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June 4, 2018

PSC STAFF OPINION 2018-008

James Cisarik
Senior Vice President
Enterprise Products Partners, L.P.
P.O. Box 4324
Houston, TX 77210-4324

Re: Letter dated January 31, 2018 requesting a Staff Opinion regarding a proposed Kentucky/Greater Cincinnati Area Pipeline Project

Dear Mr. Cisarik:

Commission Staff acknowledges receipt of your letter dated January 31, 2018, in which you request on behalf of Enterprise TE Products Pipeline Company LLC ("Enterprise") a staff opinion regarding the jurisdiction of the Kentucky Public Service Commission ("Commission") to regulate a proposed petroleum products pipeline project. 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 Commission should the issues addressed herein be formally presented to the Commission for resolution.

Based on your letter, Commission Staff understands the facts as follows:

Enterprise owns and operates an existing interstate pipeline system ("Existing Line") that transports jet fuel on behalf of an independent third-party shipper, Husky Marketing and Supply Company ("Husky"), from a refinery near Lima, Ohio to the Cincinnati/Northern Kentucky Airport ("CVG") in Hebron, Kentucky. The pipeline delivers approximately 9,500 barrels of jet fuel per day to CVG. The Commission does not regulate any aspect of the existing pipeline.

Enterprise proposes to add a new pump station in Shandon, Ohio, which will increase pipeline capacity into CVG from approximately 12,000 barrels

per day to 24,000 barrels per day. Enterprise also proposes to construct and operate a new 2.6 mile lateral pipeline and related equipment ("Lateral Line"), which will have an interconnect with the Existing Line in northern Kentucky and run north 2.6 miles, crossing under the Ohio River, to a barge and truck terminal owned by Buckeye Terminals, LLC in Cincinnati, Ohio ("Buckeye Terminal"). The Lateral Line will transport gasoline, diesel and jet fuel to the Buckeye Terminal, where the fuels will be loaded onto tanker trucks or barges for further distribution. Your letter states that it is "reasonably expected that up to 40% of the product" shipped on the Lateral Line to the Buckeye Terminal will be transported back into Kentucky and ultimately used within the state.

The Federal Energy Regulatory Commission ("FERC") regulates the rates and practices of companies engaged in the interstate transportation of petroleum or petroleum products via pipeline. Enterprise has filed with FERC, and FERC has approved, a tariff setting forth rates and terms of service for the transportation of refined products on the Existing Line and on the Lateral Line.

In your letter, you pose the following question: Are the portion of the Existing Line that is located in Kentucky and the Lateral Line (collectively, the "Kentucky Lines") subject to regulation by the Commission? You assert that with respect to operation of the Kentucky Lines, Enterprise is a utility as defined by KRS 278.010(3)(c), and is subject to the jurisdiction of the Commission because Enterprise will transport refined petroleum products by pipeline for ultimate use by Kentucky consumers. You further assert that Enterprise is a common carrier under KRS 278.470 because it is transporting oil for public consumption. You state that although federal law preempts Commission ratemaking jurisdiction, the Commission has authority to regulate some aspects of the Kentucky Lines, such as siting, assessments, aesthetics, connections, and informational reports. You also state that you seek a Staff Opinion confirming that Enterprise is a regulated utility so that "Enterprise may then seek a Certificate of Public Convenience and Necessity from the Commission."

Finally, you state that if the Commission does not regulate Enterprise as a utility, Enterprise will be denied eminent domain rights under KRS 278.502. You assert that this would result in unconstitutional discrimination against interstate common carriers by denying them eminent domain rights enjoyed by intrastate common carriers.

It is well settled that the Commission is a creature of statute, and has only such powers as are granted by the General Assembly. *See, e.g., Cincinnati Bell Telephone Co. v. Kentucky Public Service Comm'n*, 223 S. W.3d 829, 836 (Ky. App. 2007). Whether the Commission will have jurisdiction over the Kentucky Lines must be determined by reference to the Commission's enabling legislation.

KRS 278.040 grants the Commission exclusive jurisdiction to regulate the rates and services of all utilities in this state. "Utility," as used in the statutory grant of jurisdiction, is defined in KRS 278.010 as:

3. [A]ny person except . . . 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

Based upon the facts presented in your letter, Enterprise will own or control pipeline facilities to be used for the transporting of fluid substances through Kentucky, and will charge third party shippers for this service at the rates set forth in its tariff filed with FERC. Whether Enterprise will be a utility thus turns on whether Enterprise will use the Kentucky Lines to provide transportation service "to or for the public" within the meaning of KRS 278.010(3)(c).¹

The Commission has discussed what constitutes service "to or for the public" on several occasions. In Case No. 2016-00053,² the Commission determined that the operator of a gas storage field that provides gas storage service to an affiliated jurisdictional gas distribution company is a utility subject to the Commission's jurisdiction, notwithstanding the fact that it serves a single customer. The gas distribution company used the storage service to store gas for eventual sale to Kentucky consumers. The Commission found that the storage company is a utility because it offers storage service to the public at its tariffed rate to the extent of its available capacity.

In Case No. 1999-00058,³ the Commission considered whether a company that proposed to construct a power plant would be a utility subject to the requirement to obtain a certificate of public convenience and necessity ("CPCN") from the Commission. All of the power produced by the plant would be sold at wholesale to affiliated power marketers at rates and upon terms regulated by FERC. The Commission found that the company would not be a utility and was not required to obtain a CPCN because it would not sell power at retail to end users in Kentucky or to any regulated electric utility in Kentucky for resale to Kentucky consumers.

¹ Although the plain language of KRS 278.010(3)(c) encompasses the transportation of oil and other fluid substances, Commission Staff is unaware of any instance in which the Commission has asserted jurisdiction over an oil or liquid fuel pipeline.

² *Application of WKG Storage, Inc.*, Case No. 2016-00053 (Ky. PSC Sept. 20, 2016).

³ *Petition of Calvert City Power I, L.L.C. For Declaratory Order*, Case No. 1999-00058 (Ky. PSC July 6, 1999).

An implicit limitation on the Commission's jurisdiction to regulate the services enumerated in KRS 278.010(3) is that the service must be provided to or for the public **in Kentucky**. Kentucky's legitimate state interest in ensuring its citizens receive adequate utility service at fair, just and reasonable rates does not extend past our state's borders.

Thus in *Bluegrass Pipeline Company, LLC v. Kentuckians United to Restrain Eminent Domain, Inc.*,⁴ the Kentucky Court of Appeals held that a proposed pipeline that would transport natural gas liquids (NGLs) through Kentucky from the Marcellus and Utica shale formations in Pennsylvania, West Virginia and Ohio to a facility the Gulf of Mexico would not be "in public service" within the meaning of KRS 278.502 because the pipeline would not deliver NGLs to the Kentucky public. In an action for declaratory judgment, the company that proposed to build the pipeline, Bluegrass Pipeline Company, LLC ("Bluegrass"), asserted that it had the right to exercise the power of eminent domain pursuant to KRS 278.502 to secure easement rights for the path of the proposed pipeline. KRS 278.502 authorizes a company proposing to construct a pipeline for the transportation of oil, gas or gas products "in public service" to condemn the property necessary to construct and operate the pipeline. The court ruled that because the statute is found in the statutory chapter dedicated to public utilities, the legislature must have intended to delegate the power of eminent domain only to those pipeline companies that are or will be regulated by the Commission. The court noted that Bluegrass is not regulated by the Commission. The court ruled that if NGLs transported by the proposed pipeline "are not reaching Kentucky consumers, then Bluegrass and its pipeline cannot be said to be **in the public service of Kentucky**."⁵

The court in *K. Petroleum, Inc. v. Property Tax Map number 7 Parcel 12*⁶ also considered whether a pipeline company was transporting gas "in public service" and thus authorized under KRS 278.502 to exercise the power of eminent domain. In finding that the company did enjoy eminent domain rights, the court distinguished the facts from those presented in *Bluegrass Pipeline*, noting that the company sold gas directly to Kentucky farm tap customers and to Delta Natural Gas Company, a local gas distribution company in Kentucky regulated by the Commission that resells the gas to Kentucky consumers.

The decision in *K. Petroleum* is consistent with the Kentucky Court of Appeals' ruling in *Milam v. Viking Energy Holdings, LLC*.⁷ Viking Energy Holdings, LLC ("Viking") operates a pipeline system that gathers gas from a production area near Richardsville, Kentucky,

⁴ 478 S.W.3d 386 (Ky. App. 2015), *discretionary review denied* (Ky. 2016).

⁵ *Id.* at 392 (emphasis added).

⁶ No. 6:14-201-DCR, 2016 WL 937329 (E.D. Ky. March 10, 2016).

⁷ 370 S.W.3d 530 (Ky. App. 2012).

and transports the gas to its treatment plant in Bowling Green, Kentucky. After treatment, Viking delivers and sells the gas to Atmos Energy Marketing, LLC, for consumption by end users in Bowling Green. The court held that Viking's operation of its pipeline system to be "in public service."

In addition to the "in public service" requirement under KRS 278.502, several courts have construed the related concept of "for public consumption" found in two statutes pertaining to common carriers, KRS 278.470 and KRS 278.490. *In re Langford*⁸ addressed whether a company transporting gas via pipeline from its wells to an interconnect with an interstate pipeline was a common carrier obligated under KRS 278.470 and KRS 278.490 to transport gas on behalf of another producer. Both statutes limit the common carrier obligation to companies that transport or deliver gas "for public consumption." The court held that "for public consumption" as used in the statutes means "for ultimate use by Kentucky consumers."⁹ Because the company was transporting and selling gas only to an interstate gas company, the court ruled that the company was not obligated to accept and deliver gas on behalf of other producers.

The Commission has also addressed the effect of federal rate regulation of facilities on the Commission's jurisdiction. In Case No. 2011-00042,¹⁰ the Commission considered the application of AEP Kentucky Transmission Company ("Transco"), an affiliate of a jurisdictional electric utility, Kentucky Power Company, for a CPCN to begin providing wholesale electric transmission service in Kentucky. Transco asserted that FERC would have exclusive jurisdiction over its transmission assets, rates and terms of service, and that it would not be obligated to file a tariff with the Commission setting forth its rates and conditions of service. Transco argued, however, that it would meet the definition of "utility" in KRS 278.010(3)(a), and that the Commission would have jurisdiction over numerous aspects of its operations, such as construction and siting of facilities and financing.

The Commission held that because its statutory jurisdiction is limited to rates and service, Transco's provision of wholesale transmission service would not be a "regulated activity" within the meaning of KRS 278.010(23).¹¹ The Commission found that Transco would therefore not be providing "utility services" within the meaning of the CPCN statute, KRS 278.020(1), and would not legally qualify for the issuance of a CPCN.¹²

⁸ 32 B.R. 746 (Bankr. W.D. Ky. 1982).

⁹ *Id.* at 748

¹⁰ *Application of AEP Kentucky Transmission Company, Inc. for a Certificate of Convenience and Necessity pursuant to KRS 278.020 to Provide Wholesale Transmission Service in the Commonwealth* (Ky. PSC June 10, 2013).

¹¹ *Id.* at 7.

¹² *Id.* at 8.

Based on the facts presented by Enterprise, it is Commission Staff's conclusion that Enterprise will not be a utility subject to the jurisdiction of the Commission by virtue of its operation of either the Existing Line or the Lateral Line. The Commission does not regulate any aspect of the Existing Line. Enterprise did not seek a CPCN prior to constructing the Existing Line nor has it complied or attempted to comply with the numerous other regulatory requirements applicable to public utilities. FERC exclusively regulates the rates and terms of service of the Existing Line, and the Existing Line is not used to provide "utility service" in Kentucky within the meaning of the CPCN statute or a "regulated activity" as defined in KRS 278.010(23). The proposed increase in the capacity of the Existing Line does not change the jurisdictional status of the pipeline.

In contrast to the Existing Line, the proposed Lateral Line will not be used to transport fuels into Kentucky. Like the NGL pipeline at issue in *Bluegrass Pipeline*, the proposed Lateral Line, although it will traverse the state, will transport liquid fuels from a point outside the state to the Buckeye Terminal in Ohio. In your letter, you attempt to distinguish the proposed pipeline at issue in *Bluegrass Pipeline* from the Lateral Line based on the assertion that some of the liquid fuels delivered via the Lateral Line to the Buckeye Terminal will be offloaded onto tanker trucks or barges and transported across the river into Kentucky, "ultimately bringing product to Kentucky consumers." The fact that some of the fuel delivered to the Buckeye Terminal¹³ may be transported from Ohio into Kentucky for consumption in Kentucky does not change the fact that no product will be delivered by the proposed pipeline facilities into Kentucky.

Commission Staff is also of the opinion that there is no compelling public interest for assertion of Commission jurisdiction over the construction of the Lateral Line. Providers of the utility services enumerated in KRS 278.010(3) are considered natural monopolies because the costs to build and maintain the facilities required to produce and deliver the services to the public is such that in most instances, consumers are most efficiently served by a single, regulated provider.¹⁴ Regulation of a utility's rates and services is necessary and within the police power of the state in order to prevent the utility from exploiting its monopoly position to exact unjust, unnecessary or discriminatory rates.¹⁵ In the situation presented in your letter, the Lateral Line would not confer upon Enterprise any monopoly power over the market in Kentucky for liquid fuels. According to your letter, the Lateral Line is anticipated to increase the supply of fuels available for delivery into Kentucky and provide additional sources of supply for Kentucky companies, thereby

¹³ Commission Staff notes that liquid fuels delivered via the Lateral Line to the Buckeye terminal presumably will be comingled with fuels delivered to the terminal from other sources.

¹⁴ *City of Vanceburg v. Plummer*, 122 S.W.2d 772, 775 (Ky. 1938) (holding that the chief purpose of the requirement to obtain a CPCN prior to constructing utility facilities "is to prevent the unnecessary duplication of facilities for utility service and to protect the consuming public from inadequate service and higher rates which frequently result from such duplication").

¹⁵ See *Kentucky Industrial Utility Customers, Inc. v. Kentucky Public Service Comm'n*, 504 S.W.2d 695, 705 (Ky. App. 2016) (noting that due to the lack of competition at the retail level, "[c]onsumers of public utilities must rely on the Commission to protect them from unreasonable and unfair rates").

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increasing competition in the liquid fuels market in Kentucky. In these circumstances, Commission Staff finds that the policy rationale for the regulation of public utilities is not implicated.

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 John Park at (502) 782-2589.

Sincerely,

A handwritten signature in blue ink, appearing to read "J.E.B. Pinney", with a large, stylized flourish extending to the right.

John E.B. Pinney
Acting General Counsel

JP/kg