

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CHARLES B. GREGORY)	
)	
COMPLAINANT)	
)	
v.)	CASE NO. 2000-468
)	
COLUMBIA NATURAL RESOURCES and)	
DELTA NATURAL GAS COMPANY, INC.)	
)	
DEFENDANTS)	

ORDER

On October 5, 2000, Charles B. Gregory (“Complainant”) filed a formal complaint against Columbia Natural Resources (“CNR”) and Delta Natural Gas Company, Inc. (“Delta”). In the complaint, Complainant alleges that he is entitled to natural gas service from either CNR or Delta and requests that the Commission order one of the codefendants to provide him with gas service.

PROCEDURAL HISTORY

The Commission issued an Order to Satisfy or Answer to Delta on October 17, 2000. Delta filed its answer on October 27, 2000. The Commission served CNR with an Order to Satisfy or Answer on December 12, 2000. CNR filed its answer on December 27, 2000.

On January 18, 2001, the Commission issued a data request to CNR, seeking information regarding CNR's facilities near Complainant's property and the statutory and

legal authority CNR relies upon in denying Complainant service. CNR filed its answer on January 29, 2001 and provided the requested information.

On March 19, 2001, the Commission issued data requests to both CNR and Delta. In its answer, CNR provided the Commission with information regarding its retail natural gas customers in Kentucky, the gathering line in question and a copy of a gas delivery contract with Delta. In its answer, Delta provided information regarding its natural gas customers, particularly those customers located on CNR's gathering line. Delta also provided an executed copy of its gas delivery contract with CNR.

The parties and Commission Staff participated in an informal conference on June 12, 2001. At the informal conference CNR and Delta presented their positions in regard to the provision, or denial thereof, of gas service to Complainant. Complainant described the circumstances that led him to believe he is entitled to gas service from either CNR or Delta.

On July 20, 2001, the Commission issued an Order directing Delta and CNR to file briefs in support of their respective positions in the denial of retail natural gas service to Complainant.

STATEMENT OF FACTS

The Complainant purchased property on which he built his home in Flat Lick in Knox County near Barbourville, Kentucky. When he purchased the property, the real estate agent assured him that all utilities, including natural gas, would be available on the property. CNR has a gas well that is located within 60 feet of the Complainant's house, and has a gathering line in the area to transport the gas. Delta has a distribution line within 1,200 feet of the Complainant's home.

Complainant applied for gas service at Delta's Barbourville office, but Complainant says that Delta told him it was not accepting applications. He then went to the CNR office near Barbourville and CNR told him to go to Delta for service. In further discussions with Delta, Delta told Complainant that its nearest line to Complainant's proposed home was approximately 1,200 feet away and that Delta would serve Complainant if he would pay for 1,100 feet of the extension from Delta's distribution line to his home. Complainant declined to do so and built an all-electric home. He now wishes to obtain gas service for gas logs only.

The line from which Complainant believes he is entitled to receive service is CNR's gathering line that leads from CNR's gas well located within 60 feet of Complainant's house. Wiser Oil Company ("Wiser") formerly owned the well and the gathering line. During the time that Wiser owned the gathering line, Delta entered into a contract to provide retail gas service to a number of Wiser's "farm tap" customers on Wiser's gathering line.

In 1999, CNR purchased Wiser. At the time of purchase, Delta served 966 customers on the gathering line. In October 1999, Delta, wishing not to abandon the customers on Wiser's former gathering line, entered into a Contract for Gas Sales and Delivery Service with CNR, providing for the transport of gas along CNR's gathering line. The contract contains a mechanism by which Delta may, but is not obligated to, connect new customers to CNR's gathering line. CNR, however, has the right to refuse any new customer connections on its gathering line. After the execution of the contract with CNR, Delta added 21 additional customers to the gathering line, thereby serving a total of 987 customers from the line.

Delta alleges that the price for gas transported along the gathering line is higher than that of any of its other suppliers, and that it will lose money if it connects any more customers to CNR's gathering line at current prices. Delta, therefore, has denied service from the gathering line to Complainant, and stated in a data response, "Primarily due to the excessive price of the gas purchased from CNR, Delta does not intend to add new customers to CNR's gathering lines."¹ The customers on the gathering line are captive to the CNR system and Delta, therefore, cannot obtain gas from another supplier for the customers on the gathering line.

CNR claims that since it is an interstate gas transporter, it is not a jurisdictional gas provider as contemplated by KRS 278.485 and that the Commission, therefore, lacks the jurisdictional authority to compel CNR to provide farm tap service. In support of this contention CNR has submitted a written brief citing various case law, including a Memorandum and Opinion Order in Columbia Natural Resources, Inc. v. Catharine Redd, United States District Court, Eastern District of Kentucky, Pikeville Division C.A. No. 93-154.

¹ Delta's Answer to Commission's First Data Request, Answer to question 2(c).

DISCUSSION

KRS 278.485: The “Farm Tap” Statute

At the heart of this matter lies KRS 278.485,² the “farm tap” statute. KRS 278.485 generally provides for the provision of gas service from producing wells or gathering lines to land owners who live within one-half (1/2) air-mile of said facilities. Farm tap customers, however, are not entitled to the same quality or guarantees of service that normal retail gas customers enjoy. Providers of farm tap service are exempted, in subsections of KRS 278.485, from having to treat the natural gas or maintain minimum pressure requirements. They are also permitted to abandon the gathering line or well.

KRS 278.485(5)³ also exempts certain gas providers from providing farm tap service that would otherwise be obligated to provide farm tap service to surrounding customers. Specifically, KRS 278.485(5) exempts from Commission jurisdiction a gas producing company’s gathering lines and wells that have been found by either the

² KRS 278.485 provides, in pertinent part, as follows:

Every gas pipeline company obtaining gas from producing wells located within this state, upon the request of the owner of the property on or over which any producing well or gas pipeline is located or the owner of real estate whose property and point of desired of service is located within one-half (1/2) air-mile of said company’s producing gas well or gas gathering pipeline, shall furnish gas service to such owner and applicant....

³ KRS 278.485(5) provides as follows:

Nothing in this section shall be construed as requiring any gas pipeline company to serve any such owner of property or applicant from any line or lines that have been held to be subject to federal jurisdiction by order of the Federal Energy Regulatory Commission or a court of competent jurisdiction. The provisions of this section shall apply only to producing gas wells and to gas pipelines commonly known as gathering lines.

Federal Energy Regulatory Commission (“FERC”) or a court of competent jurisdiction to be under federal jurisdiction.

Applicability of KRS 278.485 to CNR

To support its argument that it is under federal jurisdiction, CNR provides a Memorandum and Opinion Order in Redd. In Redd, the United States District Court for the Eastern District of Kentucky found that because CNR produces and transports natural gas in interstate commerce, it is under federal jurisdiction and not subject to the Commission’s jurisdiction.

Redd is factually similar to the case at hand. In Redd, Catharine Redd purchased property located within one-half (1/2) air mile of a CNR gathering line and applied for gas service. CNR refused Redd’s application for service on two separate occasions and Redd, without CNR’s knowledge or consent, tapped into a CNR gathering line. CNR brought suit in federal court in which Redd argued she was entitled to gas service pursuant to KRS 278.485. CNR argued that the gathering line in question transported gas in interstate commerce and that, therefore, application of KRS 278.485 would be a violation of the commerce clause because it would afford citizens of Kentucky preferred access to natural gas over consumers in other states.

The District Court agreed with CNR’s argument. The District Court stated that the “Commerce Clause limits State laws which unconstitutionally burden interstate commerce.” Wyoming v. Oklahoma, 112 S.Ct. 789, 800 (1992). Redd at 4. The District Court also stated that KRS 278.485 would be unconstitutional if applied to natural gas in interstate commerce. Id. at 5. The District Court relied upon Public Serv. Comm’n v. Federal Energy Reg. Comm’n, 610 F.2d 439 (6th Cir. 1989) to support its

finding that it is unconstitutional for the Commission to protect local interests at the expense of interstate commerce by means of statutes such as KRS 278.485. Redd at 5-6.

It is unclear whether the decision in Redd constitutes an “order of...a court of competent jurisdiction” as contemplated by KRS 278.485(5) which would exclude all of CNR’s facilities from the general requirements of KRS 278.485. The Commission, however, acknowledges that the type of gathering line at issue in Redd is substantially similar to the gathering line in this case, in that CNR’s gathering line from which Complainant seeks service transports gas in interstate commerce. Applied to the specific facts of this case, Redd indicates that the gathering line at issue in this case is, indeed, under federal jurisdiction. Consequently, the Commission will not order CNR to serve Complainant from this gathering line.

Application of KRS 278.485 and Other Law to Delta

Delta has no gathering lines or producing wells within one-half (1/2) air mile of Complainant’s property. KRS 278.485, therefore, is not applicable to Delta in this proceeding.

KRS 278.280 and 807 KAR 5:022, Section 9

KRS 278.280⁴ empowers the Commission to order a jurisdictional utility to make any reasonable extension after a hearing on the issues. KRS 278.280(2) also provides that the Commission shall promulgate rules for the furnishing of the service, which the Commission has done in 807 KAR 5:022, Section 9(16)(a) and (b).⁵

807 KAR 5:022, Section 9(16)(a) provides that if a prospective customer is within 100 feet of a utility's distribution lines or mains, that utility must provide that customer with a free extension of up to 100 feet. Delta has no distribution lines or mains within

⁴ KRS 278.280 provides, in pertinent parts, as follows:

- (2) The Commission shall prescribe rules for the performance of any service or the furnishing of any commodity....
- (3) Any person or group of persons may come before the commission and by petition ask that any utility subject to its jurisdiction be compelled to make any reasonable extension. The Commission shall hear and determine the reasonableness of the extension, and sustain or deny the petition in whole or in part.

⁵ 807 KAR 5:022, Section 9(16) provides, in pertinent part, as follows:

- (a) Normal extension. An extension of 100 feet or less shall be made by a utility to an existing distribution main without charge for a prospective customer who shall apply for and contract to use service for one (1) year or more and provides guarantee for such service.
- (b) Other extensions.
 - (1) When an extension of the utility's main to serve an applicant or group of applicants amounts to more than 100 feet per customer, the utility shall, if not inconsistent with its filed tariff, require the total cost of the excessive footage over 100 feet per customer to be deposited with the utility by the applicant(s), based on average estimated cost per foot of the total extension.
 - (e) Nothing contained herein shall be construed to prohibit a utility from making, at its expense, greater extensions than herein prescribed, provided the same free extensions are made to other customers under similar conditions.
 - (f) Upon complaint to and investigation by the commission, a utility may be required to construct extensions greater than 100 feet upon a finding by the commission that such extension is reasonable.

100 feet of Complainant's property. Delta, therefore, is not required by 807 KAR 5:022, Section 9(16)(a) to make a free extension to Complainant.

Complainant may receive service if he is willing to pay for the approximately 1,100 feet remaining of the extension, as prescribed by 807 KAR 5:022, Section 9(b)(1). Delta offers to make an extension to Complainant, providing that Complainant makes a deposit for the estimated cost for construction of the additional 1,100 feet, an offer which Complainant declines.

Delta has declined to make an extension under 807 KAR 5:022, Section 9(16)(e), by which it could elect to make the extension at its own expense. Delta, no doubt, declines to do so because if it made a free extension to Complainant, the same regulation requires it to provide free extensions to similarly situated prospective customers. See also KRS 278.170 (prohibiting discriminatory treatment of customers). If Delta had to make extensions of service to all prospective customers who are located within 1,200 feet of its distribution lines, such extension would result in a severe financial burden on the utility.

807 KAR 5:022, Section 9(16)(f) grants the Commission the authority to order Delta to make an extension greater than 100 feet if the extension is reasonable. 807 KAR 5:022, Section 9(16)(f) is silent as to whether the Commission may order a utility to make an extension greater than 100 feet at no charge to the prospective customer. The Commission has, under extreme circumstances and when an overriding public interest existed, ordered a utility to make a free extension greater than 100 feet. The circumstances here do not justify such an order.

If the Commission ordered Delta to make the 1,200-foot extension to Complainant at no charge, Delta would incur great expense to extend service to a customer who wants service for only gas logs. Complainant does not rely upon natural gas to heat his home; nor would he incur any additional expense if his request is denied. Complainant believes he is entitled to receive natural gas because of the representations of the former owner of the property, not from representations of either CNR or Delta. The costs Complainant incurred, therefore, in constructing his house with electric heat and utilities, are not the responsibility of CNR or Delta.

CONCLUSIONS

For the reasons stated above, CNR is not legally bound to make an extension to Complainant.

Delta is willing, pursuant to 807 KAR 5:022, Section 9(16)(b)(1), to build the extension provided that Complainant pay the tariffed cost of 1,100 feet of the extension. This is Complainant's only recourse to obtain gas service. If he wishes to obtain service under these conditions, he may. Pursuant to Commission regulations, if additional customers receive service from this extension, Complainant would receive a partial refund of the cost of construction of the extension for every new customer connected. Except to the extent Complainant requests an extension pursuant to 807 KAR 5:022, Section 9(16)(b)(1), Delta is not legally bound to provide service to Complainant.

The Complainant has, however, brought to the fore certain issues regarding Delta's 987 customers served off CNR's gathering line. These customers apparently are neither "farm tap" customers, since Delta does not own the gathering line and has no "farm tap" tariff, nor retail customers as contemplated by Delta's tariff on file with the

Commission. Additionally, the classification and rights of these customers are not clearly addressed or defined in Delta's tariff. The Commission is concerned that absent changes to Delta's tariff to address these issues, similar complaints may arise.

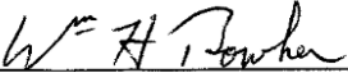
IT IS THEREFORE ORDERED that:

1. The complaint against CNR is dismissed with prejudice.
2. The complaint against Delta is dismissed with prejudice except to the extent that Delta shall make an extension if Complainant agrees to an extension under 807 KAR 5:022, Section 9(16)(b)(1).
3. Within 30 days of the date of this Order, Delta shall file with the Commission proposed changes to its tariff in order to clarify the classification of its customers served from CNR's gathering line. The proposed tariff changes shall also:
 - a. Set forth the rights and service expectations of these customers; and
 - b. Contain a mechanism by which Delta shall pass on the higher costs of the gas on CNR's gathering line to the customers who receive service from that line.
4. Delta shall appear for an informal conference to be scheduled by further Commission Order.

Done at Frankfort, Kentucky, this 28th day of November, 2001.

By the Commission

ATTEST:

Deputy 
Executive Director