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Commonwealth of Kentucky
Environmental and Public Protection Cabinet
Public Service Commission

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October 13, 2004

Mr. Harry Apostolos
Guardian Water & Power
1160 Goodale Boulevard
Columbus, Ohio 43212

Dear Mr. Apostolos:

This letter responds to your letter of July 22, 2004 in which you requested an opinion on the jurisdictional status of apartment buildings in which submeters are installed to meter the gas usage of their residents.

In your letter and telephone conversations with Commission Staff, you present the following facts:

Your client owns several apartment buildings in and around Florence, Kentucky that receive natural gas service from The Union Light, Heat and Power Company (ULH&P). ULH&P provides natural gas service to each apartment building through an individual meter. For each apartment building, the meter is located directly adjacent to the building. There is no underground piping from the utility's meter to the apartment building.

Gas service to each apartment within each building currently is not individually metered. Your client is now considering the installation of a submetering system that would measure the gas usage in each apartment. He is also considering the installation of a run-time system. Such system would electronically monitor the furnace valve and record the furnace run-time. Using the furnace run-time and the furnace's BTU rating, the apartment's gas usage could be determined.

Your client intends to bill on a "not-for-profit" basis. Billings would not include any profit component but would be designed solely to recover the cost of natural gas.

Your letter presents the following issue: Will your client's proposed actions render him a utility subject to the jurisdiction of the Public Service Commission?

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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

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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.

Other courts have reached the same conclusion. See Pub. Serv. Comm'n of Maryland 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 your client's proposed activity would not place him within the statutory definition of utility or subject him to Commission jurisdiction. While your client will own facilities that are used for the transporting of gas for compensation, he is not providing service to the public.

Commission Staff is further of the opinion that your client would not be subject to Commission regulation over the safety of his natural gas facilities. KRS 278.495(2) provides that the Commission may regulate the safety of natural gas facilities that comprise a master meter system. In the absence of any underground piping system that would connect the utility's meter to your client's structure and given the limited

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amount of piping involved in his system, it does not appear that your client is currently operating or under the proposed arrangement would be operating a master meter system.

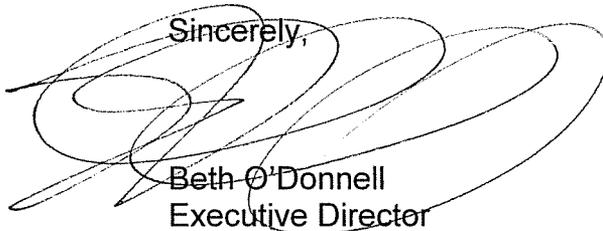
Please note that Sheet No. 21.1, Section 6 of the ULH&P's present tariff provides:

Use of Service. 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.

Your client's proposed actions may be regarded as in conflict with ULH&P's Regulations. 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), ULH&P may take a differing position. Your client, therefore, should consult ULH&P prior to implementing his proposed actions.

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,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and flourishes, positioned above the typed name.

Beth O'Donnell
Executive Director