

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

POLLITT ENTERPRISES, INC.,	)	
WHITNEY CLARK POLLITT,	)	
INDIVIDUALLY,	)	
AMANDA DEEANN POLLITT,	)	CASE NO.
INDIVIDUALLY,	)	2017-00120
AND	)	
BASIL C. POLLITT, INDIVIDUALLY,	)	
D/B/A THE GAS GROUP, INC.	)	
A/K/A THE GAS GROUP	)	
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ALLEGED VIOLATIONS OF	)	
KRS 278.020, KRS 278.160, KRS 278.140,	)	
AND 807 KAR 5:006, SECTION 4(2)	)	

ORDER

This matter arises from an investigation into alleged violations of certain statutes and regulations by Pollitt Enterprises, Inc. (“Pollitt Enterprises”), Whitney Clark Pollitt (“Clark Pollitt”), Amanda Deeann Pollitt (“Amanda Pollitt”), and Basil C. Pollitt (“Basil Pollitt” or “Mr. Pollitt”) d/b/a The Gas Group, Inc. a/k/a The Gas Group (“Gas Group”) (collectively, “Pollitts”). The alleged violations arise from the operation of a 22-mile natural gas pipeline in an area north of Richardsville, Warren County, Kentucky, (“Pollitt System”)<sup>1</sup> providing natural gas distribution service to the public since September 2006.<sup>2</sup>

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<sup>1</sup> The Pollitt System operates under multiple business names and thus the term “Pollitt System” is used to identify the system at issue.

<sup>2</sup> The Pollitt System began operation in 1993. This proceeding addresses alleged violations that occurred after the Kentucky Supreme Court denied, in August 2006, Basil Pollitt’s motion for discretionary review of a Court of Appeals decision affirming that the Pollitt System is a distribution line and a public utility subject to the Commission’s jurisdiction. See *Pollitt v. Public Service Comm’n*, 2005-SC-000888 (Aug. 17, 2006); *Pollitt v. Public Service Comm’n*, 2004-CA-001516 (Ky. App. Oct. 14, 2005).

As set forth in the March 15, 2017 Order, the purpose of this proceeding is to investigate alleged violations of the following statutes and regulations by the Pollitts, who have operated the Pollitt System under the corporate names Pollitt Enterprises and The Gas Group since September 2006:

- KRS 278.020(1): allegedly providing natural gas utility service to the public without obtaining a Certificate of Public Convenience and Necessity (“CPCN”) from the Commission.
- KRS 278.020(6) and (7): allegedly transferring ownership and control of the Pollitt System without obtaining Commission approval.
- KRS 278.160: allegedly failing to file the utility’s schedule of rates and conditions for service (“Tariff”).
- KRS 278.140: allegedly failing to file an annual report of gross earnings from intrastate business (“Annual Earnings Report”).
- 807 KAR 5:006, Section 4(2): allegedly failing to file annual financial and statistical reports (“Annual Financial and Statistical Report”).

During the course of this proceeding, two additional matters were raised and investigated:

- Whether the Pollitt System is a distribution line or a gathering line.
- Whether the Commission has jurisdiction over Clark Pollitt and Amanda Pollitt.

### PROCEDURAL BACKGROUND

The Pollitt System has operated without regulatory oversight of rates, service, and safety since it was constructed in 1993. This is the second proceeding that the Commission has initiated against the Pollitt System. Since the Pollitts sought to

relitigate issues in this proceeding that were decided on the merits in a previous proceeding, we must briefly discuss the previous matter before we turn back to the pending case.

April 1999 – August 2006

The Commission initiated a proceeding against Basil Pollitt and Gas Group in April 1999 upon learning of the existence of the Pollitt System.<sup>3</sup> When first constructed in 1993, the Pollitt System was operated by Basil Pollitt under the name Gas Group<sup>4</sup> and was classified as a gathering line<sup>5</sup> because it transported natural gas to a wholesale customer. Shortly after the line was constructed, the Kentucky Division of Mines and Minerals required Basil Pollitt to furnish retail farm tap gas service to approximately 50 customers pursuant to KRS 278.485.<sup>6</sup>

By 1999, the Pollitt System no longer served a wholesale customer and instead furnished natural gas to individual retail customers only. Because a pipeline classification is based upon function, the Commission found that the Pollitt System was a distribution line, and not a gathering line, based on the Pollitt System's sole function of provision of natural gas to individual retail customers. The Commission also found that the Pollitt System was a utility as defined in KRS 278.010(3)(b), and thus subject to the Commission's jurisdiction. Basil Pollitt challenged these findings in state court, arguing,

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<sup>3</sup> Case No. 99-130, *The Gas Group Alleged Violations of KRS 278.020; KRS 278.160; 807 KAR 5:022, Sections 14(5)(A); 14(5)(C)(2); 13(9), and 807 KAR 5:023, and 49 CFR 192.707(A); 192.707(D)(2); 192.615, and 49 CFR 199* (Ky. PSC Sept. 2, 1999).

<sup>4</sup> Aug. 9, 2017 Hearing Video Transcript (“HVT”) 1:17:13.

<sup>5</sup> The definition of different types of pipelines are set forth in 49 CFR 192.3 and the American Petroleum Institute Recommended Practice 80 SECTION (“API RP 80”). These definitions are discussed later in this Order.

<sup>6</sup> Aug. 9, 2017 HVT 1:17:13.

as he does in this matter, that the Pollitt System was a gathering line and not subject to the Commission's jurisdiction. The Kentucky Court of Appeals rejected Basil Pollitt's assertions and upheld the Commission's findings, holding that a pipeline classification was not frozen at the time it was first constructed, and that the classification could change depending upon a change in the pipeline's function.<sup>7</sup>

In addition, the Court of Appeals affirmed an injunction for Basil Pollitt to cease operating the Pollitt System. Basil Pollitt failed to comply with the court's order.<sup>8</sup> Acting upon the understanding that the Pollitt System would cease operations, the Commission did not take further action until January 2017, when it determined from a site visit that the Pollitt System was operating under the name of Pollitt Enterprises.

Case No. 2017-00120

By Order entered March 15, 2017 ("March 15, 2017 Order"), the Commission initiated this proceeding based upon information garnered during the January 2017 site visit. Basil, Clark, and Amanda Pollitt filed a joint response ("Joint Response") with the Commission on June 8, 2017, but failed to fully respond to requests for information filed as an appendix to the March 15, 2017 Order. Clark and Amanda Pollitt refused to respond to subsequent discovery requests, asserting the Commission lacked jurisdiction over them. Basil Pollitt either failed to respond in full or failed to respond to subsequent discovery requests.

Commission Staff scheduled a deposition of Basil Pollitt on a mutually agreed upon date. Basil Pollitt was served with a subpoena, but failed to appear. Clark Pollitt was served with a subpoena *duces tecum*; he filed a motion to quash the subpoena in

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<sup>7</sup> *Pollitt v. Public Service Comm'n*, No. 2004-CA-001516, p. 7.

<sup>8</sup> Pollitts' Joint Response (filed June 8, 2017) at 4.

Franklin Circuit Court, which was denied on August 7, 2017.<sup>9</sup> Clark Pollitt did not provide the requested documents, and therefore never complied with the subpoena *duces tecum*.

As scheduled in the March 15, 2017 Order, the Commission held a hearing on May 31, 2017. Because the Pollitts' counsel, but not the Pollitts, appeared, the hearing was continued to August 9, 2017. A third hearing was held on October 18, 2017, to take additional testimony from Jason Sharp, President of Southern Kentucky Energy, LLC ("Southern Kentucky Energy") regarding the current business relationship between Southern Kentucky Energy and the Pollitts.<sup>10</sup>

The Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention ("Attorney General"), is the only intervenor in this proceeding. The Pollitts filed objections to the Attorney General's motion to intervene and motion for expedited discovery and declined to respond to the Attorney General's discovery request. From the bench at the August 9, 2017 hearing, and by Order entered August 23, 2017, the Commission denied the Pollitts' objections. The Pollitts never responded to the Attorney General's discovery request.

Basil Pollitt and Jason Sharp responded to post-hearing data requests issued pursuant to the August 9, 2017 hearing. The Attorney General timely filed his post-hearing brief on September 8, 2017. The Pollitts filed an untimely brief that, after being rejected initially, was accepted for filing on October 30, 2017. On October 9 and 10,

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<sup>9</sup> *Public Service Comm'n v. Pollitt*, Franklin Circuit Court, Civil Action No. 01-CI-00581, p. 5 (entered Aug. 7, 2017).

<sup>10</sup> Mr. Sharp is not a party to this proceeding, but agreed to testify to the business relationship between Southern Kentucky Energy and the Pollitts. In September 2017, the well serving the Pollitt System was closed temporarily and Southern Kentucky Energy began supplying gas to all customers of the Pollitt System.

2017, Commission Staff conducted an inspection of the Pollitt System and pipeline records; the Inspection Report was filed into the case record on October 30, 2017. Basil Pollitt filed a response to the Inspection Report on November 8, 2017. The matter now stands submitted for a decision by the Commission.

### DISCUSSION AND FINDINGS

Because the issues of jurisdiction, pipeline classification, and transfer of control under KRS 278.020(6) and (7) are threshold issues, these issues will be discussed before addressing the remaining issues of alleged violations of KRS 278.020(1), KRS 278.140, KRS 278.160, and 807 KAR 5:006, Section 4(2).

#### Jurisdiction

Clark and Amanda Pollitt have challenged the Commission's jurisdiction over them. In their Joint Response, Clark and Amanda Pollitt asserted that the Commission did not have jurisdiction by alleging in an affidavit that they do not have a significant role in operating the Pollitt System, or a financial or ownership interest in Pollitt Enterprises.<sup>11</sup> On August 9, 2017, Clark and Amanda Pollitt filed a motion to dismiss the claims against them for lack of subject matter jurisdiction, again disclaiming financial or ownership interest in Pollitt Enterprises.<sup>12</sup> Amanda Pollitt further argued that the Commission does not have personal jurisdiction over her because she is a Florida resident, and the Commission's authority is limited to Kentucky.

In his post-hearing brief, the Attorney General argues that Clark and Amanda Pollitt are indispensable parties to this proceeding and, therefore, the Commission

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<sup>11</sup> Pollitts' Joint Response (filed June 8, 2017) Affidavit of Amanda Pollitt, unnumbered page 1, and Affidavit of Clark Pollitt, unnumbered page 1.

<sup>12</sup> The motion to dismiss was titled "Renewed Motion to Dismiss." However, neither Clark nor Amanda Pollitt filed a motion to dismiss in this proceeding prior to the August 9, 2017 motion.

should find that it has jurisdiction over Clark and Amanda Pollitt. In support of this assertion, the Attorney General points to multiple documents that evidence Clark and Amanda Pollitt demonstrated attributes of ownership and involvement in operating the Pollitt System.

The statutory basis for the Commission's jurisdiction over utilities—and utility officers, agents, and employees—is set forth in KRS Chapter 278. Under KRS 278.040(2), the Commission has statutory authority to regulate the rates and service of utilities in Kentucky. KRS 278.010(3)(b) defines a utility as any person who owns, controls, operates, or manages any facility used in connection with the production, distribution, sale, or furnishing of natural gas to or for the public for compensation. Under KRS 278.250, the Commission may investigate and examine the condition of any utility subject to its jurisdiction. KRS 278.990(1) provides that any officer, agent, or employee of a utility who willfully violates any provisions of KRS Chapter 278 or “abets a violation” shall be subject to a civil penalty.

The Commission first notes that the Pollitt System operates and transacts business under the names of two administratively dissolved<sup>13</sup> business entities: Pollitt Enterprises and Gas Group. Evidence documenting that the Pollitt System operates under both Pollitt Enterprises and Gas Group includes pipeline markers,<sup>14</sup> bills

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<sup>13</sup> Aug. 9, 2017 HVT, PSC Exhibits 7, 9.

<sup>14</sup> June 28, 2017 Deposition Transcript (“Deposition Transcript”) (Ky. PSC July 18, 2017), Exhibits 6–7.

submitted to customers,<sup>15</sup> bank accounts,<sup>16</sup> checks,<sup>17</sup> list of active operators of natural gas wells,<sup>18</sup> well permits,<sup>19</sup> well lease names,<sup>20</sup> well production reports,<sup>21</sup> gathering line operator license,<sup>22</sup> and maps of the Pollitt System.<sup>23</sup> In reviewing the evidence in the case record, regulatory-related business is typically transacted under the name of Pollitt Enterprises, and business with customers and other corporate entities is transacted under the name of Gas Group. For example, well permits, production reports, and gathering line operator permits are filed with the Kentucky Division of Oil and Gas in the name of Pollitt Enterprises, and payment made to the Division of Oil and Gas was drawn from a Pollitt Enterprises bank account. This contrasts with customer bills that are issued as Gas Group, and payments from Southern Kentucky Energy that were made out to Gas Group and deposited into a Gas Group bank account.

Although Clark Pollitt denied playing a significant role in the operation of the Pollitt System, robust evidence in the case record rebuts that allegation. According to Kentucky Secretary of State business records that were signed and filed by Clark Pollitt,

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<sup>15</sup> Aug. 9, 2017 HVT, Gas Group Exhibit 5.

<sup>16</sup> Pollitts' Response to Attorney General's Post-Hearing Data Request ("Pollitts' Response to Attorney General's Post-Hearing Request") (filed Aug. 23, 2017), Items 1–2.

<sup>17</sup> Aug. 9, 2017 HVT, Gas Group Exhibit 4; Pollitts' Response to Attorney General's Post-Hearing Request, Item 1.

<sup>18</sup> Deposition Transcript, Exhibit 5.

<sup>19</sup> *Id.* at Exhibit 3.

<sup>20</sup> Aug. 9, 2017 HVT, Attorney General Exhibit 2.

<sup>21</sup> *Id.* at PSC Exhibit 12.

<sup>22</sup> Pollitts' Response to Attorney General's Post-Hearing Data Request, Item 1.

<sup>23</sup> Aug. 9, 2017 HVT, Gas Group Exhibit 1; Commission Staff's Post-Hearing Request for Information to Jason Sharp ("Staff's Post-Hearing Request") (Ky. PSC. Aug. 11, 2017); Jason Sharp's Response to Staff's Post-Hearing Request (filed Aug. 21, 2017).



he was a corporate officer, registered agent, and incorporator for both Pollitt Enterprises and Gas Group.<sup>24</sup> All well permits and leases, the gathering line operators' license, and the list of active operators of natural gas wells that are on file with the Kentucky Division of Oil and Gas list Clark Pollitt's residence in Anchorage, Jefferson County, Kentucky, as Pollitt Enterprises' address.<sup>25</sup>

Relevant to the allegations in this matter, Clark Pollitt signs and files documents with government agencies on behalf of Pollitt Enterprises, as evidenced by Kentucky Division of Oil and Gas Production Reports filed prior to and after Pollitt Enterprises was administratively dissolved.<sup>26</sup> Clark Pollitt accompanied Basil Pollitt to a meeting with Jason Sharp in 2016 to discuss a potential business relationship with Southern Kentucky Energy using the Pollitt System to transport gas.<sup>27</sup> Although Basil Pollitt asserted that Clark Pollitt's only role was to drive him to the meeting, Jason Sharp was provided with Clark Pollitt's business card, and not that of Basil Pollitt.<sup>28</sup> Clark Pollitt was also copied on recent email exchanges regarding a potential business relationship with Southern Kentucky Energy.<sup>29</sup>

Based upon the substantial evidence in the case record that Clark Pollitt conducts business as an officer, agent, or employee of Pollitt Enterprises, the

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<sup>24</sup> Aug. 9, 2017 HVT, PSC Exhibits 7, 9; Deposition Transcript, Exhibit 4.

<sup>25</sup> Deposition Transcript, Exhibits 3, 5; Aug. 9, 2017 HVT, Attorney General Exhibit 2; Pollitts' Response to Attorney General's Post-Hearing Data Request, Item 1.

<sup>26</sup> Aug. 9, 2017 HVT, PSC Exhibit 12. Clark Pollitt's signature was verified by Basil Pollitt in sworn testimony at the August 9, 2017 hearing. Aug. 9, 2017 HVT 3:41:03.

<sup>27</sup> Aug. 9, 2017 HVT 11:50:42, 12:05:04.

<sup>28</sup> *Id.*; Jason Sharp's Response to Attorney General's Post-Hearing Request (filed Aug. 21, 2017), p. 2.

<sup>29</sup> Aug. 9, 2017 HVT, PSC Exhibit 3.

Commission finds that it has jurisdiction over Clark Pollitt pursuant to KRS Chapter 278. Therefore, the motion to dismiss Clark Pollitt is denied.

The Commission further finds that the motion to dismiss Amanda Pollitt should be granted. Unlike the substantial evidence regarding Clark Pollitt's ongoing role in Pollitt Enterprises, there is insufficient evidence to support a conclusion that Amanda Pollitt takes an active role as an officer, agent, or employee of Pollitt Enterprises. Amanda Pollitt is listed as corporate officer and incorporator for Pollitt Enterprises and The Gas Group, and her residence is listed as principal offices for both entities on Kentucky Secretary of State business records.<sup>30</sup> However, Clark Pollitt, and not Amanda Pollitt, signed the documents. Similarly, recent emails from Pollitt Enterprise to Southern Kentucky Energy originated from an email address identified as Amanda Pollitt's email address.<sup>31</sup> However, the emails sent from Amanda Pollitt's email address were all signed in the name of Basil Pollitt, and the emails sent to that email address were directed to Basil Pollitt as well.<sup>32</sup>

In summary, upon a review of the record and applicable law, the Commission denies in part and grants in part the Pollitts' motion to dismiss. The Commission denies the motion to dismiss Clark Pollitt and grants the motion to dismiss Amanda Pollitt as a party to the proceeding.

#### Pipeline Classification

The next threshold issue is to determine whether the Pollitt System is classified as a gathering line serving farm tap customers or a distribution pipeline. The pipeline

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<sup>30</sup> *Id.* at PSC Exhibits 7, 9; Deposition Transcript, Exhibit 4.

<sup>31</sup> Aug. 9, 2017 HVT 1:51:14, and PSC Exhibit 3. Basil Pollitt testified that Amanda Pollitt's email was on Basil Pollitt's phone.

<sup>32</sup> *Id.* at PSC Exhibit 3.

classification must be determined in order to establish the scope of Commission authority and regulatory oversight for the Pollitt System.

The Pollitts offer three arguments to support their assertion that the Pollitt System is a gathering line. First, as they did in the previous proceeding, the Pollitts argue the Pollitt System is a gathering line because it was constructed as a gathering line to transport natural gas to a wholesale end user, and thus its classification can never change over time irrespective of a change in function. Second, the Pollitts argue that irrespective of previous findings, the Pollitt System currently serves a wholesale end user—Southern Kentucky Energy—and therefore is a gathering line. Third, the Pollitts argue that a gathering line transports natural gas, and that the owner of the gas is irrelevant and “plays no role in the classification.”<sup>33</sup> According to the Pollitts, the Pollitt System transports Southern Kentucky Energy’s natural gas to a point of interconnection, and therefore the Pollitt System is a gathering line.

The Attorney General argues that the Pollitt System is appropriately classified as a distribution line, subject to the Commission’s jurisdiction as a utility. The Attorney General further argues that Southern Kentucky Energy is utilizing the Pollitt System as “a route” to transport Southern Kentucky Energy’s own gas, and thus is not a wholesale end user.<sup>34</sup>

In order to classify the Pollitt System, we must first determine its primary function. As the Kentucky Court of Appeals held, “the character of a natural gas line is not static, but rather changes with the needs of its owner and the public.”<sup>35</sup> Federal regulation

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<sup>33</sup> Pollitts’ Post Hearing Brief (filed Oct. 30, 2017) at 9.

<sup>34</sup> Attorney General’s Post-Hearing Brief (filed Sept. 8, 2017) at 7.

<sup>35</sup> *Pollitt v. Public Service Comm’n*, No. 2004-CA-001516, at 7.

mirrors the concept that a pipeline classification is determined by its function, which may change over time. For example, in defining a gathering line, federal regulations provide that “[i]n accordance with general industry practice, the definition of ‘gathering line’ is based on the function performed by that type of pipeline.”<sup>36</sup>

To evaluate the function of the Pollitt System, we turn to relevant definitions set forth in federal pipeline minimum safety regulations, which the Commission is authorized to enforce under KRS 278.495. 49 CFR 192.3 defines a gathering, transmission, and distribution line as follows: 1) a gathering line is a “pipeline that transports gas from a current production facility to a transmission line or main”; 2) a transmission line is a pipeline that transports gas from a gathering line to a distribution center; and 3) a main or distribution line serves as a common source of supply for more than one service line that transports gas to an individual customer. API RP 80, Section 2.2.1.2.3, further defines a type of gathering line for which the function is to gather and commingle gas from different sources for delivery to another pipeline (“commingling gathering function”).

It is undisputed that the Pollitt System serves end-use customers. What is in dispute is whether Southern Kentucky Energy’s use of the Pollitt System transforms the Pollitt System from a distribution line into a gathering line. Thus, the pipeline classification turns upon Southern Kentucky Energy’s use of the Pollitt System.

At different times in 2017, Southern Kentucky Energy utilized the Pollitt System to transport Southern Kentucky Energy’s own gas between two Southern Kentucky Energy pipelines that interconnect to the Pollitt System in order to serve a customer of

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<sup>36</sup> API RP 80, Section 2.1.

Southern Kentucky Energy.<sup>37</sup> Mr. Sharp first made an offer to purchase the Pollitt System, which the Pollitts rejected.<sup>38</sup> Mr. Sharp next provided the Pollitts with a written transportation agreement, which the Pollitts never executed.<sup>39</sup> Ultimately, Southern Kentucky Energy and the Pollitts established a verbal, day-to-day agreement for the primary purpose of transporting Southern Kentucky Energy's gas between two interconnection points north and south of the Pollitt System.<sup>40</sup> Southern Kentucky Energy utilized the Pollitt System to transport gas from March through mid-July 2017, and then resumed utilizing the Pollitt System in September 2017.<sup>41</sup> In November 2017, Southern Kentucky Energy ceased utilizing the Pollitt System because the bankruptcy filing of Southern Kentucky Energy's customer negated the need to transport Southern Kentucky Energy's gas on the Pollitt System to serve said customer.<sup>42</sup> At all times, Southern Kentucky Energy transported its gas on the Pollitt System under a verbal, day-to-day agreement. Despite Southern Kentucky Energy's having requested and/or provided a written agreement to the Pollitts on multiple occasions, Basil Pollitt declined to enter into a written agreement.<sup>43</sup>

Based upon a review of the case record and applicable law, the Commission finds that the Pollitt System is a distribution line based upon its current function as a common source of supply for service lines that transport gas to end-use customers for

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<sup>37</sup> Aug. 9, 2017 HVT 11:21:02.

<sup>38</sup> *Id.* at HVT 11:24:37.

<sup>39</sup> *Id.* at 11:24:37, and PSC Exhibit 4; Oct. 18, 2017 HVT 11:05:57.

<sup>40</sup> *Id.* at 11:27:13.

<sup>41</sup> Aug. 9, 2017 HVT 11:36:33, and PSC Exhibit 6; Oct. 18, 2017 HVT 11:04:46.

<sup>42</sup> *See In re: Real Industry Inc.*, Case No. 17-12464 (Bankr. D. Del. Nov. 17, 2017).

<sup>43</sup> Oct. 18, 2017 HVT 11:20:43.

retail consumption at their individual premises. Should Southern Kentucky Energy resume utilizing the Pollitt System on a regular basis and the Pollitts enter into a written contract with Southern Kentucky Energy, either by tariff filed at the Commission or via bilateral written contract for other than occasional, intermittent use, it is possible that the Pollitt System could be classified as a gathering system with a commingling gathering function as defined in API RP 80 Section 2.2.1.2.3.

Setting aside the intermittent use of the Pollitt System by Southern Kentucky Energy, the Pollitts' reluctance to enter into a written contract signals a lack of interest in a long-term business relationship with Southern Kentucky Energy. Without a legally binding, written contract that defines the parties' relationship and responsibilities, the Pollitts could, at any time, stop Southern Kentucky Energy from utilizing the Pollitt System for any reason and without any penalty. The indefinite nature of this transaction prevents a finding that the function of the Pollitt System is to gather and commingle gas from different sources for delivery to Southern Kentucky Energy's pipeline. This is especially so given that the Pollitts could walk away from Southern Kentucky Energy at any time without penalty.

As a distribution line, the Pollitt System, and its owners, operators, and managers, are subject to the Commission's jurisdiction as a utility. As such, the Pollitt System's and the managers' obligations include compliance with KRS 278.020(1), (6) and (7), KRS 278.140, KRS 278.160, and 807 KAR 5:006, Section 4(2).

KRS 278.020(6) and (7)

The last threshold issue is whether there was a transfer or acquisition of ownership, control, or the right to control of the Pollitt System after September 2006 without prior approval by the Commission, thus violating KRS 278.020(6) and (7).

KRS 278.020(6) provides that:

No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.

KRS 278.020(7) provides that

No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an “acquirer”), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission. Any acquisition of control without prior authorization shall be void and of no effect. As used in this subsection, the term “control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a utility, whether through the ownership of voting securities, by effecting a change in the composition of the board of directors, by contract or otherwise.

Basil Pollitt denies transferring control of Gas Group or Pollitt Enterprises to Clark Pollitt. Although acknowledging that Pollitt Enterprises and Gas Group are the names of Kentucky corporations, Basil Pollitt testified that he operates the Pollitt System as a sole proprietorship under the names Pollitt Enterprises and Gas Group.<sup>44</sup> Basil Pollitt avers that he alone exercises control over the operation of the Pollitt System, manages all affairs of Pollitt Enterprises and Gas Group, and absorbs all losses.<sup>45</sup>

The Attorney General contends that Basil Pollitt provided no proof to support his assertion that he alone owned Pollitt Enterprises and Gas Group. Further, the Attorney

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<sup>44</sup> Aug. 9, 2017 HVT 2:36:12.

<sup>45</sup> *Id.* at 1:17:13, 2:36:12, 3:02:55, 3:06:33.

General points to evidence that Clark Pollitt played a significant role in operating the Pollitt System.

Based upon the case record and applicable law, the Commission finds that Pollitt Enterprises and The Gas Group more closely resemble sham or shell corporations that are ultimately operated under the sole control and direction of Basil Pollitt, and therefore Basil Pollitt did not transfer ownership or control of either entity without Commission approval.

From his testimony, it is apparent that Basil Pollitt exercises a high degree of control over operations of the Pollitt System, including day-to-day control. Basil Pollitt performs daily operations himself, from meter reading and delivering bills to conducting leak surveys.<sup>46</sup> Basil Pollitt exercises significant financial control over Pollitt Enterprises and Gas Group; he keeps the books, pays expenses from his personal funds, and absorbs losses from the Pollitt System, which historically have run as high as \$32,000 annually.<sup>47</sup> Pollitt Enterprises and Gas Group lack indicia of a corporate existence separate from Basil Pollitt. For example, there are no board meetings and no meeting minutes for Pollitt Enterprises and Gas Group.<sup>48</sup>

Although the case record supports the conclusion that Clark Pollitt played a role in operating Pollitt Enterprises and Gas Group, there is insufficient evidence to support the conclusion that Clark Pollitt exercises sufficient control to directly or indirectly affect the management or policies of either entity. Therefore, the Commission finds that Clark Pollitt did not acquire ownership or control of either entity without Commission approval.

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<sup>46</sup> *Id.* at 2:26:39, 3:30:10.

<sup>47</sup> *Id.* at 3:02:55, 3:06:33.

<sup>48</sup> *Id.* at 6:00:22.



For the above reasons, the Commission finds that there is insufficient evidence that Basil Pollitt, Clark Pollitt, or Pollitt Enterprises violated KRS 278.020(6) or (7), and the alleged violations of KRS 278.020(6) and (7) should be dismissed.

KRS 278.020(1)

Based upon the finding that Basil Pollitt did not transfer control of the Pollitt System, the Commission dismisses the allegation that Basil Pollitt, Clark Pollitt, or Pollitt Enterprises violated KRS 278.020(1) by providing utility service beginning in October 2006 without first obtaining a CPCN.

KRS 278.020(1) requires a person to obtain Commission approval prior to providing utility service to or for the public, as well as to obtain Commission approval prior to constructing facilities for furnishing utility service to the public. Here, it is undisputed that Basil Pollitt provides utility service to and for the public without Commission permission. However, the Commission does not require retroactive applications for approval under KRS 278.020(1) to commence providing utility service or to construct utility facilities.<sup>49</sup> The Pollitt System was providing utility service prior to the 1998 amendment to KRS 278.020(1), which established the requirement to obtain prior approval to provide utility service. When a utility does not obtain prior Commission approval for construction pursuant to KRS 278.020(1), the Commission determines the reasonableness of rates and services, and recovery of expenses for construction of facilities on a proactive basis. Here, Basil Pollitt has operated the Pollitt System since 1993, and the Commission will make a determination whether Pollitt System's rates and services are fair, just, and reasonable on a proactive basis.

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<sup>49</sup> *Id.* at PSC Exhibit 13.

For the above reasons, the Commission dismisses the alleged violations of KRS 278.020(1).

KRS 278.140, KRS 278.160, 807 KAR 5:006, Section 4(2)

The Commission need look no further than Basil Pollitt's testimony at the August 9, 2017 hearing, to determine that Basil Pollitt, Clark Pollitt, and Pollitt Enterprises violated KRS 278.140, KRS 278.160, and 807 KAR 5:006, Section 4(2). Basil Pollitt testified that he failed to file with the Commission annual reports of gross earnings from intrastate business since September 2006, a schedule showing all rates collected and conditions for service enforced since September 2006, and annual financial and statistical reports since September 2006.<sup>50</sup> Thus, by virtue of his testimony, Basil Pollitt admitted to violating KRS 278.140, which requires that a utility file annual reports of gross earnings from intrastate business; violating KRS 278.160, which requires a utility to file a Tariff; and violating 807 KAR 5:006, Section 4(2), which requires a utility to file annual financial and statistical reports.

In his post-hearing brief, Basil Pollitt argues that he filed a tariff "which for whatever reason was not acted upon" by the Commission.<sup>51</sup> As documented, Basil Pollitt filed a Tariff in 2000 that was rejected.<sup>52</sup> The Tariff was rejected because it was filed as a farm tap tariff under KRS 278.485. Since the Pollitt System had been determined to be a distribution pipeline, it was not eligible to file a farm tap tariff.

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<sup>50</sup> *Id.* at 3:39:02.

<sup>51</sup> Pollitts' Post-Hearing Brief, p. 6.

<sup>52</sup> Aug. 9, 2017 HVT, PSC Exhibit 1.

Additionally, Basil Pollitt backdated the filing to 1993, which violated the provision in KRS 278.180(1) that requires 30 days' notice before the effective date of rates.

Based upon the previously discussed evidence that Clark Pollitt signs and files documents with government agencies on behalf of Pollitt Enterprises, the Commission finds that Clark Pollitt failed to perform a duty imposed upon Pollitt Enterprises, and therefore violated KRS 278.140, KRS 278.160, and 807 KAR 5:006, Section 4(2).

For the above reasons, the Commission finds that Basil Pollitt, Clark Pollitt, and Pollitt Enterprises violated KRS 278.140 and 807 KAR 5:006, Section 4(2), annually from 2006 to 2017, and violated KRS 278.160 at least once since 2006.

#### Other Issues

##### 1. Safety

On October 9 and 10, 2017, Commission Staff inspected the Pollitt System records and physical facilities, and prepared an Inspection Report, which was filed into the case record. Commission Staff inspected the system using a standard federal inspection checklist for distribution systems, pursuant to the finding by the Kentucky Court of Appeals that the Pollitt System is a distribution system; Commission Staff also conducted a gathering line inspection based upon the Pollitts' assertions that the Pollitt System is a gathering line.

Commission Staff identified 139 alleged violations of federal pipeline safety standards and two alleged violations of state pipeline safety standards for distribution systems. The Pollitts do not have four plans required by federal law for distribution systems: distribution integrity management, damage prevention, operator qualification, and public awareness. As a result, most of the alleged federal safety violations pertain

to documents or actions related by those plans. The alleged state pipeline safety violations pertain to meter testing and odorization of gas.

Commission Staff identified one alleged violation of federal pipeline safety standards and two alleged violations of state pipeline safety standards for gathering lines. The alleged federal pipeline safety standard violation pertains to odorization of gas. The two alleged state pipeline safety standard violations pertain 1) to automatic shutoff valves with manual reset to stop gas flow if gas pressure fails, and 2) to Commission supervision of construction of service lines.

The Commission finds that a separate action should be commenced to address the multiple alleged violations of pipeline safety regulations.

## 2. Future Feasibility

The Commission has serious concerns regarding the ongoing feasibility and safety of the Pollitt System. Basil Pollitt does not have the required formal training or certification to operate the system in compliance with federal pipeline minimum safety standards.<sup>53</sup> Mr. Pollitt personally absorbs annual losses incurred in providing natural gas service to his customers.<sup>54</sup> Mr. Pollitt does not carry insurance for his business.<sup>55</sup> As Mr. Pollitt and his counsel have referenced several times, Mr. Pollitt has health issues that affect his ability to conduct business.<sup>56</sup> Mr. Pollitt lives and works 130 miles from the Pollitt System.<sup>57</sup> The only assistance Mr. Pollitt has in maintaining the Pollitt

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<sup>53</sup> *Id.* at 3:10:53, 6:02:10.

<sup>54</sup> *Id.* at 3:02:55.

<sup>55</sup> *Id.* at 3:10:28.

<sup>56</sup> May 31, 2017 HVT 9:03:33; Aug. 9, 2017 HVT 1:51:14.

<sup>57</sup> Aug. 9, 2017 HVT 5:36:19.

System is provided by an independent contractor who often works in Eastern Kentucky and West Virginia, and therefore is not available at all times.<sup>58</sup> When asked how he plans to serve customers when he retires, Basil Pollitt did not respond directly, instead saying he was hopeful for the future.<sup>59</sup>

For the above reasons, the Commission strongly encourages Mr. Pollitt to address and resolve the issue of business succession, especially in light of the financial position and extenuating circumstances of the Pollitt System.

### PENALTIES

Based upon the finding that Basil Pollitt, Clark Pollitt, and Pollitt Enterprises violated Kentucky statutes and regulations by failing to file a Tariff and required financial filings, we now turn to the matter of assessing a civil penalty. Despite Basil Pollitt's erroneous assertions to his customers, the potential penalty is financial and not a requirement to cease serving customers of the Pollitt System.<sup>60</sup> KRS 278.990(1) authorizes the Commission to assess a civil penalty of up to \$2,500 per offense per person or per entity.

The Commission has significant concerns regarding the Pollitts' good faith in complying with the Commission's statutory authority in light of the Pollitts' extensive history of non-compliance since 2006. The Commission finds that a civil penalty should be assessed against Basil Pollitt, Clark Pollitt, and Pollitt Enterprises, jointly and

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<sup>58</sup> *Id.* at 5:52:32, 6:02:10.

<sup>59</sup> *Id.* at 5:56:25

<sup>60</sup> In a July 28, 2017 letter providing notice of the August 9, 2017 hearing, Basil Pollitt informed his customers that the purpose of this proceeding is to terminate gas service to his customers. Mr. Pollitt subsequently acknowledged that the proceeding is not for the purpose of terminating service to Pollitt System customers, and that the only potential penalty is a financial penalty assessed against the Pollitts. See Aug. 9, 2017 HVT 1:55:48.

severally, in the total amount of \$57,500, representing a civil penalty in the amount of \$27,500 for violating KRS 278.140 a minimum of 11 times between 2006 and the date of this Order; in the amount of \$2,500 for violating KRS 278.160 at least once between 2006 and the date of this Order; and in the amount of \$27,500 for violating 807 KAR 5:006, Section 4(2), a minimum of 11 times between 2006 and the date of this Order.

IT IS HEREBY ORDERED that:

1. The motion to dismiss Clark Pollitt and Amanda Pollitt is denied in part and granted in part.

2. The motion to dismiss Clark Pollitt as a party to this proceeding is denied.

3. The motion to dismiss Amanda Pollitt as a party to this proceeding is granted.

4. Basil Pollitt, Clark Pollitt, and Pollitt Enterprises, jointly and severally, are assessed a civil penalty of \$57,500 for violation of KRS 278.140, KRS 278.160, and 807 KAR 5:006, Section 4(2).

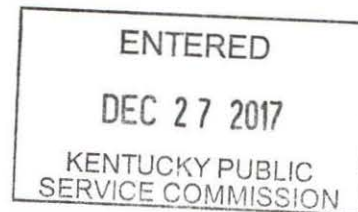
5. Basil Pollitt, Clark Pollitt, and Pollitt Enterprises shall pay the \$57,500 assessed civil penalty within 30 days of the date of this Order by cashier's check or money order payable to the Kentucky State Treasurer, and mailed or delivered to the Office of the General Counsel, Kentucky Public Service Commission, 211 Sower Boulevard, Post Office Box 615, Frankfort, Kentucky, 40602.

6. Basil Pollitt, Clark Pollitt, and Pollitt Enterprises shall tender, within 30 days of the date of this Order, a tariff that complies with KRS 278.160 and 807 KAR 5:011 as a natural gas distribution utility.

7. Basil Pollitt, Clark Pollitt, and Pollitt Enterprises shall file, within 30 days of the date of this Order, an annual report of gross earnings from intrastate business for calendar year 2016, in a form designated by the Commission.

8. Basil Pollitt, Clark Pollitt, and Pollitt Enterprises shall file, within 30 days of the date of this Order, an annual financial and statistical report for calendar year 2016, that complies with 807 KAR 5:006, Section 4(2).

By the Commission



ATTEST:

  
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Executive Director

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