

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION
CASE NO. 2018-00263

In the Matter of:

GEORGIA JOHNSON

COMPLAINANT

v.

PEOPLES GAS KY, LLC

DEFENDANT

COMPLAINANT’S RESPONSE TO COMMISSION ORDER, AND COMMENTS

Comes the Complainant, by counsel, and in response to the Order entered in this matter on April 18, 2019, states as follows:

I. Complainant Believes This Matter Is Appropriate For Submittal On The Record

The April 18, 2019 Order suggests that this matter be submitted for decision absent a request by either party for an evidentiary hearing. Complainant concurs that this matter is ripe for decision on the record, since there are no material factual matters in dispute and the question as to whether Defendant Peoples Gas Ky, LLC (Peoples) is a “utility” within the meaning of KRS Chapter 278 is instead a matter of law.

II. Comments of Complainant

The April 18, 2019 Order provided a period of ten (10) days from the date of the Order “to present any comments[.]” On this tenth day since the entry of the Order on April 18, 2019, Complainant provides these comments:

1. Peoples is a “utility” within the meaning of KRS 278.010 and KRS 278.030 and the services that the company provides (and formerly provided to Complainant) do not fall within the ambit of a “farm tap” under KRS 178.485. Under the plain language of KRS Chapter 278

Peoples is a utility and required to provide service to the Complainant, Georgia Johnson (“Johnson”).

The gas service Peoples provided to Johnson is governed by a tariff on file with and approved by the Commission. The most recent tariff indicates that *Peoples owns and maintains* natural gas meters, service taps, saddles, and first service shut-off valves for all its customers and that this equipment is required for natural gas service. In addition, Peoples acknowledges in its tariff that it is in the business of delivering and selling natural gas to the public according to the filed tariff and that it maintains a “service area.”

Additionally, the Vice President Reliability (sic) of Peoples acknowledged in response to *Commission Staff’s Initial Request For Information to Peoples Gas Ky, LLC* that it neither owns nor operates any producing natural gas wells or natural gas gathering lines. *Defendant Peoples Gas Ky LLCs Answers To Commission Staff’s Initial Request For Information* Answer No. 1. Peoples further indicated that they provide “natural gas service” to 3,083 customers. *Id.* Answer No. 3.

Peoples is a “utility” as defined by KRS 278.010(3), and is obligated to furnish adequate, efficient and reasonable service, which includes the obligation to assure that customers such as Johnson are provided a reasonable continuity of service. KRS 278.030; KRS 278.010(14). Peoples’ natural gas services fall within the definition of a “utility” as defined by KRS 278.010(3), and despite having been previously characterized as a “farm tap” service by the Commission, Peoples is not a “farm tap” gas provider exempted from the requirement as a utility to provide the level of service the Commission’s statutes guarantee to Johnson.

KRS 278.010(3) defines a utility as:

any person . . . *who owns, controls, operates, or manages any facility used or to be used for or in connection with:* . . .(b) The production, manufacture, storage, *distribution, sale,*

or furnishing of natural or manufactured gas, or a mixture of the same, to or for the public, for compensation, for light, heat, power, or other uses.

KRS 278.010(3) (Emphasis added).

Peoples acknowledges that it is engaged in the distribution, sale, and furnishing of natural gas to 3,083 customers for compensation. It's business falls within the definition of a utility. "Facility" is defined in KRS 278.010(11) to include "all property, means, and instrumentalities owned, operated, leased, licensed, used, furnished, or supplied for, by, or in connection with the business of any utility." According to Peoples' most recent tariff on file with the Commission, Peoples owns and maintains natural gas meters, service taps, saddles, and first service shut-off valves for all its customers and this equipment is required for natural gas service. Peoples also acknowledges that it is in the business of delivering and selling natural gas to the public and maintains a "service area." These meters, service taps, saddles, and shut-off valves are "property" and "instrumentalities" (i.e. "facilities") owned by Peoples and used for and in connection with the distribution and sale of natural gas for the public, for compensation, and for heat, power and other uses. Thus, under the plain language of KRS 278.010(3) and (11), Peoples is a "utility" and as such is required to provide adequate service to Johnson.

Peoples has maintained that it is a "farm tap system" that is "not subject to many of the Commission's statutes, including [KRS] 278.020." Peoples cites to Case No. 2013-00163 in which the Commission approved the acquisition of Equitable Gas assets by PNG and noted that "Equitable is a farm tap company pursuant to KRS 278.485 and not a utility as defined in KRS 278.010(3)." *Peoples Gas Ky LLC's Request To Submit Case On The Record And Comments*, p. 2.

One can search in vain through KRS Chapter 278, which is the source of the Commission's powers and which bounds the actions and discretion of the Commission and find

no definition of a “farm tap company” nor of a “farm tap.” Likewise, one can search without success to find any language that would exempt a company like Peoples “who owns, controls, operates, or manages any facility used or to be used for or in connection with: . . .(b) The production, manufacture, storage, distribution, sale, or furnishing of natural or manufactured gas, or a mixture of the same, to or for the public, for compensation, for light, heat, power, or other uses” from being regulated as a “utility” by virtue of the source of the natural gas that it purchase and then delivers to the public for compensation through its facilities.

The Kentucky Public Service Commission is a creature of statute and has only such powers as granted by the General Assembly. *PSC v. Jackson County RECC*, Ky. App. 50 S.W.2d 764 (2001), citing *Boone Co. Water and Sewer District v. PSC*, Ky. 949 S.W.2d 588 (1997).

KRS 278.485 imposes an obligation on “every gas pipeline company obtaining has from producing wells” located in Kentucky to provide gas service at rates and minimum monthly charges determined by the Public Service Commission, to a property owner on or over which a producing well or natural gas gathering line is located or whose property is within ½ mile of such well or gathering line.

The obligation to provide such service under KRS 278.485 attaches to “the gas producer” or “the gas pipeline company[.]” Peoples has acknowledged in response to Commission Staff’s Initial Request For Information, that it owns no natural gas wells nor natural gas gathering lines in the Commonwealth. *Defendant Peoples Gas Ky LLC’s Answers to Commission Staff’s Initial Request For Information*, Answer No. 1. It is therefore neither a “gas producer” nor a “gas pipeline company,” but is instead a company that purchases gas *from* a natural gas producer and gathering line owner and distributes it to customers of Peoples through its facilities, for compensation. Nor is Peoples an “owner of the property on or over which any producing well or

gas gathering pipeline is located or the owner of real estate whose property and point of desired service is located within one-half (1/2) air-mile of said company's producing gas well or gas gathering pipeline[.]” KRS 278.485 does not govern the relationship of Peoples with its customers, nor exempt Peoples from being classified as a “utility” when it undertakes activities falling within the ambit of that statutory definition. *Were* Peoples either an owner of a producing gas well or gathering line, it would be subject to the obligations and limited regulation attaching to such owners and operators pursuant to KRS 278.485. It is neither, and as a commercial entity that owns, controls, operates, or manages [facilities] used or to be used for or in connection with: . . .[the] . . . distribution, sale, or furnishing of natural or manufactured gas, or a mixture of the same, to or for the public, for compensation, for light, heat, power, or other uses,” it is by law a utility as that jurisdictional term is defined in KRS 278.010(3), with an obligation to provide a reasonable continuity of service to Complainant.

Under KRS 278.485(6) it is the owner of the natural gas gathering lines or producing natural gas wells, (in this case EQT and its successor Diversified Gas and Oil PLC), that can abandon those wells and pipelines and cease serving those customers who were eligible to demand such service pursuant to KRS 278.485. Peoples does not own gathering lines or producing wells and is instead engaged in the business of purchasing gas *from* those gas pipelines and wells and delivering that gas to Peoples customers for compensation. As such, the decision by EQT to abandon the gathering line from which Peoples had been purchasing natural gas for sale to the Complainant, does not relieve Peoples of the obligation as a utility to provide reasonable continuity of service to customers such as Complainant, whether from another producing well or gathering line, or by other means.

2. Prior Commission determinations that Peoples or its predecessor-in-interest were and are *not* utilities but are instead are a “farm tap system” exempt from the statutory obligations of a “utility” were in error and the Commission is not obligated to continue to apply that erroneous interpretation of KRS 278.010(3) and KRS 278.485. As noted earlier, it is axiomatic that the Commission is a creature of statute, and as such must act within the boundaries established by statute and by properly-promulgated regulations that accord with the underlying statute. Peoples gas delivery services do not fall within the ambit of KRS 278.485, as Peoples has no *obligation* to provide natural gas service to customers under that statute.¹ To the extent that the Commission may have previously concluded that Peoples was not a utility as defined by KRS 278.010(3), such a conclusion was inconsistent with law. Under the plain language of the statute, Peoples is a utility and required to provide service to the Complainant, Georgia Johnson (“Johnson”). Prior Commission determinations that the system now owned and operated by Peoples was exempt from regulation as a utility by virtue of KRS 278.485, are not to be perpetuated, but instead should be corrected. As noted by the Kentucky Supreme Court in *Delta Air Lines Inc. v. Commonwealth, Revenue Cabinet*, 689 S.W.2d 14 (Ky. 1985), in which the Revenue Cabinet had erroneously created an exception from taxation for Delta Air Lines, “[a]n erroneous interpretation of the law will not be perpetuated.” *Id.* at 20. As further noted by the *Delta* Court, an agency has an affirmative responsibility to abandon an erroneous policy when it is discovered to be in error.

¹ Even if Peoples *were* obligated to furnish the “farm taps,” the unreported decision in *Pollitt v. Commonwealth*, No. 2004-CA-001516-MR, 2005 Ky. App. Unpub. LEXIS 959, WL 2573987 noted that KRS 278.010(3)(b) recognizes no exception because the entity is mandated to furnish the farm taps. The Court rejected the request to create an exception to KRS 278.010(3)(b) for that reason, noting that “KRS 278.010(3)(b) recognizes no such exception, and we are not at liberty to add language to a statute. See *City of Covington v. Kenton County*, 149 S.W.2d 358 (Ky. 2004). The Commission is similarly constrained from creating an exemption from the definition of “utility” where none exists in statute, particularly where, unlike the *Gas Group* in the *Pollitt* case, Peoples is under no statutory obligation to furnish “farm taps.”

Conclusion

Wherefore, for the reasons herein stated, and as set forth in the Complaint and in the Response To Motion To Dismiss, Complainant respectfully requests that the Commission:

1. Enter an Order confirming that Peoples is a public utility under KRS 278.010(3) and subject to regulation by the Commission; and
2. Enter an Order prohibiting the discontinuation of Complainant’s natural gas service and requiring Peoples to continue to provide Complainant with adequate service in accordance with the obligations of a utility under KRS Chapter 278.

Respectfully submitted,

/s/ Tom FitzGerald

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Commission and served electronically to Ms. Monica Braun, Stoll Keenon Ogden PLLC 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507 and that the original and ten (10) copies were lodged with the Public Service Commission on the next business day following April 28, 2019.

/s/ Tom FitzGerald

Counsel for Complainant