Ernie Fletcher
Governor

LaJuana S. Wilcher
Secretary

Commonwealth of Kentucky
Environmental and Public Protection Cabinet
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460

October 14, 2004

Mr. Marc Treitler
Viterra Energy Services Inc.
7343 Ronson Road, Suite Q
San Diego, CA 92111

Dear Mr. Treitler:

This letter responds to your letter of June 9, 2004 in which you requested an opinion on the jurisdictional status of tenant-based heat billing systems.

In your letter, you present the following facts:

Viterra Energy Services provides utility billing services, including heat, to landlords through the use of timing devices.

Heat billing is commonly used in areas where apartments are heated with a central boiler system. Under that system, water is heated at a central boiler and then circulated in baseboard pipes throughout the residential units. Apartment residents, through the use of their thermostat, choose the amount of hot-water to circulate through their apartment unit. A landlord bills each tenant for their share of "heat" or gas cost by the use of a timing device that measures the time that a unit uses the "heat" or hot water. Gas submeters are not used because natural gas is not directly supplied to any apartment unit.

In other situations, a tenant may have an individual furnace or an individual hot-water heater. In these instances, the landlord measures natural gas usage through a submeter or a timing device that measures the number of minutes of gas usage. In the latter case, using the performance specifications of the furnace or hot-water heater and the number of minutes of gas usage, the volume of gas usage can be determined.

Clients of Viterra Energy Services use both methods to bill for heating costs. These billings do not include any profit component, but are designed solely to recover the cost of natural gas.

Your letter presents the following issue: Does a landlord using one of the heat billing systems described above meet the statutory definition of "utility" and thus fall within the jurisdiction 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

> 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 transporting or conveying of gas, crude oil, or other fluid substance by pipeline to or for the ***public***, for compensation.

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

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. Service Comm'n of Pennsylvania, 165 A. 47, 49 (Pa. Super. 1933). See 64 Am. Jur. 2d Public Utilities § 2 (2004). 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). If utility service is limited to a specific privileged class, that service is not to the public.

Utility service provided by landlords to their tenants is considered as being to a specific class. In Drexelbrook Associates v. Pennsylvania Public Service Commission, 212 A.2d 237 (Pa. 1965), the Pennsylvania Supreme Court, rejecting arguments that a landlord reselling utility service to its tenants was providing service to the public, declared:

> In the present case the only persons who would be entitled to and who would receive service are those who have entered into or will enter into a landlord-tenant relationship with appellant. Here. . . those to be serviced consist only of a special class of persons--those to be selected as tenants--and not a class open to the indefinite public. Such persons clearly constitute a defined, privileged, and limited group and the proposed service to them would be private in nature . . . .
>
> . . . .

> We hold, therefore, that the proposed service which appellant would render in the present case would not constitute it a public utility within the meaning of § 2 of the Public Utility Law since such service would not be furnished "to or for the public."

Id. at 240, 241.

Similarly in City of Sun Prairie v. Wisconsin Pub. Serv. Comm'n, 154 N.W.2d 360 (Wis. 1967), the Wisconsin Supreme Court refused to hold that a landlord operating natural gas fired generators used to provide electric service to his tenants was a utility. Finding that a landlord providing service to his tenants was not providing service to the public, the Court stated:

> 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. But whether or not the use is for the public does not necessarily depend upon the number of customers . . . . The tenants of a landlord are not the public; . . . . The word 'public' must be construed to mean more than a limited class defined by the relation of landlord and tenant.

Id. at 362.

Other courts have reached the same conclusion. See Pub. Serv. Comm'n of Marvland v. Howard Research & Development Corp., 314 A.2d 682 (Md. 1974); Story v. Richardson, 198 P. 1057 (Cal. 1921); Antique Village Inn. Inc. v. Pacitti, Robins & Anglin, Inc., 390 A.2d 681 (N.J. 1978); Griffith v. New Mexico Pub. Sew. Comm'n, 520 P.2d 269 (N.M. 1974); Jonas v. Swetland Co., 162 N.E.45 (Ohio 1928); Baker v. Pub. Serv. Co. of Oklahoma, 606 P.2d 567 (Okla. 1980). Regulatory commissions, including the Kentucky Public Service Commission have similarly recognized this rule. See, e.g., Envirotech Utility Management Services, Case No. 96-448 (Ky.PSC April 29, 1997); Fairhaven Mobile Home Village Sewage Treatment Plant, Case No. 90-169 (Ky.PSC June 22, 1990); Procedures Governing Sales of Electricity for Resale, 85 PUR 3d 107 (Fla. P.S.C. 1970).

Based upon the discussion above, Commission Staff is of the opinion that landlords using any of the heat billing systems described above would not meet the statutory definition of utility or be subject to Commission jurisdiction. Such landlords are not providing service to the public.

Please note that the definition of "utility" that is found at KRS 278.010(3) does not include the furnishing of heating services. Accordingly, a landlord who does not supply either electricity or natural gas to power an apartment's furnace or hot-water heater would also fail to meet the statutory definition of utility because he is not furnishing one of the specified commodities.

Please further note that many local gas distribution companies within Kentucky prohibit the resale of natural gas. While the "resale" of utility service is generally considered to involve the assessment of a charge designed to recover revenues in excess of the cost of the supplied service or commodity, see, e.g., Procedures Governing Sales of Electricity for Resale, 85 PUR 3d 107 (Fla. P.S.C. 1970), a local gas distribution company serving one of your clients may take a differing position. Your clients, therefore, should consult their local gas distribution company prior to implementing one of the heat billing methods described above.

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, Assistant General Counsel, at (502) 564-3940, Extension 259.

Sincerely,

Beth O'Donnell
Executive Director

viterra
Energy Services

June 9, 2004

Tom Dorman,
Executive Director, PSC,
P.O. Box 615, 211 Sower Boulevard
Frankfort, Kentucky 40602-0615

Dear Mr. Dorman:

Please accept this letter as an application for approval of the tenant-based heat billing systems described herein. My company, Viterra Energy Services, provides utility billing services to landlords in 25 countries and has been in business for over 75 years. Viterra bills for all utilities, including heat through the use of timing devices.

Heat billing is very common in colder areas due to the fact that many apartments are heated with a central boiler system. Under that system, water is heated at a central boiler and then the hot water is circulated in baseboard pipes throughout the residential units. The residents, via their thermostat, choose when and how much hot-water to circulate through their units. In this situation, a landlord will install a timing device in each unit to measure how many minutes each unit uses the "heat", or hot-water. The landlord will then bill the tenants for their fair share of "heat" or gas costs. In this situation, gas submeters can not be used as there is no "gas" to measure in each unit.

In other situations, each tenant may have an individual furnace or an individual hot-water heater. The landlord would either measure the gas used at the furnace or hot-water heater via a submeter, or install a timing device to measure the amount of minutes (which is then converted into therms) used. Both methods are equally accurate and the installation of a timing device is much safer than a submeter (which actually involves cutting the gas line). This is the main argument for specifically including the timing devices in the statute-landlords generally do not want to cut into gas lines where timing devices can be used with the same accuracy.

In all situations described above, the landlord is only allocating his heating costs to the residents-in other words, the landlord is not "marking-up" the cost of gas during the

7343 Ronson Road, San Diego, CA 92111
Phone: (858) 737-2710. Fax: (858) 244-2349. www.viterrausa.com

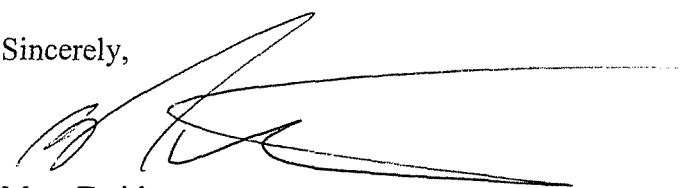
billing process, nor is the landlord charging anyone other than his tenants for the heat (i.e., the landlord is not serving the public, only his tenants).

The device used to measure the amount of time the "heat" is used is a timing device, or a runtime meter device. Generally, these devices have over 99% accuracy levels.

I would greatly appreciate if you would provide me with an analysis of the legality of the above-described heat billing systems in Kentucky.

Please contact me directly with any comments or questions that you may have on this matter.

Sincerely,



Marc Treitler
General Counsel
Viterra Energy Services Incorporated
7343 Ronson Road, Suite Q
San Diego, CA 92111
858-737-2743 (phone)
858-244-2349 (facsimile)