responsibility for management control of the Monticello-Wayne County Dispatching Center is hereby designated to the Monticello-Wayne County Communications Center Control Board as provided in the attached Interlocal Agreement between the City of Monticello and the Wayne County Fiscal Court.

PUBLICLY, READ, APPROVED AND ADOPTED this 12th day of February, 2001.

Kenneth D. Catron, Mayor

ATTEST:

Gregory E. Latham, City Clerk

INTERLOCAL AGREEMENT

This agreement, made and entered into this 15th day of MARCH, 2001, by and between the County Judge Executive of Wayne County, Kentucky, and the Mayor of the City of Monticello, Kentucky, for the purpose of establishing management control of the Monticello-Wayne County Dispatching Center and thereby, access to information obtained through the Law Information Network of Kentucky (LINK), and thereby access tot he National Crime Information Center (NCIC), and the National Law Enforcement Telecommunications System (NLETS); and,

Whereas, it is a requirement by the Kentucky State Police, as the administrators of the LINK System, that the use of information received from LINK telecommunications terminals be restricted to dissemination to law enforcement or criminal justice agencies, the LINK terminal equipment must be placed under the management control of a law enforcement or criminal justice agency, or a Board whose membership is comprised of a majority of law enforcement or criminal justice members; and,

Whereas, management control is defined as: The authority to set and enforce (1) priorities, (2) standards for the selection, supervision, and termination of personnel, and (3) policy governing the operation of computers, circuits, and telecommunications terminals used to process criminal justice information. Additionally, a written agreement must be executed assuring that criminal justice or law enforcement has management control of the non-criminal justice agency operating the data center. Management control shall not be construed as the actual hiring and firing of personnel which shall remain the responsibility of the respective governments; and,

Whereas, the County Judge Executive of Wayne County and the Mayor of the City of Monticello, desire to obtain the use of information received from the LINK, NCIC, and NLETS systems for the benefit of the criminal justice and law enforcement agencies within Wayne County and the City of Monticello; and,

Whereas, in order to comply with the rules and regulations of the Law Information Network of Kentucky (LINK), the officials stated herein before have agreed to place the responsibility for management control of the Monticello-Wayne County Dispatching Center with the Monticello-Wayne County Communications Control Board comprised of the following members:

1. Chief of Police, City of Monticello, KY.
2. Sheriff of Wayne County.
3. Department of Corrections Officer.
4. Mayor's Citizen Designee.
5. City Telecommunications Coordinator.

The officials herein agree that the Monticello-Wayne County Communications Control Board set forth in this agreement shall have the authority to set and enforce (1) priorities, (2) standards for the selection, supervision, and termination of personnel and (3) policy governing the operation of computers, circuits and communications terminals used to process criminal justice information as defined herein. Other required duties shall include, but not limited to, make reasonable effort to exercise its management control; hold official regular meetings, at least once a quarter and produce minutes of the meetings; the Chairman or Director shall ensure that a copy of the minutes of the meetings are promptly forward to the LINK Audit Staff, monthly or quarterly, as applicable; and the Board shall adopt written policy for the Dispatch Center covering the Priorities, Standards, & Policy as stated above.

Whereas, the duration of this agreement shall commence on May 1, 2001, and shall run to April 30, 2002, and shall be automatically renewable unless terminated by any of the participating parties. Each member shall have the right to terminate this agreement at any time during the term or a renewal thereon by giving thirty (30) days notice in writing to the other member.

Whereas, all operational expenditures and capital costs shall continue in its present format as outlined in other agreements and budget ordinances, which may be amended or changed from time to time by the respective governments.

In testimony hereof, witness the hands of the parties herein named this 15 day of March, 2001.

Bruce Ramsey
County Judge Executive
Wayne County Fiscal Court

March 15, 2001
Date

Kenneth D. Carter
Mayor
City of Monticello

March 15, 2001
Date

APPROVED BY:

JODY A. LASSITER, COMMISSIONER
DEPARTMENT FOR LOCAL GOVERNMENT

Filed with the Secretary of State: _____

Filed with the County Clerk: _____

Paul E. Patton, Governor

Janie A. Miller, Secretary
Public Protection and
Regulation Cabinet

Thomas M. Dorman
Executive Director
Public Service Commission

COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION
211 SOWER BOULEVARD
POST OFFICE BOX 615
FRANKFORT, KENTUCKY 40602-0615
www.psc.state.ky.us
(502) 564-3940
Fax (502) 564-3460

Martin J. Huelsmann
Chairman

Gary W. Gillis
Vice Chairman

Robert E. Spurlin
Commissioner

March 25, 2003

Honorable D. M. Wotier
Mayor, City of Owenton
220 South Main Street
Owenton, KY 40359

Dear Mayor Wotier:

Commission Staff acknowledges receipt of your letter concerning the jurisdictional status of the City of Owenton. You state that the City is in the process of receiving funds to install a natural gas system to serve the City of Owenton and parts of Owen County and request confirmation that a City owned gas system is not subject to Public Service Commission jurisdiction except for safety. You are correct.

KRS 278.040(2) provides that "[t]he jurisdiction of the commission shall extend to all utilities in this state." A utility is defined as

> any person **except a city**, who owns, controls, or operates or manages any facility used or to be used for or in connection with . . . (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;

KRS 278.010(3)(b) (emphasis added). As the City of Owenton is going to own the gas system, it is not subject to any provisions of KRS Chapter 278 that apply to public utilities. However, it is subject to the jurisdiction of the Commission for gas pipeline safety. See KRS 278.495(2)(a); KRS 278.992.

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

EXHIBIT 5

Questions concerning this opinion should be directed to Anita Mitchell, Staff Attorney, at (502) 564-3940.

Sincerely,

Thomas M. Dorman
Executive Director

alm

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

Charles R. Borders
Commissioner

September 30, 2011

Kipley J. McNally, Esq.
2527 Nelson Miller Parkway
Suite 104
Louisville, Kentucky 40223

Re: Prestonsburg City's Utilities Commission Service to Dewey Lake Subdivision

PSC STAFF OPINION 2011-008

Dear Mr. McNally:

Commission Staff acknowledges receipt of your letter of June 8, 2011 in which you requested on behalf of Prestonsburg City's Utilities Commission ("PCUC") an opinion regarding the need to obtain Public Service Commission approval to provide water service to the Dewey Lake Subdivision in Floyd County, Kentucky.

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

> PCUC is a municipally owned utility created pursuant to KRS Chapter 58. A three-member Board of Commissioners manages PCUC. The Mayor of the City of Prestonsburg appoints each member of this Board. As of June 1, 2011, PCUC provided water service to approximately 7,751 customers. Among the areas to which PCUC provides water service is the Dewey Lake Subdivision of Floyd County, Kentucky.
>
> Dewey Lake View, Incorporated, a Kentucky corporation, began development of the Dewey Lake Subdivision in the late 1960s. As part of this development, it installed a water distribution system that included water mains, pumps, and underground water storage tanks. On November 1, 1990, the Kentucky Secretary of State administratively dissolved Dewey Lake View Incorporated.
>
> Lakeview Association is an unincorporated homeowner's association which is composed of persons who own real property in the Dewey Lake Subdivision of Floyd County,

EXHIBIT 6

> Kentucky. It purchases water from PCUC for resale to its members. All twenty-three personal residences within Dewey Lake Subdivision are members of Lakeview Association and purchase their water from Lakeview Association. For calendar year 2010, Lakeview Association sought exemption from federal income taxes under 26 U.S.C § 528. Lakeview Association provides water service to its members only.
>
> PCUC proposes to directly serve Lakeview Association's members. To provide direct service, PCUC proposes to construct facilities, including pumps, a water storage tank, and water distribution mains. Upon PCUC's construction of these facilities, Lakeview Association will abandon its existing facilities and cease providing water service to its members.

Your letter presents the following question: Must PCUC obtain Commission approval before constructing the facilities necessary to directly serve Lakeview Association members or providing water service to those members?

As to the construction of new water distribution facilities and the initial provision of water service, KRS 278.020(1) is generally applicable. It provides:

> 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 retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction.

While the language of KRS 278.020(1) seemingly suggests that Commission approval of PCUC's proposed action is required, *see e.g., City of Vanceburg v. Plummer*, 275 Ky. 713, 122 S.W.2d 772 (1938), the contrary is true. The Commission's jurisdiction extends only to the rates and service of "utilities" in the Commonwealth of Kentucky. *See* KRS 278.040(2). As the definition of "utility" specifically excludes facilities that a city owns, *see* KRS 278.010(3),[1] however, municipal utilities are not subject to Commission jurisdiction. *McClellan v. Louisville Water Co.*, 351 S.W.2d 197

[1] "Utility" means any person except . . . a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with . . [t]he diverting, developing, pumping, impounding, distributing, or furnishing of water to or for the public, for compensation.

(Ky. 1961). The only exception to this general rule is the case in which a municipal utility provides wholesale utility service to a public utility. *See Simpson County Water Dist. v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994).

Based upon the statutory exclusion, Kentucky courts have found that KRS 278.020(1) is not applicable to municipal utilities and does not require municipal utilities to obtain a Certificate of Public Convenience and Necessity before constructing facilities or providing service. *City of Georgetown v. Public Service Commission*, 516 S.W.2d 842 (Ky. 1974) ("It is our view that the plain intent of the General Assembly as expressed in KRS 278.010(1) should prevail and should not be circumscribed by a strained reasoning process bringing into play KRS 278.020(1)."); *City of Flemingsburg v. Public Service Commission*, 411 S.W.2d 920 (Ky. 1966). Accordingly, PCUC is not required to obtain a Certificate of Public Convenience and Necessity.

Furthermore, neither KRS 278.020(5) nor KRS 278.020(6) requires PCUC to obtain Commission approval of PCUC's facilities displacement of Lakeview Association's water distribution facilities. KRS 278.020(5) provides:

> No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.

KRS 278.020(6) provides:

> 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. Any acquisition of control without prior authorization shall be void and of no effect.

Assuming that Lakeview Association met the definition of "utility,"[2] the displacement of Lakeview Association's facilities by PCUC's facilities would not constitute a transfer of control or ownership of Lakeview Association's facilities. The facts as presented do not suggest that PCUC will acquire any ownership interest in Lakeview Association's facilities or will control the operation or management of those facilities. Ownership and control of those facilities will apparently remain with Lakeview

[2] The Commission has previously held that a homeowners' association does not meet the statutory definition of "utility" as it does not provide service to the public. *See, e.g., B.B. Shepherd Sanitary Sewage Corp.*, Case No. 9014 (Ky. PSC July 3, 1984); *Huntington Woods Neighborhood Ass'n*, Case No. 99-515 (Ky. PSC June 14, 2000); *Doe Valley Utilities, Inc.*, Case No. 2003-00360 (Ky. PSC May 19, 2004).

Association. Without PCUC's acquisition of control or ownership of these facilities, the requirements of KRS 278.020(5) and KRS 278.020(6) for Commission approval are not triggered.

In summary, Commission Staff is of the opinion that, based upon the facts presented in your letter of June 8, 2011, PCUC does not require Commission approval to construct facilities to serve persons residing within the Dewey Lake Subdivision or to begin water service to those persons.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Gerald Wuetcher, Executive Advisor/Attorney, at (502) 564-3940, Extension 259.

Sincerely,

Jeff Derouen
Executive Director

Cc: Julie Roney

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August 26, 1999

David A. Koenig, Esq.
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Post Office Box 6205
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Dear Mr. Koenig:

Commission Staff acknowledges receipt of your letter of July 6, 1999 in which you request an opinion on whether an Interlocal Cooperative Agreement among Boone County Water District, the City of Florence, Kentucky, the Boone-Florence Water Commission, and the City of Cincinnati, Ohio requires Public Service Commission approval.

Your letter presents the following facts: Boone County Water District ("Boone District") has entered an Interlocal Cooperative Agreement with the City of Florence, Kentucky ("Florence"), the Boone-Florence Water Commission ("Water Commission"), and the City of Cincinnati, Ohio ("Cincinnati") to provide for the supply of water to the Boone County area. Under the terms of this agreement, the parties agree that Cincinnati will provide wholesale water service to Boone District and Florence through the Water Commission. Boone District, Florence and the Water Commission have agreed to design, finance, build, own, maintain and operate the capital improvements for water distribution from the point of delivery where Cincinnati will sell the water to the Water Commission. Boone District and Florence further agree to contract with the Water Commission as the exclusive water supplier for their water distribution systems.

You pose the following question: Is Public Service Commission approval of the Interlocal Cooperative Agreement required?

KRS 65.300 provides:

> In the event that an agreement made pursuant to KRS 65.210 to 65.300 shall deal in whole or in part with the provisions of services or facilities with regard to which an officer or agency of the state government has constitutional or statutory powers of control, the agreement shall, as a

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> condition precedent to its entry into force, be submitted to the state officer or agency having such power of control and shall be approved or disapproved by such officer or agency as to all matters within the jurisdiction of such 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.

The Public Service Commission has jurisdiction over only one of the parties to the Interlocal Cooperation Agreement. As water district created pursuant to KRS Chapter 74, Boone District is subject to the Public Service Commission's jurisdiction. See KRS 278.040(1) and (2). The Public Service Commission does not have jurisdiction over the other parties to the Agreement. The Legislature has declared that water commissions and municipalities are not utilities.[1] See KRS 74.510; 278.010(3). While the Public Service Commission exercises limited jurisdiction over municipal utilities that provide wholesale water service to public utilities, Simpson County Water District v. City of Franklin, Ky., Ky., 872 S.W.2d 460 (1994), that jurisdiction is not present in this case as Cincinnati is not providing wholesale water service to a public utility.[2]

None of the matters presented in the Interlocal Cooperation Agreement appear within the Public Service Commission's jurisdiction. That jurisdiction extends only to Boone District's rates and services. See KRS 278.040(1) and (2). The Agreement does not address these areas. The Agreement also does not require the construction of specific facilities or the issuance of any evidences of indebtedness – actions that require express Commission approval. KRS 278.020(1); KRS 278.300. While the Agreement will permit Boone District to change its water supplier, the Commission is without any jurisdiction to determine a utility's choice of a water supplier. See *City of Newport, Kentucky v. Campbell County Water District*, Case No. 89-014 (Ky.P.S.C. Jan. 31, 1990) at 17-20. As none of the matters of the Interlocal Cooperation Agreement are within the Public Service Commission's jurisdiction, Commission Staff is of the opinion that KRS 65.300 does not require Public Service Commission approval.

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[1] While it operates a water distribution system, Florence provides only retail water service and does not provide wholesale utility service to any public utility. Simpson County Water District, therefore, is not applicable.

[2] Under the holding of Cincinnati is not a municipal utility proposes of KRS Chapter 278. If the Water Commission were its only customer in Kentucky, however, Cincinnati would not be considered as providing utility service to the public for compensation and would not meet the definition of utility.

Please note that the Public Service Commission retains authority over rate and service issues. To the extent that Boone District's decision to enter the agreement may affect its rates for service, the Public Service Commission may review the reasonableness of its decision at Boone District's next rate proceeding or any proceeding in which Boone District requests a Certificate of Public Convenience and Necessity to construct facilities to receive service from the Water Commission. The Public Service Commission may also consider the issue as part any proceedings that may arise concerning the early termination of Boone District's current water supply agreement with Northern Kentucky Water District.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Gerald Wuetcher, Commission counsel, at (502) 564-3940, Extension 259.

Sincerely,

Helen C. Helton
Executive Director