

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
Response to Kentucky Frontier Gas Brief

Comes East Kentucky Midstream, LLC (“EKM”), by counsel, and for its Response to the brief of Kentucky Frontier Gas, LLC (“KFG”), hereby states as follows:

Introduction

KFG did not provide any determinative information or arguments in its Brief regarding the Kentucky Public Service Commission’s (“PSC”) pending investigation to address the following: (1) 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”; (2) whether “the pipeline owned and operated by [EKM] should be regulated for compliance with federal pipeline safety standards pursuant to KRS 278.495(2)”; and (3) whether EKM is subject to “utilities jurisdiction” under any provision of KRS Chapter 278. Rather, the KFG Brief ignores or mischaracterizes facts in the record and also conflates DOT/PHMSA safety classifications with PSC/FERC functionality regulation in its discussion of EKM. However, despite these groundless characterizations, the EKM system was, is, and remains subject to regulation as a gathering system.

Response

EKM is not subject to regulation as an LDC.

While the specific argument is unclear, KFG’s Brief may be arguing that EKM somehow qualifies as a local distribution company. KFG speculates: “There are apparently miles of unmapped distribution pipelines that EKM operates to supply all farm taps customers....” (KFG Brief p. 6). EKM does have customer/service lines throughout the region that have been in place for a significant period of time, many going back multiple decades or more.¹ Numerous wells are also scattered throughout the region, and EKM gathers gas for 25 producers at 36 meters on the system.² However, this is not indicative of local-distribution designation per the applicable law. KRS 278.504 defines a local distribution company to be a utility or other person transporting or locally distributing and selling natural gas for ultimate consumption, but specifically exempts “any part of a pipeline primarily used for storage or gathering or low pressure distribution of natural gas.”

KFG mistakes the fact that such customer/service lines exist with qualifying as a distribution system, while ignoring the producer wells feeding into the system and Kentucky law about farm tap service to end-users. These customer lines were not included on the main pipeline maps, and their existence does not change the fact that EKM is a gathering system – if anything it reinforces it.³ Furnishing natural gas to end-users, whether directly or through LDCs or other

¹ As shown in the Jefferson Gas to EKM asset sale/purchase agreements (KY PSC 2022-00380 01-0030 to 0056, attached to the 1 AG Response), grants of underlying property rights to segments of the system date back to the early 1900s and others to the 1940s and 1950s. The statutory codification of farm-tap rights and obligations, KRS 278.485, was first enacted in 1952.

² See EKM Responses to PH PSC 01(a) and 05.

³ KRS 278.485 refers to lines past the meter to the point of desired service as “service lines.” See also 807 KAR 5:026 “Gas service; gathering systems”, Section 6 “Customer Lines and Metering Facilities” (emphasis added). Section 6(6) of that regulation provides: “Metering pressure shall not exceed eight (8)

master meters, does not undo EKM’s designation as a gathering system. (See EKM Brief pp. 4-7). While regulations and good practice now prioritize locating the meter as near to the pipeline as possible, these are relatively recent developments.⁴ Safety regulations have also evolved to determine where a producer or gatherer’s responsibility (or liability) ends and where a customer’s begins.⁵ Locating the meter closer to the pipeline rather than the home was one way to address this situation, and is the practice going forward. Maps asserting locations of lines for Kentucky Frontier customers, and Kentucky Frontier’s “belief” about the existence or function of a system unsupported by evidence in the record (see KFG Brief pp. 6-7), simply have no bearing on the determination of EKG’s gathering system function.

EKM’s system is not intrastate transmission.

Similar to the definition for a “local distribution company,” the KRS 278.504(1) definition for an “intrastate pipeline” expressly exempts “any part of any pipeline expressly dedicated to storage or gathering or low pressure distribution of natural gas.” KFG nonetheless argues for a different kind of PSC regulation of the EKM system, on contentions that the system — or maybe just parts of it — meet transmission criteria. In doing so, KFG focuses largely on three segments of the EKM system: KZ-East, C-Line, and A-1. (KFG Brief pp. 4-5). This argument relies on unsupported allegations, factual inaccuracies, and misapplied law.

KFG’s Brief reflects Scott Shutte’s impressions and opinions about the Jefferson Gas system based on a sales brochure prepared by Jefferson Gas rather than actual evidence in this

ounces or .5 psig”; however, KFG’s Brief at pp.13-14 ignores the low pressures at which such EKM customer/service lines operate.

⁴See 807 KAR 5:026, Section 5(5): “All metering and regulating equipment shall be as near to the gathering line as practicable, in accordance with safe and accepted operating practices.” 807 KAR 5:026 was not promulgated until 1982, with amendments in 1983, 1990, 1996, 2018 and 2019.

⁵ See, esp., KRS 278.485(2)-(4); 807 KAR 5:026, Sections 2, 4-6.

record.⁶ It also conflates the PHMSA classification for safety purposes with classification by functional purpose for PSC regulation. While examining the C-Line, KFG cites the PHMSA FAQs — not the actual regulations and standards — to suggest that the C-Line is entirely a transmission line with no production. (KFG Brief pp. 4-5, Exhibit 2). There are, however, producer purchase meters on the C-Line, including from Troublesome Creek Gas.⁷ Analyzing the C-Line solely pursuant to PHMSA safety guidelines also misses that these guidelines are not a definitive classification of the line’s functionality⁸ and cannot support making EKM as PSC-regulated intrastate pipeline or utility.

KFG claims that Line A-1 does not have production located on the line, is solely supplied by the C-Line, and that this makes it a transmission line. (KFG Brief p.4). This claim blatantly ignores EKM’s data request responses that provide information about production gathered on the A-1 line segment.⁹ KFG also asserts that the KZ-East line is “inarguably still in DOT-jurisdictional service” and attempts to minimize the local production on that line. (KFG Brief p. 4). DOT certainly has broad jurisdiction over pipeline safety, but this mistakes the actual function of this pipeline and again ignores the producer meters on the line — there is production introduced

⁶ The Shutte Testimony pp. 5-7 expounds on how Jefferson Gas’s “marketing literature described the system” (p.6 l.5) and how things “seemed” to KFG, then admits that “Frontier has no expertise or business interest in producing, gathering or exporting gas” (p.7 l.14). His statistics about miles of pipeline and categories are said to be based on the sales brochure. KFG’s Brief (pp.3-5) then re-asserts those same statistics, but with its own categories and labels applied. Its citation of two EKM responses for those statistics (KFG Brief p.3 fns. 7-8), are actually to the requests made, not the responses.

⁷ See EKM Response to PH PSC 01(a) and 05, identifying five (5) purchase/producer meters on the C-Line.

⁸ The cited FAQ states that what it presents are not substantive rules, *see* KFG Brief Exh.2, p.1. In addition, KFG’s contention that Gathering FAQ 7112007 example 9 “seems to indicate that the entire EKM system meets the transmission criteria” (KFG Brief p.5, emphasis added) is superficial in declaring the example to be “like EKM,” missing that it focuses entirely on the sale of “processed” gas downstream, but EKM’s system has no gas processing.

⁹ EKM 11/28/22 Supplemental Response to 1 PSC 01 (adding producer meter to A-1 diagram); EKM Responses to PH PSC 01(a) and 05 (identifying producer interconnect on A-1 line).

at the eastern end of KZ-East, upstream of the West Liberty meter.¹⁰ Additionally, FERC made a definitive determination that KZ East reverted to gathering function upon its abandonment by Columbia Gas.¹¹ Therefore, even if PHMSA may classify KZ East as transmission, the line's primary function for PSC purposes remains that of a gathering system.

EKM's regulation as a gathering system — for safety and functionality — is appropriate.

KFG plainly is not satisfied with the level of regulation to which it thinks EKM is subjected. It presents a scattershot array of conclusory assertions that EKM's system (in whole or in part) should be categorized as x, y, or z and thus should be regulated differently, but without those assertions being consistent or cohering into a meaningful, sensible structure. In the end, KFG may simply want EKM's system to be treated like the "several small gas systems in eastern Kentucky" that KFG purchased and runs and which "have always been treated as utilities and regulated by the Commission." (KFG Brief at p.9). However, Kentucky statutes provide for different types and levels of regulation for those who own/operate natural gas pipelines and those distinctions — based on pipeline and system characteristics, function, etc. — must be respected. EKM cannot be legitimately analogized to KFG or forced out of its category as a gathering system.

Gathering systems like EKM often serve to purchase locally produced gas from multiple producers for sale in interstate markets or to wholesale customers or farm tap customers, and

¹⁰ The EKM Response to PH PSC 01(a) accurately shows the producer interconnection in Morgan County at the physical location 37.911165°N, 83.261104°W, which is on the KZ-East line. The initial Response to PSC PH 05 mistakenly located that same interconnection in Boyd County and on the A-4 line; a Corrected Response filed Feb. 9, 2023, matches the Response to PH PSC 05 to PH PSC 01(a).

¹¹ "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 [FERC's] jurisdiction." *Columbia Gas Transmission, LLC and Jefferson Gas, LLC*, 129 FERC ¶ 61,029, at P 4. "[T]he 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.

custody transfer (whether in terms of ownership or physical custody) does not trump the gathering function.¹² Supplementing interstate gas when needed (for example, when local production does not provide enough gas in winter months) does not necessarily change a FERC gathering function determination,¹³ and is not determinative of Kentucky law, which along with PSC decisions squarely views EKM as a gathering system. (*See* EKM Brief pp. 5-9.)

EKM differs from KFG in a substantial way. KFG does hold itself out as providing service “to or for the public” (an essential part of the KRS 278.010 definition of a utility), including non-farm tap end-users, and acquired its current system for exactly such purpose; EKM does not hold itself out as providing this service, and rather provides service to a limited class of persons who, based on proximity to gathering facilities and requesting service, are entitled to limited gas service pursuant to KRS 278.485. EKM exists to facilitate production in the region, and its only service obligations are to customers within one-half air mile of the system. *See* KRS 278.485.

The fact that EKM also sells gas to KFG and a municipality does not change its gathering function. (*See* EKM Brief at p.8). The KFG Brief (p.10) cites the 1999 *Calvert City* decision¹⁴ for an assertion that such transactions somehow make EKM a utility under KRS 278.010.

¹² *See* API 80 2.6.2.2, “Ownership/Physical Custody: Custody transfer — whether defined in terms of ownership or physical custody — was another factor judged unsuitable for representing pipeline function. This factor has become inherently unstable and unreliable for such purposes due to the rapidly evolving nature of transactions in the gas transportation industry and the increasingly frequent changes of ownership of the facilities themselves.” Ownership of a system’s segments or components is also not determinative, and KFG’s attempt to distinguish the Equitable system on this basis (Brief p.13, citing Case No. 2013-00163, 9/3/13 Order pp.2,5) is unavailing. *See* EKM Brief pp. 6-7 & fns. 24-25.

¹³ *See* EKM Brief at pp. 3-4 & fn.12; *Columbia Gas Transmission, LLC and Jefferson Gas, LLC*, 129 FERC ¶ 61,029, at P 26 (“incidental interstate transportation service” did not “affect[] the non-jurisdictional status” of gathering operations). *See also Equitrans, L.P. and Big Dog Midstream, LLC*, 181 FERC ¶ 61,235, at P 34 (“allow[ing] the gathering company to provide incidental interstate transportation service through the newly acquired facilities without affecting the non-jurisdictional status of its gathering operations”).

¹⁴ Case No. 1999-00058, *Petition of Calvert City Power I, L.L.C. for Declaratory Order*, 7/6/1999 Order.

Calvert City is not applicable. Calvert City Power (CCP) was an exempt wholesale generator (EWG) under the Federal Power Act proposing to locate in Kentucky. Because EWGs had not yet been addressed by Kentucky law,¹⁵ it sought a declaratory order confirming it was not a utility. In the course of concluding that CCP was not a utility, the PSC cited as one of several factors that it had no contracts or intent to sell energy to Kentucky regulated utilities.¹⁶ In the present investigation, whether or not EKM is a KRS 278.010(3) utility is not a function of whether it sells gas to a municipality or regulated utility for resale. EKM is not such a utility primarily because it is a “gathering” or “farm tap” system” under Kentucky law that obliges pipelines to provide “farm tap service” to a limited class of customers, and the PSC has repeatedly found that such service is not “to or for the public” and therefore not a utility. *See* KRS 278.485; EKM Brief at pp. 5-7.

Because there are Kentucky producing wells all along the EKM system, it is distinguishable from the situation initially presented in the Pollitt System cases. The Kentucky producing wells all along the EKM system, along with the agreements in place to provide gathering service, support the argument that EKM can only be a gathering system. Over the long saga of the Pollitt System, when it did not transport to a wholesale customer other than on an intermittent, at-will basis, the PSC’s focus was on the “[t]he indefinite nature of this transaction”, which prevented “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.”¹⁷ Unless and until the Pollitt System entered

¹⁵ *Calvert City* predated passage of KRS 278.700-714, creating the Kentucky State Board on Electric Generation and Transmission Siting, which now specifically provides for the (non-utility) regulation of such projects. In general, an EWG would meet the definition of a “merchant electric generating facility,” KRS 278.700(2).

¹⁶ *Calvert City*, 7/6/1999 Order at pp.5-6. The PSC more generally concluded that CCP was restricted to selling for resale, and that this restriction was why it was not selling or supplying to or for the public. *Id.* at p.6 (citing the Order dated 11/1/89 in Case No. 89-232 (Electric Energy, Inc.)).

¹⁷ Case No. 2017-00120, *In re Pollitt Enterprises, Inc. et al.*, 12/27/17 Order p.14.

into a written agreement for such transport through its system, the PSC held that it was a “distribution line” subject to full regulation as a utility.¹⁸ With the subsequently signed agreement, the PSC recognized the Pollitt System as a gathering system with a commingling gathering function, and that it was not a gas distribution utility, with its retail farm tap service as the only service subject to the PSC’s statutorily-limited jurisdiction.¹⁹

EKM provides gathering service for 25 producers at 36 purchase meters serving hundreds of natural gas wells in Eastern Kentucky.²⁰ 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.²¹ 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.²² The EKM system therefore falls within the PSC’s latest decision about the Pollitt System and should likewise be determined as merely a gathering system, with its farm taps subject to the limited jurisdiction of the PSC.²³

¹⁸ *Id.* KFG asserts that the producer “owned the gas that was transported on the Pollitt System” and then insists that EKM’s system is significantly different because “EKM owns all the gas that is transported through its pipelines.” (KFG Brief p.12). EKM would have to have some right to the gas in order to supply it to farm tap customers along its lines, so this distinction is not sensible. *See also* fn. 12 above.

¹⁹ Case No. 2018-00263, *Georgia Johnson v. Peoples Gas KY, LLC*, 3/27/20 Order p.13 (citing Case No. 2018-00103, *Pollitt Enterprises*, 6/11/19 Order pp. 1-2).

²⁰ *See* Response to 1 PSC 04; Response to PH PSC 01(a) and 05.

²¹ *See* Response to 2 PSC 01(c) and related attachment; *see also* Response to PH PSC 01(c) and 07.

²² *See* Response to 1 PSC 09; *see also* Supplemental Response to 1 PSC 09. Currently, there is only one tap that supplies a large-volume user, the East Kentucky Correctional Complex in West Liberty. However, as conceded in KFG’s Brief (p.9 fn.16), the prison is a customer of the municipality’s gas distribution function. EKM has not bypassed the municipality to directly serve the prison.

²³ EKM does not dispute that its farm taps are subject to limited PSC jurisdiction as required in KRS 278.485; it has been working to prepare a farm tap tariff that it anticipates filing in the very near future.

Conclusion

KFG's Brief provides unsupported assertions masquerading as facts, mischaracterizations, and misapplied law in attacking the jurisdictional status of EKM. The unsupported arguments and lack of evidence in KFG's brief should therefore be rejected in whole. Without supportive evidence from the record in this case, KFG's Brief only serves to create confusion and does not provide helpful assistance with the investigation. As the PSC knows, EKM's system has historically been an important part of the production and gathering system in multiple counties in Eastern Kentucky and will continue to be so in the future. The facts in the record along with a correct analysis of applicable law support the conclusion that EKM should remain regulated as a gathering system.

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