KOGA
KENTUCKY OIL & GAS ASSOCIATION

April 4, 2023

Submitted via email

Kentucky Public Service Commission
211 Sower Blvd
Frankfort, KY 40601

Re: Case No. 2022-00238, Electronic INVESTIGATION OF JURISDICTIONAL STATUS OF EAST KENTUCKY MIDSTREAM, LLC, AND ITS COMPLIANCE WITH KRS CHAPTER 278 807 KAR CHAPTER 005, AND 49 CFR PARTS 191 AND 192

Dear Chairman Chandler, Vice Chairman Hatton and Commissioner Regan,

The Kentucky Oil and Gas Association ("***KOGA***") respectfully submits these comments to the Kentucky Public Service Commission ("***Commission***") in connection with the above matter. Although the Commission has not solicited public comments on this proceeding, KOGA is hopeful the Commission with accept and consider the comments.

KOGA represents hundreds of companies and individuals who are engaged in various aspects of Kentucky's oil and gas industry. Indeed, both of the parties involved in this action are members of KOGA. Consequently, in these comments KOGA does not advocate for the position of one party or the other. However, this matter does involve a number of issues, the determination of which could have broad and serious consequences for hundreds of KOGA members who operate gas pipelines and pipeline networks which are currently characterized as "gathering lines" or "gathering systems."

Those gathering systems are critical to oil and gas production in Kentucky. They are the arteries which carry natural gas produced from thousands of Kentucky wells downstream to

various markets. On that journey, these gathering systems may also provide gas, through wholesale sales, to local distribution companies which serve thousands of Kentucky residents. In addition, the operators of these gathering lines are obligated by statute to make gas available to thousands more Kentuckians though "farm taps" pursuant to KRS 278.485 ("***Tariff Farm Taps***").

Of concern to KOGA on behalf of many of its members is the possibility that a decision of the Commission in this matter determining that a gathering system, or one or more segments of it, are not "gathering" for regulatory purposes could set a precedent with unintended economic and regulatory effects for other gathering systems.[1] Similarly, a precedent for characterizing a gathering system, or a segment thereof, as a "'utility," and thereby subjecting it to all of the operational and service requirements imposed on a utility could devastate Kentucky's gas producers by making the gathering of their gas, and its movement downstream, economically unfeasible.

As one would expect of pipeline systems which were developed over many decades of gas production in Kentucky in rural areas with often-difficult terrain, these systems have a multiplicity of configurations. That variability prevents an easy, one-size-fits-all regulatory definition of "gathering system" impossible. In 49 CFR 192.8(a) the Pipeline and Hazardous Materials Safety Administration ("***PHMSA***") has incorporated the American Petroleum Institute's "Guidelines for the Definition of Onshore Gas Gathering Lines: Recommended Practice 80" ("***RP 80***") as a guide for delineating "gathering lines" for purposes of federal safety

[1] Such a determination could also affect residents who receive access to gas from those recharacterized pipeline systems or segments through Tariff Farm Taps. KRS 287.485 only applies to "gathering lines." Consequently, a determination that a pipeline system or segment is no longer "gathering" could eliminate the Tariff Farm Taps on that pipeline system or segment.

regulation.[2] RP 80 provides many different examples of production and gathering system configurations. Interestingly, RP 80's Figure B-11 entitled "Typical Appalachian Production Operation and Gas Gathering Applications" is the most varied and complicated of its illustrations.

Under the guidelines provided by RP 80, the function of gathering is to transmit gas from the furthermost downstream point in a production operation to a defined endpoint. All of the segments of a gas gathering system are deemed to be "gathering" until the gas has reached its furthermost potential downstream point, such as delivery into an interstate gas transmission line. This is the case even though there may be other intervening potential endpoints to gathering. However, the gathering function does not end until all potential endpoints have occurred. In sum, the policy expressed in RP 80 is to broadly define "gathering" in applying that concept to a pipeline system.

KOGA would urge the Commission to consider this policy as it evaluates the characterization of any gathering system. In addition, KOGA would suggest that the Commission consider this policy and evaluate a gathering system as a whole, avoiding the separation of segments of an integrated network for differing state regulatory characterization.

In Kentucky the characterization of a gathering system is complicated by the statutory imposition of unwanted retail functions on the operator of such a system. In the early 1950's the Kentucky General Assembly enacted what is now KRS 278.485, sometimes referred to as the

[2] While RP 80 provides some helpful principles for navigating the wide variety of gathering system configurations, it is not determinative of the characterization of pipelines or pipeline networks for state regulatory purposes. Moreover, pipelines or pipeline segments which are "gathering lines" for purposes of RP 80 may have special characteristics that subject them to, or relieve them from, federal safety regulation pursuant to 49 CFR 192.9. Pursuant to KRS 278.992, the Commission enforces those safety regulations, but a pipeline that is subject to that enforcement may yet be a gathering line for state regulation purposes.

"Farm Tap Statute" (the "***Statute***"). The obvious purpose of the Statute was to make natural gas available to individuals in rural areas not served by a natural gas utility. To achieve that goal, the General Assembly took the extraordinary step of requiring companies which produce or gather natural gas in Kentucky to make gas available to (a) owners of the property on which their wells or gathering lines are located, and (b) owners of property within one-half mile of their wells or gathering lines. In so doing the General Assembly imposed on those producers and gathering line operators (collectively "***Producers***") a totally foreign and unwanted activity – making gas available to certain consumers by way of Tariff Farm Taps.

While the Statute requires a Producer to make gas available to certain landowners, it does not make that Producer a utility. Nor does it require a Producer to make gas available at all times and in all circumstances. Indeed, the obligation to make gas available is "subject to" the limitations contained in the Statute. Section (4) of the Statute expressly relieves a Producer from any obligation to maintain any specific gas pressure at a Tariff Farm Tap. Thus, if a Producer's well or pipeline has insufficient gas or otherwise has insufficient pressure to make gas available at a Tariff Farm Tap, the Producer has no obligation to the recipient of gas from that Tariff Farm Tap. Similarly, KRS 278.485(6) recognizes the right of a Producer to temporarily or permanently abandon a well or pipeline without incurring any liability to an affected Tariff Farm Tap gas recipient.

In short, the Statute recognizes that, despite the obligations it imposes, a Producer remains free to operate its business, and to produce its wells and operate its pipelines, in accordance with the dictates and interests of its business. This is, of course, the exact opposite of the obligations of "utility" as defined in KRS 287.010(3) which is subject to all of the statutory and regulatory requirements imposed on a utility.

At the heart of the definition of "utility" in KRS 278.010(3) is the notion that the applicable activity be "to or for the public." Each of the gas-related activities referenced in KRS 278.010(3)(b) and (c) as part of the definition of "utility" must be "to or for the public" before the person performing them can be subject to the obligations of a utility. None of the statutes and regulations relating to utilities or requirements and obligations imposed on them defines what is "to or for the public." However, several parameters are implicit in that concept.

One such parameter is that a utility voluntarily provides the relevant goods or services directly to end users of those goods or services. Another is that a utility offers to provide those goods or services to the general public or to a defined subset of the general public. A third is that, as part of that voluntary offer to provide goods and services to the public, a utility explicitly or implicitly dedicates its property and resources to the service of that public up to their capacity.

Two of these concepts are succinctly stated in the treatise authority at 64 Am. Jur. 2d "Public Utilities" §2:

> Thus, the principal determinative characteristic of public utility is that of service to, or readiness to service, and indefinite public who has a legal right to demand and receive its services or commodities. A public utility *holds itself out to the public generally* and may not refuse any legitimate demand for service while a private business independently determines who it will serve. The plain meaning of "to the public" requires that there be a *direct transaction between the public utility and the public.* Courts will not expand the definition of public utility by allowing an indirect relationship with the public to suffice. (emphasis added)

These comments encapsulate the requirement of a **voluntary** offer of goods or services to a **general public**. It further clarifies that the transaction must be **directly** with a member of the public, as by a retail sale, and not indirectly, as by a wholesale transaction with a utility which does provide those good or services "to the public."

The following section of that treatise illuminates the third prong in determining whether an entity is a public utility – the dedication of resources to public use. (" To determine whether an entity is a public utility, the question is not the number or type of customers but whether the utility has dedicated its property to public use.")[3]

The Commission has recognized these elements in determining whether a particular activity created a "utility" for purposes of KRS 278.010(3). For example, the Commission cited nearly identical language from the same treatise in its final order in Case No. 99-058.[4] In that case, the Commission found that Calvert City Power was not a utility because it had no intent to serve an indefinite public or to dedicate or hold out its generation to the public as a class or serve any end users in Kentucky. Since then, the Commission has reaffirmed the application of those principles in the context of gas systems which make gas available to end users though Tariff Farm Taps pursuant to KRS 278.485.

For example, in Case No. 2013-00163,[5] the Commission found that Equitable was not a utility because "… it has not dedicated its facilities to serve the public up to its capacity. Rather, such a company is providing gas service only to those within one-half air mile of a producing well or a gas gathering pipeline and is only doing so because the statute requires it to provide that service." This was true even though Equitable did not produce the gas, but purchased it from third parties.

[3] *Id*., at §3.
[4] Case No. 99-058 in In the Matter of: The Petition of Calvert City Power I, L.L.C. For a Declaratory Order, July 6, 1999 Order.
[5] Case No. 2013-00163, Joint Application of PNG Companies LLC, Peoples Natural Gas Company LLC, EQT Corporation, Distribution Holdco, LLC and Equitable Gas Company, LLC For Approval of Acquisition of Ownership of Equitable Gas Company, LLC, p. 6.

More recently, the Commission reaffirmed that position in finding that Peoples Gas KY, LLC was not a utility. There, the Commission stated,

> Peoples does not furnish retail gas service "to or for the public," but rather provides service to a limited class of persons who, based on proximity to production facilities, are entitled to gas service pursuant to KRS 278.485.
>
> It is well settled that utility service that is limited to a defined, privileged class of persons is not service to or for the public. In such case, the provider is not holding itself out as willing to serve, up to the extent of the capacity of its facilities, all who desire service.[6]

In that same opinion, the Commission underscored the significant differences in the obligations and regulatory requirements applicable to a gas utility and those applicable to an operator which provides gas to an end user pursuant to a Tariff Farm Tap.

> A gas distribution utility is subject to much more comprehensive service obligations than the operator of a farm tap system. A farm tap operator is not required to provide minimum level of service, whereas every utility has a statutory obligation to furnish "adequate, efficient and reasonable service." KRS 278.010(14) defines "adequate service" in part as maintaining sufficient facilities to assure customers of "reasonable continuity of service." A farm tap system operator that furnishes gas pursuant to KRS 278.485 has no such duty to maintain continuity of service. A farm tap operator has the right to abandon any gas well or gathering line and to terminate service to any customer connected to and served by the abandoned well or gathering line.[7]

A determination by the Commission that an operator providing access to gas pursuant to Tariff Farm Taps is a "utility" would effectively upend that operator's business model, regulatory obligations and economics by the imposition of a wholly different regulatory regime. It is highly likely that the operator's business might not survive such a change.

Of course, it is the obligation of the Commission to regulate any entity which is truly and clearly acting as a utility. However, KOGA respectfully suggest that imposing the obligation of a

[6]Case No. 2018-00263, Georgia Johnson v. Peoples Gas KY, LLC, pp.14-15.
[7] *Id*., at 5-6.

utility on the operator of a gathering system should be limited to cases in which the facts and the law unequivocally support such a conclusion.

KOGA very much appreciates the opportunity to submit these comments on behalf of Kentucky's oil and gas industry .

Respectfully,

Ryan Watts
Executive Director

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