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**Commissioner**

April 26, 2000

Robert C. Stilz, Jr., Esq.  
Kinkead & Stilz  
3120 Wall Street, Suite 350  
Lexington, Kentucky 40513-1710

Dear Mr. Stilz:

Commission Staff has received your letter of April 10, 2000, in which you request an opinion on the jurisdictional status of Xalapa Estates Association, Inc.

Your letter states the following facts:

Xalapa Farm Limited Partnership ("the Partnership"), a Kentucky limited partnership, owns approximately 1,500 acres in Bourbon County, Kentucky. It intends to divide and develop this property into approximately 7 to 10 parcels, ranging in size from 5 acres to 550 acres. This development will be known as Xalapa Estates. A public water supply is currently available to only a small portion of the property. A private water distribution system currently serves most of the property and must continue to serve the property if it is divided into parcels. The Partnership proposes to establish Xalapa Estates Association, Inc. ("the Association"), a non-profit corporation, to lease and operate the water distribution system. Each parcel within Xalapa Estates will be subject to a covenant that requires its owner to be a member of the Association, limits membership in the Association to parcel owners, and limits use of Association facilities to Association members. This covenant is contained in a declaration of covenants and restrictions that the Partnership will record with the Bourbon County Clerk.

Your letter poses the following issue: Is the Association a public utility subject to the regulation of the Public Service Commission?

The Public Service Commission regulates the rates and services of all public utilities. See KRS 278.040(2). A utility is



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any person except a city, who owns, controls, or 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;

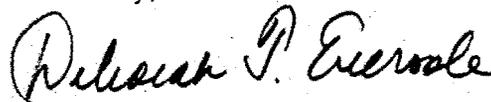
KRS 278.010(3)(d) (emphasis added).

According to the majority view, the characterization of a service as public or private "does not depend . . . upon the number of persons by whom it is used, but upon whether or not it is open to the use of the public who may require it, to the extent of its capacity." Ambridge v. Pub. Serv. Comm'n of Pennsylvania, 165 A. 47, 49 (Pa. Super. 1933). See 64 Am. Jur. 2d Public Utilities §1 (1972). Stated another way, "[o]ne 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).

Based upon the facts presented in your letter, it appears that the Association will not be serving the public. It intends to serve only its members, not the public. Its membership is well defined and limited. Several courts have recognized that an association's rendering of service to its members is not service to the "public." City of Millbrook v. Tri-Community Water System, 692 So.2d 866 (Ala. Civ. App. 1997); Lockwood Water Users Association v. Anderson, 542 P.2d 1217 (Mont. 1975). But see Anchor Point, Inc. v. Shoals Sewer Company, 418 S.E.2d 546 (S.C. 1992); Lewandowski v. Brookwood Musconetcong River Property Owners Ass'n, 181 A.2d 506 (N.J.1962). Commission Staff, therefore, believes that the Association will not be a public utility subject to the jurisdiction of the Public Service Commission.

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,



Deborah T. Eversole  
General Counsel