

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF MOUNTAIN WATER DISTRICT FOR)
DISCLAIMER OF JURISDICTION OR APPROVAL) CASE NO. 2009-00405
OF TARIFF)

ORDER

Mountain Water District has petitioned the Commission for a declaratory ruling regarding the Commission's jurisdiction over certain sewage septic systems and aerator sewage systems that it operates and manages under contract. Finding that these systems are not facilities that provide service "to the public," we declare that Mountain Water District's provision of operation and maintenance services to these systems and the rates and fees for such services are not within Commission jurisdiction.

Mountain Water District, a water district organized pursuant to KRS Chapter 74, owns and operates water distribution facilities that provide water service to approximately 16,676 customers¹ and sewage collection and treatment facilities that provide sewer service to approximately 2,184 customers in Pike County, Kentucky.²

¹ *Annual Report of Mountain Water District to the Public Service Commission of Kentucky for the Calendar Year Ended December 31, 2008 (Water Operations)* at 27.

² *Annual Report of Mountain Water District to the Public Service Commission of Kentucky for the Calendar Year Ended December 31, 2008 (Sewer Operations)* at 12.

Mountain Water District currently operates 54 sewer septic systems³ and nine aerator sewage systems⁴ in the Big Creek area of Pike County. Under the terms of a grant agreement with Eastern Kentucky PRIDE,⁵ Mountain Water District contracted with the individual property owners to install and operate the sewage disposal systems. It does not own any of the systems, but operates and maintains each under the provisions of an operations and maintenance agreement with each customer.⁶ It assesses a monthly fee for these services.⁷

Each system serves an individual home residence and is a completely closed system. None are connected to any Mountain Water District facilities. None of the

³ A septic system is a passive treatment system in which "sewage is retained for a short period while it is decomposed and purified by bacterial action. The organic matter in the sewage settles to the bottom of the tank, a film forms excluding atmospheric oxygen, and anaerobic bacteria attack the solid matter, causing it to disintegrate, liquefy, and give off gases. The gases are discharged from a vent and the liquids overflow through an outlet into a disposal field where they can leach into the soil. Here aerobic bacteria purify the liquid." The Columbia Encyclopedia (6th ed. 2008), http://www.encyclopedia.com/topic/septic_tank.aspx (last visited Mar. 30, 2010).

⁴ The principal difference between an aerator sewage system and a septic sewer system is the mechanical injection and circulation of air within a treatment tank to permit the use of aerobic bacteria. Both systems require some maintenance and periodic pumping.

⁵ Eastern Kentucky PRIDE is a nonprofit organization funded by federal grants to encourage and assist citizens, local governments, schools and others in 38 counties of southern and eastern Kentucky to improve water quality in the region; clean up illegal trash dumps and other solid waste problems; and promote environmental awareness and education.

⁶ Aerator sewage systems are considered wastewater treatment plants and must be operated by a certified wastewater treatment operator. 401 KAR 5:002, Section 1(171); 401 KAR 5:010.

⁷ Mountain District originally assessed a monthly fee of \$14. It proposes to increase this fee to \$33.45 per month within 12 months of any Commission decision finding that the facilities are subject to Commission jurisdiction. Application at 7.

waste from any of these facilities is collected or transported through Mountain Water District facilities nor is it treated at any Mountain Water District sewage treatment facility. Each system is designed to serve only one residence.

A grant of \$396,495 to Mountain Water District from Eastern Kentucky PRIDE for the purpose of eliminating 44 failed septic systems and 37 straight pipes⁸ and a \$225,000 payment from Sidney Coal Company to Mountain Water District as part of an agreed settlement to an environmental lawsuit⁹ financed the construction and installation of these systems.

Mountain Water District contends that the facilities in question do not meet the statutory definition of "utility" and therefore do not fall within the Commission's jurisdiction. It notes that the facilities are not connected to Mountain Water District's treatment facilities nor is the waste from these facilities collected or transported through Mountain Water District's facilities or treated by them. It further notes that "operation" and "maintenance" of another's sewage disposal facilities are not functions within the Commission's jurisdiction.

We begin by observing that the Commission's jurisdiction extends to "all utilities in this state" and that the Commission possesses "exclusive jurisdiction over the

⁸ "A straight-pipe is a sewage disposal system that transports raw or partially settled sewage directly to a lake or stream, to a drainage system, or onto the ground." Case No. 2010-00017, *Application of Troublesome Creek Environmental Authority, Inc., a Public Non-Profit Corporation, for a Certificate of Public Convenience and Necessity to Construct Facilities and to Operate, For Initial Rates, and For Authority to Incur Indebtedness* (Ky. PSC Feb. 16, 2010) at 3, fn. 5.

⁹ Application at 1. See also Bill Estep, *Violations No Surprise to Massey Neighbor*, Lexington Herald-Leader, Jan. 18, 2008, at A10.

regulation of rates and services of utilities.”¹⁰ With the enactment of KRS 278.015, the General Assembly declared that a water district is “a public utility and shall be subject to the jurisdiction of the . . . Commission in the same manner and to the same extent as any other utility defined in KRS 278.010”

While the General Assembly has declared water districts to be utilities, this declaration does not place all activities of a water district under Commission jurisdiction. For example, in *Boone County Water and Sewer District v. Public Service Commission*, 949 S.W.2d 588 (Ky. 1997), the Kentucky Supreme Court found that the absence at that time of any reference within KRS Chapter 278 to sewage collection and transmission facilities was evidence of legislative intent that the Commission not regulate a water district’s sewage collection system.¹¹

Based upon our review of the facts, we find that the facilities in question are not within Commission jurisdiction. KRS 278.010(3) defines a utility as:

any person except . . . a city, who owns, operates, controls, operates, or manages any facility used or to be used for or in connection with . . . [t]he 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 [emphasis added].

¹⁰ KRS 278.040(2).

¹¹ Following this decision, the General Assembly amended KRS 278.010(3)(f) to include sewage collection and transmission facilities. 2000 Ky. Acts Ch. 118.

While the facilities in question are used for sewage collection and treatment, they do not provide service to the public. “The use to which the plant, equipment or some portion thereof is put must be for the public in order to constitute it a public utility.” See *City of Sun Prairie v. Wisconsin Pub. Serv. Comm'n*, 154 N.W.2d 360, 362 (Wis. 1967). “One offers service to the ‘public’ . . . when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial . . . that his service is limited to a specified area and his facilities are limited in capacity.” *North Carolina ex. rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 148 S.E.2d 100, 109 (N.C. 1966). Utility service limited to a specific class of persons is not service to the public.

Each facility in question serves only one customer—its owner.¹² It does not provide service to other persons nor does it offer such service to others. None of the facilities are connected to a collection or treatment system that serves the public. They are not facilities that provide sewage services to the public and therefore do not fall within the definition of utility as set forth in KRS 278.010(3).

Based upon the above, we find that the facilities in question are not subject to the Commission’s jurisdiction. We further find that the fees that Mountain District

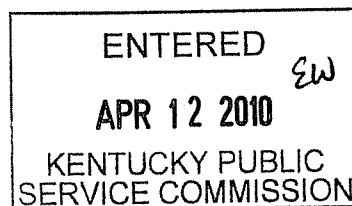
¹² See Case No. 2000-00206, *An Investigation of Boone County Water District’s Decision to Change Water Suppliers and of the Amendment of Water Supply Agreements Between Northern Kentucky Water Service District and Boone County Water District and the City of Florence, Kentucky* (Ky. PSC Nov. 9, 2000) at 11-12 (“Where a person provides wholesale water service to one person or entity, does not sell to a jurisdictional utility, and has no expectation of making any retail sale to Kentucky customers, it does not provide service to the public.”) See also Case No. 2000-00075, *Petition of Kentucky Pioneer Energy, LLC for a Declaratory Order*, (Ky. PSC July 13, 2000); Case No. 1999-00058, *Petition of Calvert City Power I, L.L.C. for Declaratory Order*, (Ky. PSC July 6, 1999).

assesses for the maintenance and operation services provided to these facilities are not subject to Commission jurisdiction and that KRS 278.160 does not require these fees to be set forth in Mountain Water District's filed rate schedules.¹³

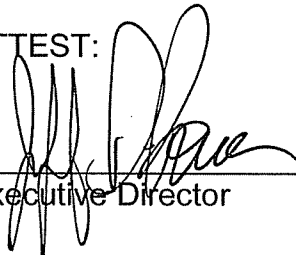
IT IS THEREFORE ORDERED that:

1. Mountain Water District's Petition for Disclaimer of Jurisdiction is granted.
2. Mountain Water District's provision of operation and maintenance services to customer-owned aerator and sewage septic systems that were funded through grants from Eastern Kentucky PRIDE is not subject to Commission jurisdiction.
3. KRS 278.160 does not require Mountain Water District to place the rates and fees associated with the provision of operation and maintenance services to customer-owned aerator and sewage septic systems that were funded through grants from Eastern Kentucky PRIDE in its filed rate schedules as a condition to assessing those rates and fees.

By the Commission



ATTEST:



Executive Director

¹³ As the fees for these services are for non-jurisdictional services, a customer's failure to pay these fees cannot serve as a basis for the discontinuance of his or her water service.

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