



COMMONWEALTH OF KENTUCKY  
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**Ronald B. McCloud, Secretary**  
**Public Protection and**  
**Regulation Cabinet**

**Helen Helton**  
**Executive Director**  
**Public Service Commission**

**Paul E. Patton**  
**Governor**

July 13, 1999

Mr. T. Pat Harrison  
Texas-Ohio Energy Management, Inc.  
4606 FM 1960  
Suite 600  
Houston, Texas 77069-4613

Dear Mr. Harrison:

Commission Staff acknowledges receipt of your letter of April 26, 1999 concerning the regulatory requirements for a proposed transaction.

Your letter states the following facts: Texas-Ohio Energy Management, Inc. ("Texas-Ohio") has entered into an agreement to purchase natural gas from a natural gas gathering system located in Kentucky. It has also entered into an agreement to sell natural gas to an end-user across whose property the producer's gathering lines run. Texas-Ohio proposes to engage a local certified pipeline contractor to construct a tap and regulator station on the gathering system. The tap and regulator will be located on the end-user's property and will be owned by the end-user. The end-user is the only entity served through this tap. The purchased gas will not be resold or distributed to other users.

Your letter poses the following question: What, if any, portion of the proposed transaction is subject to Commission regulation?

KRS 278.040(2) provides that "[t]he jurisdiction of the commission shall extend to all utilities in this state." A utility is defined as

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 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).



Mr. T. Pat Harrison  
July 13, 1999  
Page 2

According to the majority view, 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. Serv. Comm'n of Pennsylvania, 165 A. 47, 49 (Pa. Super. 1933). See 64 Am. Jur. 2d Public Utilities §1 (1972). 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).

Jurisdictions are divided upon whether the sale of utility service to one customer constitutes the provision of service to the public. Many jurisdictions have held that such sales are not to the public. See, e.g., Holder v. Mississippi Fuel Co., 317 So.2d 891, 892 (Miss. 1975) ("[I]t is apparent that appellee is not a public utility because its transmission of gas through the proposed pipeline in question was not 'to the public' but only to one customer, Mississippi Power Company.") At least one jurisdiction has held that service to only one customer can qualify the service provider as a public utility. See PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988).

In Impact of Federal Policy on Natural Gas to Kentucky Customers and Suppliers, Administrative Case No. 297 (Ky.P.S.C. May 29, 1987), the Commission addressed the issue of how many customers would have to be served for such service to be deemed "to or for the public." In concluding an exhaustive investigation of the impacts of federal policy on Kentucky's gas industry and the emerging issue of utility bypass, the Commission stated that:

In summary, any utility selling gas to the public, whether it has historically been considered as producer, transporter, LDC, or otherwise, is subject to full rate-base and facilities regulation. **The Commission considers the public to be one or more end-users.**

Id. at 20 (emphasis added). In a subsequent decision, however, the Commission declined to consider this Order as binding precedent and held that it "should be considered along with other relevant decisions and applied to the facts and circumstances on a case-by-case basis." Calvert City Power, LLC, Case No. 99-058 (Ky.P.S.C. July 6, 1999) at 5.

As Texas-Ohio is serving only one customer,<sup>1</sup> it does not appear to be providing service "to or for the public." It, therefore, is not subject to any provisions of KRS Chapter 278 that apply to public utilities. Moreover, as there is no evidence that the

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<sup>1</sup> In your letter, you do not indicate whether the owner of the natural gas gathering system is providing natural gas to other users. For purposes of this opinion, Commission Staff assumes that the end-user to whom Texas-Ohio is selling natural gas is the only customer being served.

Mr. T. Pat Harrison  
July 13, 1999  
Page 3

gathering system is charging the end-user for the transportation of the gas that Texas-Ohio has purchased, the proposed transaction will not subject either the gathering system's owner or Texas-Ohio to the requirements of KRS 278.485.<sup>2</sup>

Commission Staff is also of the opinion that Texas-Ohio would not meet the definition of utility and therefore would not be subject to Commission regulation. Under the proposed transaction, Texas-Ohio will not own, operate, control or manage any facilities that are used to provide natural gas service to the public.

The proposed construction of a tap and regulator station does not appear to require a certificate of public convenience and necessity. KRS 278.020(1) provides:

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 retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and 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.

As the proposed regulator and tap will be used to provide service to only one customer and are not part of any system that provided service to the public, KRS 278.020(1) does not apply.

Please note that, while Texas-Ohio and the owner of the natural gas gathering system are not subject to the provisions of KRS Chapter 278 that apply only to public utilities, it may be subject to the gas pipeline safety regulations promulgated by the United States Department of Transportation and enforced by the Commission pursuant to KRS 278.992.

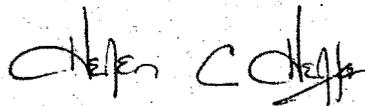
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<sup>2</sup> Your letter makes no mention of compensation being provided to the gathering system owner to transport the gas to the proposed tap. Commission Staff assumes therefore that no compensation is being provided. As KRS 278.485 refers only to gas service furnished to persons within one-half air mile of the gathering pipeline, it is still not applicable if compensation for any transportation service is required only of Texas-Ohio.

Mr. T. Pat Harrison  
July 13, 1999  
Page 4

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, Commission counsel, at (502) 564-3940, Extension 259.

Sincerely,

A handwritten signature in black ink, appearing to read "Helen C. Helton". The signature is stylized with a large initial "H" and a long, sweeping underline.

Helen C. Helton  
Executive Director