

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CAPITOL OIL AND GAS COMPANY)	
FOR REVIEW OF ITS 1982-1983)	CASE NO.
ASSESSMENT FOR THE MAINTENANCE)	8756
OF THE PUBLIC SERVICE COMMISSION)	

O R D E R

KRS 278.130 provides that the Commission shall assess all utilities based upon "gross operating earnings or receipts derived from intrastate business for the preceding calendar year." On January 3, 1983, Capitol Oil and Gas Company ("Capitol") filed a motion with the Commission requesting that its 1982-83 assessments be revised to include revenues only from its retail sales to 47 customers. Capitol specifically requested that the \$1.3 million it receives from its wholesale sales to Columbia Gas Transmission Company ("Columbia") be deleted from its revenues for purposes of assessment under KRS 278.130.

A hearing was held in this matter on February 28, 1983, at the Commission's offices in Frankfort, Kentucky. Therein, Capitol stated its position that the wholesale sale to Columbia was a sale in interstate commerce and, therefore, not jurisdictional to the Public Service Commission of Kentucky. Capitol then argued that the revenues from the sale to Columbia should be exempt from

assessment since they came from interstate as opposed to intrastate business. The Commission's staff then introduced into the record a copy of a 1981 Order of the Federal Energy Regulatory Commission ("FERC") holding that Capitol's sale to Columbia was not a sale in interstate commerce. Capitol summarized its position in a brief filed with the Commission on March 30, 1983.

Based upon the above facts and being advised, the Commission hereby finds as follows:

1. The wholesale sale by Capitol to Columbia is not a sale in interstate commerce. The basis of the Commission's finding on this point is the FERC's Order of October 1, 1981, which specifically disclaimed jurisdiction over Capitol. Therein, the FERC held that due to the facilities configuration of the Columbia system, the gas from Capitol which enters Columbia's system cannot leave the state. Accordingly, the FERC concluded that Capitol's sale to Columbia was not in interstate commerce and not subject to federal regulation. 1/

2. If Capitol's sale to Columbia is not subject to federal regulation, it must be subject to state regulation since the United States Supreme Court has held that there cannot be a "gap" in regulation. Pennsylvania Gas Company v. Public Service Commission, 252 U.S. 23 (1920). If Capitol's wholesale sale to Columbia is subject

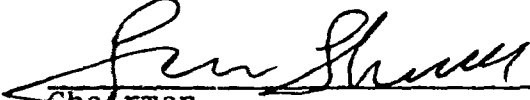
1/ FERC Order, pps. 4-5. A copy of the FERC's October 1, 1981, Order is attached to this Order as an appendix.

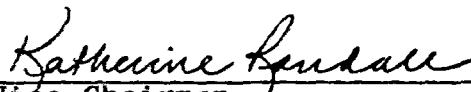
to state regulation, the revenues obtained therefrom must be deemed "intrastate" for assessment purposes. Capitol's motion to have the revenues from the wholesale sale to Columbia declared "interstate" and exempt from state assessment should therefore be denied.

Based upon the above-stated findings, the Commission HEREBY ORDERS that Capitol Oil and Gas Company's motion to exempt from assessment its revenues from its wholesale sales to Columbia Gas Transmission Company be, and it hereby is, denied.

Done at Frankfort, Kentucky, this 26th day of April, 1983.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Secretary

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

JURISDICTION

Before Commissioners: C. M. Butler III, Chairman;
Georgiana Sheldon, J. David Hughes
and A. G. Sousa.

Public Service Commission of Kentucky) Docket No. CP81-530-000

ORDER DISCLAIMING JURISDICTION

(Issued October 1, 1981)

On September 15, 1981 the Public Service Commission of Kentucky (PSCK) filed in Docket No. CP81-530-000 a request for a determination concerning the jurisdictional status of certain transmission and sales of natural gas in the State of Kentucky, as more fully set forth in the request and supporting documents. 1/

The facts are as follows. The Capitol Oil and Gas Company (Capitol) operates a natural gas field gathering system in Kentucky which is connected to an interstate pipeline owned by Columbia Gas Transmission Corporation (Columbia), a jurisdictional pipeline company. Capitol purchased the gathering system in December 1971 from Holly Creek Gas Transmission Company (Holly). Capitol and Columbia have a gas purchase contract under the terms of which Capitol sells to Columbia all of its gas from certain wells in Wolfe, Lee and Breathitt Counties, Kentucky.

Prior to Capitol's purchase of Holly's facilities, a group of some thirty customers of Holly in Daysboro, Kentucky (the Daysboro

1/ The PSCK's request is in the form of a letter to the Chairman of the Commission rather than being styled as a petition for a declaratory order pursuant to §1.8 of the Commission's Rules of Practice and Procedure. We have determined to treat the letter as though it were a petition filed pursuant to §1.8 and to waive the form of pleading requirements of §1.15 and §1.16 of the Regulations. Our normal procedure would be to publish notice of such a petition and allow time for intervention. In view of the emergency situation created by the discontinuance of gas service, we have determined to forego that procedure. Copies of this order will be served on Capitol, Columbia and the PSCK, and petitions for intervention will be entertained in conjunction with any petition for rehearing that may be filed.

customers) installed at their own expense a line some six miles in length connecting Daysboro to the Holly facilities (the Daysboro line). This line was activated in November of 1971.

On February 21, 1978 Capitol was issued a certificate of public convenience and necessity by the PSCK requiring the sale of natural gas to retail customers whether or not those customers are qualified to request service pursuant to Kentucky Revised Statutes 278.485 (KRS 278.485). ^{2/} KRS 278.485 provides that owners of property located within one-half mile of a wellhead or gathering pipeline can demand natural gas service, subject only to terms prescribed by the PSCK. Among the customers then being served by Capitol were the Daysboro customers. While Holly had also served the Daysboro customers, it apparently never applied for a certificate from the PSCK.

A dispute has since arisen between Capitol and the Daysboro customers concerning the safety of the line from Capitol's system to Daysboro. The Kentucky Department of Energy (KDOE) states ^{3/} that Capitol alleges the Daysboro line is unsafe and that Capitol's insurance carrier has indicated it will cancel Capitol's coverage for that reason. The KDOE further states that some of the Daysboro customers, based on a report by a PSCK inspector, maintain that the Daysboro line is in substantial compliance with PSCK standards. As a result of this dispute, Capitol terminated service to the Daysboro customers on August 25, 1981.

It is, of course, not in this Commission's province to determine the merits of the dispute between Capitol and the Daysboro customers. We are called upon here to determine whether jurisdiction over Capitol's sales and transmission of gas rests with this Commission or with the PSCK. The PSCK's request for such a determination is based on the holding of the United States Court of Appeals for the Sixth Circuit in Public Service Commission of Kentucky v. F.E.R.C., 610 F.2d 439 (1979) that KRS 278.485 does not permit the PSCK to order service from gathering lines where the gas being transported therein is in interstate commerce. ^{4/} The PSCK states that Capitol contends the gas it sells to Columbia is in interstate commerce because it is ultimately resold in

^{2/} Case No. 6741.

^{3/} The KDOE wrote to the Chairman of the Commission in a letter dated August 28, 1981 outlining the facts of this matter.

^{4/} Accord, Backus v. Panhandle Eastern Pipe Line Co., 558 F.2d 1373 (10th Cir. 1973).

another state by virtue of the connection between Capitol's system and the Columbia line.

If this were indeed the case, Capitol would be correct. Transportation of gas through Capitol's system and any sales for resale therefrom would be subject to F.E.R.C. jurisdiction. In addition, the Commission has what is effectively a veto power over direct sales where such sales require jurisdictional transportation. 5/

The law in this area has been reasonably established. In California v. Lo-Vaca Gathering Company (Lo-Vaca), 379 U.S. 366 (1965), the Supreme Court held that the sale of any gas which crosses a state line at any stage of its movement from wellhead to ultimate consumption is in interstate commerce. The journey in interstate commerce begins at the well head 6/ even though some of that gas is sold in the state of production. 7/

The Commission has recently applied Lo-Vaca in other cases involving producer sales and has further refined the principle enunciated therein. In F.P.C. Opinion No. 777, 8/ the Commission held that it does not have jurisdiction under the Natural Gas Act over producers who sell gas to an interstate pipeline, which commingles the gas with gas produced in other states and resells the commingled stream in the producing state so that none of the the producers' gas leaves the state of origin. It was found "that the interstate pipeline ended in the state from which the subject producer sales were made. There was no possibility that any of the gas produced from the state would flow to another state." 9/ Opinion No. 777 was applied later in United Gas

5/ Louisiana Power and Light Co. v. United Gas Pipe Line Co., 456 F.2d 326 (5th Cir. 1972), rev'd on other grounds, 406 U.S. 621 (1972).

6/ Phillips Petroleum Company v. Wisconsin, 347 U.S. 672 (1954).

7/ Deep South Oil Company v. F.P.C., 247 F.2d 882, 888 (5th Circuit, 1957).

8/ Colorado Interstate Gas Company, Docket Nos. CP75-323 and CP75-300, Opinion No. 777, Opinion and Order Affirming Initial Decision, issued September 30, 1976.

9/ See discussion in Columbia Gas Transmission Company and National Fuel Gas Supply Corporation, Docket No. CP77-363, order issued May 9, 1979, mimeo at p. 6.

Pipeline Company and Certain Producer Respondents, Docket No. CP76-238, order issued January 17, 1980. In that case, certain producers sold gas to United Gas Pipeline Company (United), which gas entered United's interstate system. However, United's system is designed such that certain segments of it are "locked-in", that is, the gas entering those segments is prevented by mechanical devices from escaping into other parts of the system where it could be commingled with gas leaving the state. The producers' gas in question entered these "locked-in" segments. In light of that factual determination and the decision in Opinion No. 777, the Commission determined that the producer sales to United were non-jurisdictional. In the course of United the Commission stated,

"Opinion No. 777 ... establishes that gas which does not leave the state of its production is non-jurisdictional even if it is commingled with gas from another state and resold as part of a jurisdictional transaction." 10/

Applying the law set forth above to the facts of this case, it is clear that the facts of this case are distinguishable from those in P.S.C.K. v. F.E.R.C., and that this Commission does not have jurisdiction over Capitol's transportation of gas through Capitol's facilities or its sales to the Daysboro customers under the Natural Gas Act. In P.S.C.K. v. F.E.R.C. the gathering lines in question were owned and operated by Kentucky-West Virginia Gas Company (Kentucky -West), a jurisdictional pipeline. Those lines were used to transport gas from the well head to Kentucky-West's interstate transmission facilities for resale in other states, albeit there might be some direct or other sales from those lines to Kentucky customers. Under the Lo-Vaca physical flow of the gas test, the gas in those lines was indisputably in interstate commerce.

In this instance, Capitol's gas does enter the Columbia system but, due to the facilities configuration of the Columbia system, it cannot leave the state of origin. Capitol's gas flows into Columbia's Line K2, which is a low pressure line operating at between 170 and 220 psig. It serves three small towns in Kentucky and does not leave that state. The volume of gas used

10/ United Gas Pipeline Co. and Certain Producer Respondents, supra, mimeo at p. 3.

by those towns is greater than the flow of Kentucky production into Line KZ (including Capitol's). The deficiency in volumes is made up by deliveries into Line KZ from a main line of Columbia's affiliate, Columbia Gulf Transmission Company (Columbia Gulf). Columbia Gulf's system operates at pressures between 800 and 1000 psig. Thus, none of Capitol's gas can leave Kentucky. 11/ It is clear from these facts and the decisions in Opinion No. 777 and United that Capitol's transportation and sale of gas is non-jurisdictional under the Natural Gas Act. 12/

The Commission finds:

(1) Capitol's transportation and sales of gas are not subject to the Commission's jurisdiction under the Natural Gas Act.

(2) Good cause exists to waive the provisions §1.15 and §1.16 of the Regulations.

The Commission orders:

The form of pleading requirements of §1.15 and §1.16 of the Commission's Regulations is waived with regard to PSCK's petition.

By the Commission.

(S E A L)

Lois D. Cashell
Lois D. Cashell,
Acting Secretary.

11/ Letter to R.A. Oswald, Columbia Gas System Service Corporation from James P. Holland, Columbia Gas Transmission Corporation, dated September 28, 1981, filed with the Secretary of the Commission September 30, 1981.

12/ We note, however, that, depending on the factual circumstances, Capitol's sales to the Daysboro customers may be "first sales", as that term is defined in the Natural Gas Policy Act of 1978 (NGPA). If that is the case, the pricing provisions of NGPA Title I apply.