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March 13, 2015

PSC STAFF OPINION 2015-007

Mr. Rocco D'Ascenzo
Associate General Counsel
Duke Energy Kentucky, Inc.
139 East Fourth Street
PO Box 960
Cincinnati, Ohio 45201-0960

Re: Duke Energy Kentucky, Inc.'s Concerns
Regarding Actions Taken by a Home Owners Association

Dear Mr. D'Ascenzo:

This letter responds to your letter of August 4, 2014 in which you requested an opinion regarding the jurisdictional status of a Home Owners Association ("HOA") that is a customer of Duke Energy Kentucky, Inc. ("Duke"). The HOA has allegedly installed sub-meters and interior piping for the purpose of re-selling gas to residents throughout an apartment building. This opinion represents Staff's ("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.

Your letter presents the following questions: 1) Do the actions taken by the HOA render it a public utility, as defined under KRS 278.010(3), and thus subject it to the jurisdiction of the Commission; 2) Do the HOA's actions create a master meter system, pursuant to KRS 278.495; 3) Do the HOA's actions subject it to the provisions of 807 KAR 5:022, Section 16 regarding the installation and control of gas meters; 4) Do the HOA's actions violate Duke's tariffs; and, 5) What options does Duke have in light of its safety concerns regarding this situation?

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

> [A] home-owners association ("HOA") has installed tab meters to the inside piping of a condominium complex building intended to measure individual tenant natural gas consumption for resale. Duke serves the building in accordance with its tariffs . . . . The gas enters the building through a large diameter pipe where the service is measured at the single delivery point for the entire building. Duke's customer in this regard is the HOA, which the Company bills monthly. The HOA has entered into a relationship with a third party whereby separate "tab meters" for 38 condominiums have been installed throughout the building to sub-meter and measure each individual unit's gas consumption. The individual "tab" gas meters are read by a third party vendor and then billed by the HOA to the individual tenants separate and apart from Duke's meter at this location.

You state that Duke does not have any involvement with the tab metering, resale, or individual billing situation by the HOA to the individual tenants and has not and does not inspect or test these individual tab meters, nor does it inspect the internal piping for these individual units. You also state that Duke does not have any involvement with the HOA's calculation of individual bills to the tenants and whether they accurately reflect the usage and charges billed by Duke to the HOA. Duke believes that the way these tab meters were installed originally by the third party may be improper and that the internal piping of the housing units does not conform to Duke's standards for natural gas delivery and that it has safety concerns with this sub-metering. Finally, Duke has been contacted by a new meter reading company requesting it to explicitly authorize the sub-metering arrangement.

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

> 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 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).

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 a 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 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.

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 on the facts presented in your letter, the HOA has installed inside piping and tab-meters for 38 individual units located in one building. The HOA is then re-selling the gas it purchases from Duke to the tenants of these individual units. Your letter does not suggest that the HOA intends, either directly or indirectly, to distribute, sell or furnish natural gas "to the public" as a class or to serve an indefinite public. Rather, it appears that the HOA's re-selling of gas is limited and that it is not furnishing gas "to the public." While it owns facilities that are used for distribution, sale, or furnishing of gas for compensation, the HOA does not provide service to the public under KRS 278.010(3) and is therefore, not a utility subject to the regulatory jurisdiction of the Commission, pursuant to KRS 278.040.

Staff is further of the opinion that the HOA has not created a master meter system, pursuant to KRS 278.495, which would subject it to the Commission's regulation over the safety of its natural gas facilities.

> *Master meter system* means a pipeline system for distributing gas within, but not limited to, a definable area, such as a mobile home park, housing project, or apartment complex, where the operator purchases metered gas from an outside source for resale through a gas distribution pipeline system. The gas distribution pipeline system supplies the ultimate consumer, who either purchases the gas directly through a meter or by other means, such as through rents.

49 CFR 191.3.

This definition of a master meter system is consistent with KRS 278.495(1)(b). In addition, KRS 278.495(2)(b) sets forth the Commission's authority to regulate the safety of natural gas facilities that comprise a master meter system. The U.S. Department of Transportation ("DOT") has delegated to the Office of Pipeline Safety ("OPS") enforcement of minimum safety standards over natural gas master meter systems, which by definition include mobile home parks, housing projects, or apartment

complexes.[1] The OPS policy is that the term master meter system applies only to gas distribution systems serving multiple buildings[2] in a defined area served by an exterior gas distribution pipeline system.[3] This definition does not include gas distribution systems consisting entirely or primarily of interior piping located within a single building.[4]

Based on the specific facts presented in your letter, including that there is a single building and the system described does not involve distribution of gas through exterior or underground pipelines to more than one building, it is Staff's opinion that the HOA does not operate a master meter system.

Duke is also seeking clarification regarding the applicability of 807 KAR 5:022, Section 8(2)(a) and (b) to the HOA's actions. 807 KAR 5:022 in general requires that the Commission prescribe rules for the safety and service or the furnishing of any commodity by any utility.[5]

807 KAR 5:022, Section 8(2)(a) states:

> All gas sold by a **utility** and all gas consumed by a **utility** in the State of Kentucky shall be metered through approved

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[1] U.S. Department of Transportation ("U.S. DOT") for the Office of Pipeline Safety ("OPS"), "Assessment of the Need for an Improved Inspection Program for Master Meter Systems," a Report of the Secretary of Transportation to the Congress, prepared pursuant to Section 108 of Public Law 100-561(Jan.2002) at 5.

[2] *Id.*

[3] *Id.*

[4] *Id.* See U.S. DOT, "Research and Special Programs Administration ('RSPA') Responses to National Association of Pipeline Safety Representatives ('NAPSR') Resolutions," pp. 115-116, which states, in part, that

> Even though the present definition of 'master meter system' does not refer specifically to the existence of exterior piping serving multiple buildings, the reference to a 'pipeline system for distributing gas within . . . a mobile home park, housing project, or apartment complex' must involve the distribution of gas through exterior or underground pipelines to more than one building. The phrase regarding exterior piping serving multiple buildings was not considered essential since the use of exterior or underground pipelines to distribute gas to more than one building is implicit in the language of the definition.

This is a continuation of the policy adopted by the OPS prior to the publication of the regulatory definition of a master meter system. [See OPS Advisory Bulletin 73-10, October 1973, or the May 1973 letter from Joseph Caldwell, then Director of OPS, to Wayne Carlson, Public Service Commission of Utah.]

[5] 807 KAR 5:022 also applies to gas pipeline companies that obtain gas from producing wells located within this state, pursuant to KRS 278.485.

> type meters except in cases of emergency or when otherwise authorized by the commission. Each meter shall bear an identifying number. When gas is sold at high pressures or large volumes, the contract or rate schedule shall specify standards used to calculate gas volume. Prepayment meters shall not be used unless there is no other satisfactory method of collecting payment for services rendered (emphasis added).

807 KAR 5:022, Section 8(2)(b) requires:

> All gas delivered as compensation for leases, rights-of-way, or for other reasons, not charged at the **utility's** regular schedule of charges, shall be metered and a record kept of each transaction. All meters and regulators installed to measure gas and to regulate pressure of gas shall be under the control of the **utility** and subject to the rules of the **utility** and of the commission (emphasis added).

Based upon our earlier stated position that the HOA is not a "utility" as defined in KRS 278.010(3), it is Staff's opinion that the above provisions of 807 KAR 5:022 would not apply to the HOA.

Duke also questions whether the HOA's purported actions of installing tab meters and inside piping for the purpose of reselling natural gas[6] purchased from Duke, violate Duke's tariffs, and thus would permit Duke to terminate service to the HOA until the safety concern is rectified.

Specifically, Sheet No. 21, Section 6 of Duke's present tariff provides:

> Service is supplied directly to Customer through Company's own meter and is to be used by Customer only for the purposes specified in and in accordance with the provisions of the Service Agreement and applicable Rate Schedule. *Service is for Customer's use only and under no circumstances may Customer or Customer's agent or any other individual, association or corporation install meters for the purpose of reselling or otherwise disposing of service supplied Customer* (emphasis added).

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[6] 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).

. . . .

> In case of unauthorized remetering, sale, extension or other disposition of service, Company may immediately discontinue the supplying of service to Customer until such unauthorized act is discontinued and full payment is made for all service supplied or used, billed on proper classification and Rate Schedule, and reimbursement in full made to Company for all extra expenses incurred, including expenses for clerical work, testing and inspections.

Assuming that the purported actions have been taken by the HOA, it is Staff's opinion that Duke may have the right to terminate service to the HOA, pursuant to the provisions of 807 KAR 5:006, Section 15(1)(a) for noncompliance with Duke's tariffs, only after Duke had made a reasonable effort to obtain the HOA's compliance and after the HOA is provided with advance notice in writing.[7] In addition, Duke may terminate or refuse service to the HOA immediately if there is an existing dangerous condition, pursuant to 807 KAR 5:006(15)(b). [8] Finally, 807 KAR 5:022, Section 9(17)(a)3, addresses the utility's responsibility for inspecting service lines and provides in pertinent part that, "The utility shall test all piping downstream from the meter for gas leaks, each

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[7] 807 KAR 5:006, Section 15. Refusal or Termination of Service.

(1) A utility may refuse or terminate service to a customer only pursuant to the following conditions . . . .

(a) For noncompliance with the utility's tariffed rules or the commission's administrative regulations:

1. A utility may terminate service for a customer's failure to comply with applicable tariffed rules or 807 KAR Chapter 5 pertaining to that service;

2. A utility may not terminate or refuse service to a customer for noncompliance with the utility's tariffed rules or 807 KAR Chapter 5 without first having made a reasonable effort to obtain customer compliance; and,

3. After the effort by the utility, service may be terminated or refused only after the customer has been given at least ten (10) days written termination notice pursuant to Section 14(5) of this administrative regulation.

[8] 807 KAR 5:006, Section 15. (1)(b) Refusal or Termination of Service.

(1) A utility may refuse or terminate service to a customer only pursuant to the following conditions . . . .

(b) For dangerous conditions. If a dangerous condition relating to a utility's service that could subject a person to imminent harm or result in substantial damage to the property of the utility or others is found to exist on the customer's premises, the service shall be refused or terminated without advance notice:

1. The utility shall notify the customer immediately in writing and, if possible, orally of the reasons for the termination or refusal;

2. The notice shall be recorded by the utility and shall include the corrective action to be taken by the customer or utility before service can be restored or provided;

3. If the dangerous condition, such as gas piping or a gas fired appliance, can be effectively isolated or secured from the test of the system, the utility need discontinue service only to the affected piping or appliance.

time gas is turned on by the utility, by observing that no gas passes through the meter when all appliances are turned off."

This letter represents 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 Virginia Gregg at (502) 782-2584.

Sincerely,

Jeff Derouen
Executive Director

VG/ph