BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF COMMISSION PIPELINE SAFETY PROGRAM MANAGER FOR A DECLARATORY RULING ON JURISDICTION OF LOW INCOME HOUSING PROPANE SYSTEM	)))))	**PETITION FOR DECLARATORY RULING** **PS08-004**

COMES NOW, the South Dakota Public Utilities Commission (herein "Commission") Pipeline Safety Program Manager (herein "the Program Manager") by and through its undersigned Staff Attorney, and files this Petition for Declaratory Ruling.

I. <u>APPLICABLE LAW</u>

South Dakota Code Chapter 49-34B is the pipeline safety chapter for the regulation of gas pipeline facilities. South Dakota pipeline safety inspectors have an obligation to inspect such facilities (see SDCL 49-34B-6) and the facility has an obligation to follow all relevant statutes in the aforementioned codified law chapter.

SDCL 49-34B-1(5) "Gas Pipeline Facilities," includes master meter systems within its definition. SDCL 49-34B-1(10) "Master Meter Systems," is written as,

> *"any pipeline system for distributing gas within 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 and the gas distribution pipeline system supplies the ultimate consumer who either purchases the gas directly through a meter or by other means, such as by rents"*

II. FACTS

The Burke Housing Authority herein (the "facility") is a non-profit elderly and low income housing unit in Burke, South Dakota. Residents must undergo an application process prior to acceptance as a resident at the facility. After acceptance, the applicant is provided a housing unit. The housing units are set up in sets of four individual units under one roof. There are 23 individual units utilizing propane for heating as well as one community room

The resident pays a set fee for his or her rent. The rent paid by the resident includes all utilities, upkeep and maintenance used at the facility. The rent paid by the resident is either 30% of his or her income or a set rate. The "percentage of income rent" is set by US Housing and Urban Development. If a resident is above a particular income rate he or she must pay the flat rate, also set by US Housing and Urban Development.

The facility makes an annual application to US Housing and Urban Development to recoup its utility expenses through a subsidy. The application is based on a three year average consumption and the estimated rate of the utility (inclusive of water, sewer, gas and electricity). At the end of the year US Housing and Urban Development calculates actual consumption and actual cost. After expiration of the three year estimate period, the cumulative calculations are evaluated. The facility keeps 75% of unused money if it over estimated its costs or usage and thus collected more government subsidy than necessary. If, however, the facility exceeds its estimate, US Housing and Urban Development pays only 25% of the overage and the facility covers the remaining overage. At no time, however, may the facility increase its rent. The facility may only collect the rent set by US Housing and Urban Development.

The facility has paid the program fees set in SDCL 49-34B and been considered part of the South Dakota pipeline safety program since at least 1997. While inspecting the facility, however, one of the pipeline safety program inspectors questioned whether the facility falls within the pipeline safety program's jurisdiction and now looks to the Commission for assistance.

III. ISSUE

Is a propane gas delivery system, where costs thereof are paid through a government subsidy, and where user rents cannot be modified based on actual cost, a master meter system according to SDCL 49-34B-1(10) and thus within the jurisdiction of this Commission?

IV. REASONING IN FAVOR OF JURISDICTION

The pipeline safety program's first priority is safety. The tenants, the operator and the distributor could all be at risk if propane is not delivered and used safely at the facility. The South Dakota pipeline safety program, therefore, through the federal codes, requires compliance with safety measures such as written operating and emergency response plans and more complex standards such as regulator operation and corrosion control. The facility at issue deserves the protection and help offered by our program. While not a gas distribution safety consultant, the South Dakota pipeline safety inspectors act as guides to help the jurisdictional pipeline operators wade through the federal code to achieve the highest level of safety and compliance. The facility at issue requires such assistance.

The definition of a 'master meter system' in the South Dakota code specifically contemplates a facility such as the Burke Housing Authority. The definition specifically lists a "housing project" where the "operator purchases metered gas from an outside source for resale"...and the "ultimate consumer purchases the gas... by other means such as rents." SDCL 49-34B-1(10). The resident is clearly the end consumer and he, either through rent or through qualification for government assistance pays for the metered gas. The cost of the metered gas is one such expense paid by the money collected either directly or indirectly from the resident, the end user. The system of delivery to the resident then is a Master Meter System and within our pipeline safety jurisdiction.

V. REASONING AGAINST JURISDICITON

SDCL 49-34B-1(10), 'master meter system' requires payment from the resident, or ultimate consumer. In this case, however, the consumer or the resident does not pay for his or her proportional use of gas. Rather, the resident must "qualify" to live at the facility and then pays a fee for the services he or she receives. The facility purchases fuel as necessary, and applies to the federal government for a subsidy that covers all or some of its fuel costs. Renters do not directly or indirectly pay for propane but rather are provided heat. Federal rulings state that the provision of heat is not jurisdictional to 49 CFR Part 192.

There is not truly a "true up" process for such fuel purchases. If the facility over estimates the amount of fuel or the cost of fuel needed, it keeps the additional money. Alternatively, if it underestimates the cost, the facility itself compensates for any lack of funds. In other words, the consumer's payment to the facility does not change with fuel costs. From conversation with the facility, it appears the facility accounts for fuel as a general expense to operate the facility. The facility is the ultimate consumer, as it pays for the fuel. The resident merely obtains a service and pays a fee for receipt of such service. More specifically, the gas is not resold according to SDCL 49-34B-1(10). The facility purchases it to run its facility. The facility does not resell the product; it is merely compensated for the gas purchases through its application to the federal government.

VI. PROGRAM MANAGER RECOMMENDATION

Pipeline Safety Staff does not believe this Commission has jurisdiction over the facility. Although this Commission's responsibility is to enforce the Federal Safety Rules and Code, it has the authority to determine which facilities it has jurisdiction over. The Program Manager, through direct discussion with the Pipeline and Hazardous Materials Safety Administration confirmed this Commission's authority in determining jurisdiction under the regulations in 49 CFR Part 192.

It is essential the gas be resold to qualify as a "system" over which the pipeline safety program has jurisdiction. The program is designed to protect the end consumer when a third party distributes the product for profit. The program is designed to protect the consumer through safety standards for such transport of gas. The facility at issue does not resell its product. Rather, the facility itself is the direct consumer.

The gas provided by facility is a byproduct of its intended purpose, to provide housing for those that otherwise cannot afford it. The consumer does not pay for the gas rather the federal government and facility pay for the gas consumed. The consumer does not qualify for the fuel subsidy, the facility qualifies for it. The analysis would be different should the consumer apply and qualify, receive a fuel subsidy then paid to the facility. In addition, the individual usage of each resident is not tracked and allocated to him or her. Rather, the usage is considered based on the facility as a whole. For all the above reasons, the pipeline safety staff recommends denying jurisdiction over the facility.

VII. CONCLUSION

The Program Manager respectfully requests a Commission decision regarding jurisdiction according to the preceding facts consistent with ARSD 20:10:01:36.

Signed and dated this 29th day of October, 2008

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