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August 29, 2013

Mr. Tom Shirey
President
Apache Gas Transmission Company, Inc.
2718 Wesley Street
Greenville, TX 75401

Re: Apache Gas Transmission Company, Inc. **PSC STAFF OPINION 2013-009**
Request for an Advisory Opinion

Dear Mr. Shirey:

Commission Staff acknowledges receipt of your July 8, 2013 letter in which you request an opinion concerning a gas transmission line replacement project proposed by Apache Gas Transmission Company, Inc. ("Apache"). This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Commission should the issues herein be formally presented for Commission resolution.

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

Apache is a Kentucky Corporation that owns a 21-mile intrastate natural gas transmission line that extends from Metcalf County, Kentucky to Burkesville, Kentucky. Apache's only customer is Burkesville Gas Company, Inc. ("BGC") in Burkesville, Kentucky. The Commission has previously treated Apache as a utility for rate making purposes in Apache's 2007 application for an adjustment of rates pursuant to the alternative rate filing procedure in case number 2007-00354. Apache states that it presently needs to replace 0.4947 miles of natural gas pipeline at a cost of approximately \$70,000.¹

¹ Apache has since provided a revised cost estimate of the project in the range of \$117,925 to \$190,530. E-mail from Tom Shirey, President, Apache Gas Transmission Company, Inc. to Leah Faulkner, Manager, Kentucky Public Service Commission (Aug. 7, 2013). Attached as Exhibit A.

You pose four questions to the Commission. First, whether Apache will be permitted to recover the costs of the aforesaid project pursuant to KRS 278.509; second, whether a Certificate of Public Convenience and Necessity ("CPCN") will be required for the project; third, whether the project would be deemed to be in the ordinary course of business and, therefore, not require the employment of a project engineer; and fourth, whether Apache may submit an application to the Commission for recovery, absent the services of an attorney.

KRS 278.509 permits a regulated utility to recover the costs of its "investment in natural gas pipeline replacement programs which are not recovered in the existing rates of a regulated utility." The expenses may only be recovered upon a finding by the Commission that the costs are "fair, just and reasonable."²

Pursuant to KRS 278.010(3), utility service includes "[t]he transporting or conveying of gas . . . by pipeline to or for the public, for compensation." In instances wherein an otherwise non-regulated entity sells gas to an affiliated regulated utility, the unregulated business will also be deemed a utility "to the extent necessary to ensure that the rates charged the utility and ultimately to the consumer are just and reasonable." KRS 278.274(3)(b). Companies are affiliated when "[o]ne or more of the owners control or have the right to control the business affairs of all affected companies."³

The statutory provision permitting recovery of costs for investments in natural gas pipeline replacement programs is explicitly limited to regulated utilities. As defined by KRS 278.010, a regulated utility is an entity that performs an enumerated service, such as the transportation of gas, to the public and for compensation. An entity provides service to or for the public when it offers to or is willing to serve all individuals to the extent of the available facilities.⁴

Apache and BGC have common principals controlling the operations of both companies.⁵ They are considered sister companies.⁶ Therefore, Apache is deemed to

² KRS 278.509.

³ KRS 278.274(3)(a).

⁴ Case No. 89-322, *The Application of Electric Energy, Inc. for a Certificate of Convenience and Necessity to Construct a Power Transmission* (Ky. PSC Nov. 1, 1989).

⁵ *Annual Report of Burkesville Gas Company, Inc. to the Public Service Commission* for the calendar year ended December 31, 2011 at 1.

⁶ Case No. 2007-00354, *Application of Apache Gas Transmission Company, Inc. for an Adjustment of Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities* (Ky. PSC Dec. 21, 2007).

be affiliated with BGC.⁷ As a result, Apache is subject to the Commission's jurisdiction to ensure the rates it charges to BGC, as an affiliate, are just and reasonable to the extent authorized by KRS 278.274.

As Apache is treated as a utility under KRS 278.010 in regard to the rates it charges, Apache may avail itself of the rate recovery mechanisms devised by the legislature to include KRS 278.509, which provides for the recovery of investments in pipeline replacement programs not otherwise recovered through existing rates. Upon submission of an application for rate recovery, as provided for by both KRS 278.274 and KRS 278.509, the Commission is charged with determining whether the rate recovery is fair, just and reasonable.

As to the second and third questions posed, KRS 278.020(1) provides that:

No person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant, equipment, property or facility for furnishing to the public any of the services enumerated in KRS 278.010 except . . . 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.

The Commission has adopted a regulation, 807 KAR 5:001, Section 15(3), which defines "ordinary extensions" that do not require a CPCN as follows:

Extensions in the ordinary course of business. A certificate of public convenience and necessity shall not be required for extensions that do not create wasteful duplication of plant, equipment, property, or facilities, or conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general or contiguous area in which the utility renders service, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers.

A CPCN is required prior to a regulated utility commencing construction on a project that is not within the ordinary course of business.⁸ A project is *per se* not within

⁷ KRS 278.274(3)(b).

⁸ KRS 278.020(1); 807 KAR 5:001 Section 15(3).

the ordinary course of business when it will result in increased charges to customers, and here Apache intends to propose a contemporaneous request to pass on the project's costs through an increase in rates or assessment of a surcharge.⁹ Moreover, the rate recovery mechanism in KRS 278.509 is contingent upon a finding by the Commission that the project is necessary and that the corresponding rate assessment is just and reasonable. Absent an examination of the underlying construction to ascertain whether the proposed project is necessary and reasonable, the Commission would be stymied in attempting to assess the propriety of the requested rate increase in conjunction with KRS 278.509. Accordingly, the construction project coupled with a simultaneous rate increase, as proposed by Apache, requires a CPCN.

Commission regulations also require applications for CPCNs to include descriptions of the need and manner for which the proposed project will be constructed.¹⁰ Reports, drawings and plans submitted to the Commission must be signed by a Licensed Professional Engineer and bear the engineer's stamp or seal.¹¹ A professional engineer must be engaged in all projects that require a CPCN, regardless of whether the project entails new construction or replacement of existing facilities. Therefore, the services of an engineer would be required for the proposed main replacement project as a requirement of the application for a CPCN.

Finally, the practice of law is broadly defined by Kentucky Supreme Court Rule 3.020, which states:

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities or business relations of one requiring the services.

The practice of law includes representation of a party before a state administrative agency.¹² The Commission has required that those representing the interests of others must be licensed attorneys. The Commission has previously held:

[A]ny attorney who is not licensed to practice in the State of Kentucky and who seeks to represent a client or employer before this Commission must engage a member of the

⁹ 807 KAR 5:001 Section 15(3).

¹⁰ 807 KAR 5:001 Section 15(2).

¹¹ KRS 322.340.

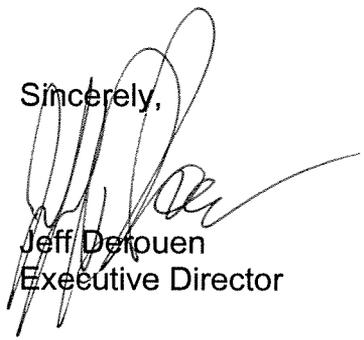
¹² *Kentucky State Bar Association v. Henry Vogt Machine Co.*, 416 S.W.2d 727, 728 (Ky. 1967).

Kentucky Bar Association. It logically follows that if an unlicensed attorney may not represent a client before this Commission, neither may a layman.¹³

Practice before the Commission by the representative of a corporation necessarily requires retainer of an attorney.¹⁴ Commission regulations preclude a person, other than an attorney, from filing papers on behalf of another person in the course of a formal proceeding, which includes applications for a CPCN under KRS 278.020 and rate recovery pursuant to KRS 278.509.¹⁵ The papers must also be signed and filed by an attorney.¹⁶ A person is defined to include a corporation, thereby precluding a non-attorney from filing papers on behalf of a corporation.¹⁷ Furthermore, an appearance before the Commission in the course of a formal hearing constitutes the practice of law. Consequently, the services of an attorney licensed in the Commonwealth of Kentucky will be required for Apache to proceed with the proposed applications.

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

Sincerely,



Jeff Derouen
Executive Director

¹³ Case No. 2004-00348, *Howard B. Keen v. Carroll County Water District* (PSC Ky. Oct. 15, 2004) (citing Administrative Case No. 249, Practice Before the Commission by Attorneys Non-Licensed in the Commonwealth of Kentucky (Ky. PSC June 15, 1981)).

¹⁴ *Vogt Machine*, 416 S.W.2d at 728.

¹⁵ 807 KAR 5:001 Section 4(4).

¹⁶ *Id.*

¹⁷ KRS 278.010(3).

Ex. A

From: Tom Shirey [<mailto:dtshireyll@gmail.com>]
Sent: Wednesday, August 07, 2013 3:09 PM
To: Faulkner, Leah (PSC)
Cc: 'Brenda Everette'
Subject: RE: Apache Gas Transmission Company, Inc. request for determination

Leah,

Hope you are having a great summer. Have you heard anything about our request for an executive determination relating to Apache Gas Transmission Company being able to file under KRS 278.509 for recovery of costs for natural gas pipeline replacement? Since I met with you, Ronald and Jason on July the 1st we have received a closer estimate from a utility pipe contractor after a site inspection of the areas that need to be replaced. The current estimate is more than first estimated. The current estimated cost to replace the sections of pipe is between \$117,925 and \$190,530 depending on options and the time over which the repairs are to be completed. As before, these estimates are without the costs of an engineer or attorney.

Thank you,

Tom
Apache Gas Transmission Company, Inc.

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