

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

<i>Electronic Investigation of Jurisdictional Status</i>)	Case No.
of East Kentucky Midstream, LLC, and of its)	2022-00238
Compliance with KRS Chapter 278, 807 KAR)	
Chapter 005, and 49 CFR Parts 191 and 192)	

East Kentucky Midstream, LLC
Initial Brief

Comes East Kentucky Midstream, LLC (“EKM”) and in compliance with the Order entered December 20, 2022, hereby provides its initial brief in support of its post-formal conference position.

Introduction

EKM is a gathering system (a.k.a. “farm tap system”) under both Kentucky and Federal law for purposes of rates and quality of service jurisdiction, and is not a utility under KRS 278.040. Since it is neither a utility nor a master meter system, EKM is not regulated under KRS 278.495(2) for purposes of pipeline safety. Rather, EKM is regulated by the Kentucky Public Service Commission (“PSC”) for compliance with Pipeline and Hazardous Materials Safety Administration (“PHMSA”) standards for gathering and transmission through the PSC’s certification as a state authority under 49 U.S.C. § 60105 and its penalty and enforcement authority under KRS 278.992. For PHMSA purposes, it is classified as Type-B gathering with one segment classified as low-pressure intrastate transmission. FERC found the primary function of EKM’s predecessor to be gathering (i.e., to collect locally-produced gas from multiple producing wells and supply it in bulk to the market). The function and configuration of the assets has not changed

under EKM’s ownership. EKM is clearly a common carrier as designated in KRS 278.470, as are all gathering systems. However, since EKM is dedicated to gathering and low-pressure distribution, it is by definition not an “intrastate pipeline” under KRS 278.504(1). Furthermore, EKM is not a “local distribution company” under KRS 278.504(3) because it is primarily used for gathering or low-pressure distribution of natural gas.

Procedural History

The PSC initiated this investigation on August 11, 2022, to determine EKM’s jurisdictional status following a 7/22/22 Application for a declaratory order about PSC jurisdiction filed by Kentucky Frontier Gas (“KFG”) in Case No. 2022-00224. Specifically, the PSC inquired whether EKM “is selling, furnishing, or transporting natural gas to or for the public and is therefore subject to the Commission’s jurisdiction as a utility under KRS 278.040”; and (2) “the pipeline owned and operated by [EKM] should be regulated for compliance with federal pipeline safety standards pursuant to KRS 278.495(2).”¹ The PSC then expanded its investigation to include whether EKM is subject to “utilities jurisdiction” under any provision of KRS Chapter 278.² The investigation has included several sets of data requests, with responses thereto, and a formal conference on October 14, 2022, at which sworn testimony was taken.

Statement of Facts

In 2021, EKM acquired the assets of Jefferson Gas, LLC (“Jefferson Gas”) for a gathering system located across several counties in Eastern Kentucky.³ The assets consist of a system of pipelines gathering gas from local producers and delivering it to the interstate transmission

¹ 8/11/22 Order p.1.

² 8/12/22 Order pp. 1,2.

³ See Response to 1 AG 05, containing the purchase agreements for the assets of Jefferson Gas; *see also* the Response to 2 PSC 05 and 11/28/22 J. Justice testimony, pg.1 lines 11-20.

system at the South Means and Van Lear Compressor Stations.⁴ The system consists of Lines A-1, A-2, A-3, A-4, A-5, C, J, KZ East and KZ West, and stretches East and South from Clark County across multiple counties extending to Ashland, Kentucky.⁵ There are no gas treatment or processing facilities on the EKM system.⁶

EKM provides gathering service for nearly 30 producer purchase meters servicing hundreds (if not thousands) of natural gas wells in Eastern Kentucky.⁷ On EKM's system alone, there are 325 "farm taps", which are statutorily required connections for points of service within one-half air mile of a gathering line.⁸ This number does not include farm tap customers on producer lines connected to EKM. In addition to delivering gas to interstate markets and as a secondary aspect of its gathering function, EKM sells gas to local distribution facilities of the City of West Liberty and the privately-owned KFG, as well as to large-volume end-users.⁹

When owned by Jefferson Gas, the system has been expressly categorized as a gathering system, and not as a utility. In 1999, the PSC stated that Jefferson Gas was not a KRS 278.010(3)(b) utility, but was regulated as what "is commonly referred to as a 'farm tap system.'"¹⁰ A 2013 PSC Staff Opinion stated that, unlike a jurisdictional utility, Jefferson Gas was allowed to abandon a portion of its gathering system serving farm-tap customers without obtaining PSC approval.¹¹ In 2009, the Federal Energy Regulatory Commission (FERC)

⁴ See Response to 1 PSC 03, containing a detailed explanation of the EKM natural gas pipeline system diagram provided as 01-0001 to -0016 attached to 1 PSC Response; *see also* Response to PH PSC 01.

⁵ See Response to 1 PSC 01 and 03; diagrams 01-0001 to -0016 attached to 1 PSC Response.

⁶ *Id.*

⁷ See Response to 1 PSC 04.

⁸ See Response to 2 PSC 01(c) and related attachment; *see also* Response to PH PSC 01(c) and 07.

⁹ See Response to 1 PSC 09; *see also* Supplemental Response to 1 PSC 09. Currently, there is only one such large-volume end user, the East Kentucky Correctional Complex in West Liberty.

¹⁰ Case No. 1998-00499, 2/16/19 Order p.1.

¹¹ PSC Staff Opinion 2013-014, dated 10/23/13, pp. 3-4.

concluded that the Jefferson Gas system was a gathering facility exempt from FERC jurisdiction over rates and other terms of service.¹²

Argument

PSC Farm-Tap System Jurisdiction

“Every gas pipeline company obtaining gas from producing wells located within Kentucky” (a category that includes EKM) is subject to the KRS 278.485 requirements to furnish gas service to specially-eligible points of service. For EKM’s system predecessors and other such pipeline companies, PSC decisions make a distinction between KRS 278.485 (“farm-tap”) service subject to limited rates and service PSC regulation and gas-furnishing service subject to full PSC utility regulation.¹³ To make the distinction and in harmony with other KRS Chapter 278 provisions, the PSC focuses on the primary use of the pipeline facilities, such that pipeline primarily used to gather natural gas from producers or for low-pressure distribution of natural gas is not a utility.¹⁴

¹² See Responses to 1 AG 13, 1 PSC 07, and 2 PSC 08. “Jefferson owns and operates approximately 400 miles of natural gas gathering lines in ten counties in eastern Kentucky. . . . Jefferson is not a “natural gas company” as defined by the NGA, nor does it currently own or operate any facilities or provide any services that are subject to the Commission’s jurisdiction.” *Columbia Gas Transmission, LLC and Jefferson Gas, LLC*, 129 FERC ¶ 61,029, at P 4. “For these reasons, the Commission concludes that the application of the primary function test criteria to the facilities to be abandoned supports a finding that the primary function of the facilities will be gathering once the facilities are abandoned by sale.” *Id* at P 24.

¹³ Decisions regarding EKM’s predecessor are listed above, and other system’s decisions are discussed below. See, also, e.g., Case No. 2020-00346, *Peoples Gas KY LLC et al. Application*, 2/22/21 Order pp. 8-10 (raising question for investigation whether Delta Natural should have a separate farm-tap tariff rather than providing such service under its utility tariff schedules).

¹⁴ See, e.g., KRS 278.504 defining a *local distribution company* to be a utility or other person transporting or local distribution and sale of natural gas for ultimate consumption, but excepting *inter alia* “any part of a pipeline primarily used for storage or gathering or low pressure distribution of natural gas.” See also Response to 1 PSC 02 for the maximum allowable operating pressure for the EKM pipelines.

To classify a system of gas-carrying pipes, the PSC “must first determine its primary function.”¹⁵ The PSC has examined similar jurisdictional situations in relatively recent orders for two other systems. In a 2017 Order, it recapped the long saga of the Pollitt System,¹⁶ which operated without regulatory oversight from its 1993 construction to April 1999, when the PSC opened an investigation into its regulatory status. In 1999, the PSC found that the pipeline system had lost its gathering line classification because it no longer served a wholesale customer and was a distribution line (and a utility) because its “sole function of provision of natural gas to individual retail customers.”¹⁷ On court review and subsequent appeal, that PSC order was affirmed; then, in early 2017, the PSC discovered that the system was still operating and opened a new investigation.¹⁸ The PSC found that the Pollitt System currently did not serve a wholesale customer other than on an intermittent, at-will basis and that “[t]he indefinite nature of this transaction prevents a finding that the function of the Pollitt system is to gather and commingle gas from different sources for delivery to [the wholesaler’s] pipeline”; therefore, the Pollitt System was a distribution line subject to the Commission’s jurisdiction as a utility.”¹⁹ As suggested in the 2017 Order, however,²⁰ when the Pollitt System subsequently entered into an agreement to transport gas from producer X through the system to an interconnect with a downstream pipeline, the PSC at that point:

recognized the Pollitt System as a gathering system with a commingling gathering function” [and] ... as an operator of a gathering system, Pollitt is not a gas distri-

¹⁵ Case No. 2017-00120, *In re Pollitt Enterprises, Inc. et al.*, 12/27/17 Order p.11; see also Case No. 2018-00263, *Georgia Johnson v. Peoples Gas KY, LLC*, 3/27/20 Order p.12 (“classification of a gas pipeline is determined by its primary function”; citing *Pollitt Systems* 12/27/17 Order at pp. 11-12.

¹⁶ Case No. 2017-00120, *In re Pollitt Enterprises, Inc. et al.*, 12/27/17 Order pp. 3-6.

¹⁷ 12/27/17 Order p.3, citing Case No. 99-130, *The Gas Group*, 9/2/99 Order.

¹⁸ 12/27/17 Order pp. 3-4.

¹⁹ 12/27/17 Order p.14.

²⁰ 12/27/17 Order p.14.

bution utility, and its retail farm tap service is subject only to the Commission's more limited jurisdiction under KRS 278.485.

Case No. 2018-00263, *Georgia Johnson v. Peoples Gas KY, LLC*, 3/27/20 Order p.13.²¹

In the 2020 *Peoples Gas* decision, the PSC dismissed a complaint that Peoples Gas KY, LLC, which provided retail, farm-tap service to approximately 3300 customers in eastern Kentucky, unlawfully terminated service to customers along a pipeline for which the producer was discontinuing the supply of gas. The PSC contrasted the more comprehensive service obligations of a gas distribution utility with those of a farm-tap system operator, and found that Peoples Gas was not a utility and had no duty to maintain continuity of service.²² Peoples Gas was found to not provide retail service “‘to or for the public’ [an essential part of the KRS 278.010 definition of a utility] but rather provides service to a limited class of persons who, based on proximity to production facilities, are entitled to gas service pursuant to KRS 278.485.”²³ Furthermore, its operation of the farm-tap system on the gathering pipelines was “functionally identical” to that of its predecessor (Equitable Gas) for which there were prior determinations that it was farm-tap (not utility) service and that both Peoples Gas and Equitable Gas “have been entitled to rely in making business decisions on the Commission’s jurisdictional determination.”²⁴ In approving a later proposal to merge Peoples Gas into Delta Natural Gas, the PSC states that “if Peoples [Gas] were a public utility and not a farm-tap system,” it would be

²¹ Citing Case No. 2018-00103, *Pollitt Enterprises*, 6/11/19 Order pp.1-2 (which itself cites a settlement of the court-review action from the 2017-00120 Order and the earlier court-review action of the 99-130 Order).

²² Case No. 2018-00263, *Georgia Johnson v. Peoples Gas KY, LLC*, 3/27/20 Order pp. 5-6, 18.

²³ 3/27/20 Order pp. 14, 16.

²⁴ *Id.* at 16-17. The Order reviewed those determinations at pp. 8-11, 14, noting that beginning with a 1958-59 transaction, the PSC had held that Equitable was a public utility (Case No. 3563), but in a 1992 jurisdictional investigation case (No. 92-00168) and in decisions thereafter had recognized Equitable’s and People’s status as a farm-tap company.

reviewing the proposed transaction under the KRS 278.020 transfer/acquisition provisions.²⁵

EKM is “functionally identical” to its predecessor Jefferson Gas, which was found to be a gathering system by both the PSC and FERC.

PSC Pipeline Safety Regulation

As noted above, EKM’s primary function is to collect locally-produced gas from multiple producing wells and supply it in bulk to the market. Since it is neither a utility nor a master meter system,²⁶ EKM is not regulated for purposes of pipeline safety under KRS 278.495(2). Rather, EKM is regulated by the Kentucky PSC for compliance with PHMSA pipeline safety standards for gathering and transmission through the PSC’s certification as a state authority under 49 U.S.C. § 60105 and its penalty and enforcement authority under KRS 278.992. The PSC may take administrative notice of its recent inspection reports for safety purposes, which classify EKM as a Type-B gathering and low-pressure intrastate transmission system.

The “transmission” designation of one small segment of EKM for pipeline safety purposes does not change the gathering function of the EKM system for PSC jurisdictional consideration. The American Petroleum Institute (API) publishes recommended practices relating to such classification which are incorporated by reference into federal minimum safety standards for gas transportation by pipeline (49 CFR Part 192) — the API RP 80 Guidelines for

²⁵ Case No. 2020-00346, *Peoples Gas KY LLC et al. Application*, 2/22/21 Order p.5.

²⁶ KRS 278.495(1)(b) defines *Master meter system* as “a pipeline system for distributing gas within a definable area ... where the operator purchases metered gas from an outside source for resale through a gas distribution pipeline system”; the ultimate consumer “either purchases the gas directly or by other means, such as through rents.” The examples given of a definable area are “a mobile home park, housing project, or apartment complex.” EKM does not make service available to end-users simply for being within a definable area, but only those eligible by distance who request service and provide the necessary tap, hook-up, and service line.

the Definition of Onshore Gas Gathering Lines (“API 80”).²⁷ The PSC has referenced API 80 in making jurisdictional determinations about pipelines.²⁸

API 80 § 2.2(a)(1) defines a gas *Gathering Line* in relevant part as “any pipeline or part of a connected series of pipelines used to transport gas from the furthestmost downstream point in a production operation to the furthestmost downstream of the following endpoints,” specifying various inlets, outlets, commingling points, or connections. API 80 § 2.2.1 explains the basic definitional concepts for a “Gathering Line” (emphasis added):

The gathering of gas from multiple production operations can be a complex procedure. Because a gathering system may extend over a large geographical area, it is not uncommon for taps on gathering systems to serve numerous residential consumers [such as farm taps] as well as to make intermediate deliveries to local distribution facilities or large volume end users.

As API 80 § 3.1.5 details, that complexity is illustrated by “Typical Appalachian Production Operations,” where “natural gas production, gathering and transmission systems have evolved around the producing fields in an interlacing grid that has moved gas from the wells to nearby markets.” That interlacing grid supports production from wells that are often “long life, low pressure, and economically marginal” and are typically operated by small independent producers. API 80 § 3.1.5.2

The concept of function is important to determining “where a gathering line ends,” and recognizes that the line “continues to fulfill the gathering function until it reaches a defined and

²⁷ 49 CFR § 192.7(b)(3) incorporates API 80 (1st ed. Apr. 2000) by reference and notes the 49 CFR § 192.8(a) requirement that it be used “to determine if an onshore pipeline (or part of a connected series of pipelines) is an onshore gathering line.” API 80 (1st ed. Apr. 2000) is available in PDF format at <https://law.resource.org/pub/us/cfr/ibr/002/api.80.2000.pdf> (last visited 1/19/23). Review access is also provided by the API to its standards that have been incorporated into federal regulation to a member of the public who creates an API account therefor, see <https://publications.api.org/Default.aspx> (last visited 1/19/23).

²⁸ See Case No. 2017-00120, *In re Pollitt Enterprises, Inc. et al.*, 12/27/17 Order p.3 & fn. 5, pp. 12, 14.

recognized endpoint regardless of intermediate processes and/or deliveries along the line.” API 80 §§ 2.2.1, 2.2.1.1 (emphasis added).

By its very nature, a common function of gas gathering is to gather (“comingle”) gas from different sources for processing, treatment, and/or delivery to an end-user or other pipeline. The basic function of the gathering line — to “gather” gas for delivery to another pipeline (e.g., a gas transmission line) or to an end user — would not change if no processing or treatment were needed. The gathering function extends at least as far as the last point of commingling....

API 80 § 2.2.1.2.3 (commingling function; footnotes omitted).

Only the C-Line of EKM’s system is designated as “transmission” by PHMSA and enforced by the PSC. While API 80 gathering definitions are helpful in understanding the gathering function of EKM’s system as a whole in the context of Appalachian production fields, API 80 pipeline safety classifications are not intended to govern State jurisdictional determinations such as the matter at present. Indeed, API 80 2.6.2.4 “FERC or Other Agency Regulatory Definitions” clearly states:

“... FERC or other agency pipeline designations were not developed with pipeline safety as the regulatory purpose and as such may represent and include concepts and assumptions that are not relevant to Pipeline Safety Act objectives. Conversely, the definitions presented herein are not designed to address issues—nor are they intended for application—in any regulatory context other than gas pipeline safety pursuant to the federal Pipeline Safety Act.”

Other PSC Jurisdiction

Common carrier status of oil and natural gas pipelines is broadly stated in KRS 278.470,²⁹ a 1920 enactment pre-dating the PSC’s creation. This designation was important for long-standing statutes related to condemnation power and enacting common-law rights, duties, and protections for common carriers (*see* KRS 278.502; KRS 278.480 and .490). It is connected

²⁹ “Every company receiving, transporting or delivering a supply of oil or natural gas for public consumption is declared to be a common carrier, and the receipt, transportation and delivery of natural gas into, through and from a pipeline operated by any such company is declared to be a public use.” KRS 278.470.

with the obligations imposed on gas gathering pipelines in KRS 278.485 and the authorization therein of limited PSC regulation. KRS 278.470 does not, however, refer to the PSC or confer authority on the PSC over the practices of gas utilities and pipelines. Furthermore, over time, the breadth of the PSC’s jurisdiction over common carriers has been narrowed in KRS Chapter 278. Legislation in 1984 and 1992 addressed among other things the obligations of oil and gas producers to provide farm tap service, but also specifically limited PSC authority as it relates to regulation that encroaches on the rights of oil and gas producers. Indeed, the 1984 amendments creating the KRS 278.504–.507 provisions about required carriage of oil and gas apply to intrastate pipelines and local distribution companies, but specifically carve out “any part of any pipeline” dedicated or primarily used “for gathering or low pressure distribution of natural gas.”³⁰

Conclusion

EKM is an important part of the production and gathering system in multiple counties in Eastern Kentucky, both historically and in the future. It has evolved as an important part of the gas supply for customers and communities in the region. Indeed, as is typical in Appalachia, gathering systems are an integral part of the symbiotic relationship between producers, consumers, and interstate markets that allows the cost-efficient use of gas from typically long-life, low-volume wells and for rural customers to have access to gas at their homes and businesses. Regulating EKM as anything other than a gathering system will adversely affect both producers and consumers in the region for whom the system was built.

³⁰ KRS 278.504(1), (3).

Respectfully submitted,

/s/ Jason R. Bentley

Jason R. Bentley

jbentley@mmlk.com

Kathryn A. Eckert

keckert@mcbayerfirm.com

MCBRAYER PLLC

201 East Main Street; Suite 900

Lexington, KY 40507-1310

859-231-8780; fax: 859-960-2917

Counsel for East Kentucky Midstream, LLC