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July 30, 2013

Mr. Tom FitzGerald, Director
Kentucky Resource Council
P.O. Box 1070
Frankfort, KY40602

PSC STAFF OPINION 2013-006

Re: Applicability of KRS 278.020
CPCN Requirement to Bluegrass NGL Pipeline
Request for an Advisory Opinion

Dear Mr. FitzGerald:

This letter responds to your letter dated July 4, 2013 requesting a Commission Staff Opinion as to whether KRS 278.020 requires prior Commission approval before beginning construction of an interstate pipeline to transport natural gas liquids. This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Public Service Commission should the issues herein be formally presented for Commission resolution.

Commission Staff understands the facts set forth in your letter to be as follows:

> The proposed Bluegrass Pipeline project is an interstate pipeline intended to transport natural gas liquids (NGL) from the Utica and Marcellus shale plays [sic], across Kentucky, and to the Gulf. The project is in part new pipeline (500+ miles) and in part a repurposing of the existing Texas Gas natural gas pipeline loop at Hardinsburg. A petition has been filed with Federal Energy Regulatory Commission asking for approval to abandon that existing line as a natural gas pipeline.
>
> As a pipeline transporting natural gas liquids that have been separated from the natural gas (methane), the Federal Energy Regulatory Commission jurisdiction is limited by the Interstate Commerce Act, to the tariffs associated with the pipeline. Unlike an interstate natural gas pipeline, there is

> no federal Certificate of Public Convenience and Necessity ("CPCN") required for an NGL pipeline, and no preemption of state law requirements as pertains to siting or licensing.

In your letter, you pose the following question: Does the Commission have the authority and obligation to require that NGL pipelines in the state, and specifically the Bluegrass Pipeline, apply for a CPCN? You state that the Bluegrass Pipeline project appears to be within the regulatory ambit of the Commission, as a utility based on "the transporting or conveying of . . . other fluid substance by pipeline to or for the public, for compensation."

Commission Staff's opinion is based on the statutes which are applicable to the Commission's jurisdiction over utilities and are set forth in KRS Chapter 278, as well as the regulations promulgated thereunder as set forth in 807 KAR Chapter 5. As a starting point for this opinion, we note that under KRS 278.040(2), "The jurisdiction of the Commission shall extend to all utilities in this state," and "The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities . . . ." Under KRS 278.010(3), a "utility" is defined as:

> any person except . . . for purposes of paragraphs (a), (b), (c), (d), and (f) of this subsection, a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with:
>
> > (c) The transporting or conveying of gas, crude oil, or other fluid substance by pipeline to or for the public, for compensation.

In general, a public utility has been characterized as follows:

> As its name indicates, the term "public utility" implies a public use and service to the public; and indeed, the principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities. There must be a dedication or holding out, either express or implied, of produce [sic] or services to the public as a class. The term precludes the idea of service, which is private in its nature and is not to be obtained by the public . . . .[1]

[1] 64 Am.Jur.2d Public Utilities § 1 (1972).

There exists no presumption that a person is subject to regulation as a utility merely because that person is providing what is traditionally characterized as utility products or services. To the contrary, the general rule of law is that:

> A dedication of private property . . . to a public utility service will not be presumed from the fact that the product of such property is the usual subject matter of utility service, nor does such presumption arise from the sale by private contract of such product and service to utility corporations for purposes of resale. Such dedication is never presumed without evidence of unequivocal intention.[2]

As stated in your letter, Bluegrass Pipeline is "an interstate pipeline intended to transport natural gas liquids from the Utica and Marcellus shale plays [sic], across Kentucky, and to the Gulf." Based upon the facts presented, Bluegrass Pipeline is a person that intends to own, control, and operate a facility for "transporting . . . other fluid substance by pipeline." Thus, one critical factor in determining Bluegrass Pipeline's status as a utility under KRS Chapter 278 is whether the transporting of NGL by pipeline "across Kentucky," will be "to or for the public."

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). 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. In Drexelbrook Associates v. Pennsylvania Public Service Commission, 212 A. 2d 237 (Pa. 1965), the issue was whether utility service provided by landlords to their tenants is considered to the public or to a specific class. The Pennsylvania Supreme Court 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

[2] 27A Am.Jur.2d Energy and Power Sources § 195.

> 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 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 held that "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 . . . ." Regulatory commissions, including the Kentucky Public Service Commission, have similarly recognized this rule. See. *e.g.,* Case No. 96-448, Envirotech Utility Management Services (Ky. PSC Apr. 29, 1997); Case No. 90-169, Fairhaven Mobile Home Village Sewage Treatment Plant, (Ky. PSC Jun. 22, 1990); Procedures Governing Sales of Electricity for Resale, 85 PUR 3d 107 (Fla. P.S. C. 1970).

In Re Langford, 32 B.R. 746, (1982),[3] a case involving the bankruptcy of Dewitt Langford, an entrepreneur in the natural gas industry in Kentucky for over 60 years,

[3] Langford had obtained various gas leases located primarily in Grayson County and adjacent counties in Kentucky. He had a contract with Texas Gas Transmission Corporation ("Texas Gas") to sell the gas he intended to produce. Texas Gas had an interstate pipeline that was located 23 miles from the production area. Langford, and ultimately the bankruptcy trustee, attempted to negotiate and then to compel Equitable Life Assurance Society ("Equitable") to accept and transport, through pipelines owned by Equitable, natural gas produced by Langford. Equitable was certified as a "small producer" by the Federal Energy Regulatory Commission, and produced gas which it transported under contract to Midwestern Pipeline. Equitable was not licensed or certified in any way by the Commission, and was not subject to state regulation, as it produced and transported its natural gas across Kentucky to its interstate transmission agent, Midwestern.

described a further limitation to the scope of "the public." The Bankruptcy Court examined Kentucky law to determine whether Equitable Life Assurance Society ("Equitable"), which owned a pipeline, had a duty as a common carrier to receive and transport Langford's gas. The Court referred to the pertinent provisions of KRS 278.470 and 278.490 which state:

> "Every company receiving, transporting or delivering a supply of oil or natural gas for public consumption is declared to be a common carrier . . . [and] . . . shall at all reasonable times receive, for transportation and delivery, from such pipes as may be connected up with any main or tributary line, all oil or gas that may be held and stored or ready for delivery . . . ."[4]

The Bankruptcy Court stated that the Kentucky statute left it powerless to act, as "It applies only to companies engaged in the transportation of gas 'for public consumption' – that is, for ultimate use by Kentucky consumers." [Emphasis added] The court further held that since Equitable only sold its gas to Midwestern Pipeline it was excluded from the statute's operation and could not be forced to transport Langford's gas.

The Commission has reviewed and analyzed the issue of what constitutes "to or for the public" in several of its decisions. In Case No. 99-058, In Re: Petition of Calvert City Power, LLC For Declaratory Order (Ky. PSC July 6, 1999), the Commission declared that a merchant generating facility would not be a utility under KRS Chapter 278 if there were no sales to retail customers; if it had no existing contracts to sell power to Kentucky jurisdictional utilities; and it had no existing expectation to enter into such contracts.

This position was reaffirmed by the Commission in Case No. 2000-00075, Petition of Kentucky Pioneer Energy, LLC For Declaratory Order (Ky. PSC July 13, 2000), where the Commission found that Pioneer Energy did not have existing contracts, or the expectation to enter into contracts, to sell power at retail to Kentucky consumers for ultimate consumption or to make any retail sales in other jurisdictions. Even though the Commission found that Pioneer Energy had a long-term contract to sell its total electrical output to a jurisdictional utility, East Kentucky Cooperative Corporaton, for resale ultimately to retail customers in Kentucky, the Commission found that such a contractual right, held by one wholesale electric customer, is not sufficient evidence of an intent to serve the public or of a dedication of private property to a public use. As Pioneer Energy had no intent to directly or indirectly serve an indefinite public, to

[4] KRS 278.470 and 278.490.

dedicate or hold its generation out as available to the public as a class, or to serve any end-users in Kentucky or elsewhere, the Commission found that Pioneer Energy was not a utility subject to its regulatory jurisdiction.

According to the facts presented, the proposed Bluegrass Pipeline will transport NGL "across Kentucky," but there will be no Kentucky consumers or ultimate consumption in Kentucky and, therefore, will not be considered "to or for the public." Commission Staff is of the opinion that the proposed Bluegrass Pipeline will not be a Kentucky jurisdictional utility and, therefore, no certificate of public convenience and necessity under KRS 278.020(1) would need to be obtained prior to construction of the proposed pipeline.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and is not binding on the Commission should the issues herein be formally presented for Commission resolution.

Questions concerning this opinion should be directed to Virginia Gregg, Staff Attorney, at (502) 564-3940.

Sincerely,

Jeff Derouen
Executive Director

VG/kar