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PUBLIC SERVICE
COMMISSION

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 DEFENDANT'S MOTION TO DISMISS

Comes the Complainant, by counsel, and in response to the motion of Defendant Peoples Gas KY LLC to dismiss this matter with prejudice, and states as follows:

Defendant, Peoples Gas KY, LLC's ("Peoples") argues that it provides "farm tap" service under KRS 278.485 and that it is not a "utility" within the meaning of Chapter 278. A reading of the statute reflects plainly that Peoples gas delivery services do not fall under the ambit of KRS 278.485. To the extent that the Commission may have previously concluded that Peoples was not a utility as defined by KRS 278.0210, 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").

BACKGROUND

Johnson owns property in Garner, Kentucky, which is supplied with natural gas by Peoples. Complaint at ¶1. On April 23, 2018, EQT Production Company, which owns the wells and pipelines through which Peoples delivers gas to Johnson, notified Peoples that it was disconnecting the gas supplied by the WL745472 pipeline ("Pipeline") on or around September 1, 2018, because it was no longer feasible to maintain and operate the pipeline. *Id.* at ¶3-4. On May 16, 2018, Peoples sent a letter to Johnson stating in part:

We have been put on notice recently by the supplier that owns the wells and/or pipelines that services your community/home that they will be terminating our supply received from WL 745472. They will not be delivering any more gas to the pipelines that serve your home on or around September 1, 2018. Peoples does not have any other gas supply in your area. Once the supplier terminates the gas, we will not be able to deliver natural gas to your home.

Johnson currently has no other supply of natural gas or other source of heat for her home.

The gas service Peoples provides 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 of 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.”

ARGUMENT

I. PEOPLES IS A “UTILITY” AS DEFINED UNDER KRS 278.010 AND 278.030

Johnson requests not that the Commission “fundamentally alter the scope of Peoples KY’s gas service in Kentucky,” but instead that the Commission recognize Peoples for what it is: a “utility” that is required to provide an adequate level of service to the customers in its service area. KRS Chapter 278 requires that every “utility,” as defined by KRS 278.010(3), shall furnish adequate, efficient and reasonable service, which includes the obligation to assure that customers such as Johnson are provided a reasonable continuity of service and that the utility has sufficient capacity to meet the maximum estimated requirements of the customer. KRS 278.030; KRS 278.010(14). Peoples’ natural gas service falls within the definition of a “utility” as defined by KRS 278.010(3), and despite having been characterized as a “farm tap” service by the Commission, Peoples is required 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(11) defines a “facility” 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 of 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” owned by Peoples and used for or 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 meets the definition of a “utility” and is required to provide adequate service to Johnson.

While Peoples argues that the Commission has already issued an Order finding that Peoples is a farm tap provider and not a utility, such a position is in direct contrast with the position the Commission has previously taken on an almost identical issue. In *Pollitt v. Commonwealth*, an unmarked natural gas line was discovered in Warren County that was in violation of several regulations. 2005 Ky. App. Unpub. LEXIS 959, *1 (Ky. Ct. App. 2005). The line was found to be owned by the Gas Group, which was owned and operated by Pollitt. *Id.* The Commission found that the line in question was pressurized and supplied gas to approximately 50 customers. *Id.* The Commission entered an order assessing penalties and directing the Gas Group to apply for a certificate of convenience and necessity for the line. *Id.* at *2. The Gas

Group did not follow the Commission's Order and the Commission filed a complaint in the Franklin Circuit Court requesting injunctive relief and enforcement of its Order. *Id.* at *3. In response to the Gas Group's argument that the Commission lacked jurisdiction to enter the original order, the Commission argued that it was authorized to regulate "utilities" and that the Gas Group was a "utility" within the meaning of KRS 278.010(3), as cited above. *Id.* at *5.

Specifically, the "PSC argues that the Gas Group was a utility because the natural gas line provided "**farm tap**" gas services to some fifty property owners along the gas line's route. The property owners pay for the gas utilized. Thus, the PSC concluded the Gas Group clearly distributed natural gas to the public for compensation and met the requirements of a utility under KRS 278.010(3)(b)." *Id.* Pollitt and the Gas Group argued that since the farm taps were provided to the fifty property owners because it was required under KRS 278.485, which requires a gas pipe line company to furnish gas service to property owners within ½ mile of its gas gathering lines, that it should not be considered a utility because its provision of gas was at the direction of the PSC. *Id.* at *5-6. However, the Circuit Court agreed with the Commission and found that the "language of KRS 278.010(3)(b) is clear that any person who operates a facility which produces or distributes natural gas to the public for compensation **is a utility.**" *Id.* at *6. In addition, the Court found that there was no exception to KRS 278.010(3)(b) that would allow a "utility" to avoid that classification solely because it supplies gas under farm taps as required by KRS 278.485. *Id.* at *7. As a result, the court agreed with the Commission's argument and found that the Gas Group was a utility, despite it supplying gas only through "farm taps."

This case is almost identical to *Pollitt*. While in the *Pollitt* case the Gas Group owned the gas line in question, in this case Peoples owns the equipment and instrumentalities that enable it to sell gas to the public. Even if Peoples is serving its customers solely through so-called "farm

taps,” the *Pollitt* case and the Commission’s position in that case make clear that Peoples can still be classified as a utility despite serving only “farm tap” customers. Peoples appears to argue that because it does not own the gathering lines or producing wells and provides only farm tap service that it cannot be classified as a “utility,” however, as outlined in *Pollitt* and as argued by the Commission in that case, since Peoples owns property used to sell gas to its customers it is a utility under the statute despite its utilizing only a “farm tap” system.

In addition, it is precisely because Peoples does *not* own the gathering lines or wells that makes it unlawful for it to cut off Johnson’s service in this case. Under KRS 278.485(6) it is the owner of the gas pipelines and wells, (in this case EQT and its successor), can abandon those wells and pipelines and cease serving those customers connected to it under KRS 278.485(6). However, since Peoples does not own those lines or wells and is instead engaged in the business of purchasing gas *from* the owner of those gas pipelines and wells, in order to deliver to customers from wells and pipelines owned by third parties, Peoples is still obligated to serve those customers within its system because it is a “utility.” Peoples obligations are not extinguished solely because its current supplier chooses to abandon a pipeline. Regardless of whether one accepts Peoples’ characterization of their business as providing “farm tap” service, it is a “utility” subject to Commission regulation and must provide adequate service to Johnson and the other customers within its service area.

II. PEOPLES’ TARIFF IS CONTRARY TO KENTUCKY LAW AND SHOULD BE REVISED BY THE COMMISSION.

Even if Peoples’ tariff gives it the right to abandon gas service to any customer served from a line no longer operated by its supplier, such authorization was based on the erroneous conclusion of the Commission that the predecessor to Peoples was not a “utility.” As a “utility,” Peoples does not have the legal right to discontinue service to Johnson or any other customer and

instead has an obligation to provide adequate service. As the *Pollitt* case makes clear, Peoples' classification as a farm tap system does not create an exception to KRS 278.010(3) simply because Peoples is mandated to provide taps and the Public Service Commission does not have the authority to approve a tariff that violates this statutory language. *Pollitt*, 2005 Ky. App. Unpub. LEXIS 959 at *7 (citing *City of Covington v. Kenton County*, 149 S.W.3d 358 (Ky. 2004)). Because Peoples' tariff was unlawfully approved by the Commission, its tariff should be revised to reflect that Peoples' is a "utility" and is required to provide adequate service as required by Kentucky law.

The PSC is a creature of statute and has only such powers as granted by the General Assembly. Thus, any issue involving the PSC's authority is necessarily one of statutory analysis. *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). The statute in question, KRS 278.485, provides in full that:

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 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, shall furnish gas service to such owner and applicant, subject to and upon the following terms, conditions, and provisions, to-wit: (1) The gas service shall be furnished at rates and minimum monthly charges determined by the Public Service Commission.

(2) The applicant for such gas service shall construct or cause to be constructed, and shall maintain and keep in good repair, the service lines, and shall provide and install or cause to be installed, and keep in good repair, the necessary automatic gas regulators, and shall pay the entire cost thereof. The company, at its own expense, shall provide, install, and maintain the necessary gas meters.

(3) The construction of each service line; the installation, type, and number of automatic gas regulators and gas meter or meters, and the connection thereof with the gas producing well or pipeline shall be under the supervision of the Public Service Commission or an agent thereof; and shall conform to such standards of safety, location, and convenience as may be prescribed by said commission.

(4) Neither the gas producer nor the gas pipeline company shall be responsible for maintaining any fixed or specified gas pressure. Neither the gas producer nor the gas pipeline company shall be liable for any accident or accidental injuries or damages which may result from any defect or failure of any automatic gas regulator or for any leakage or other defect or failure of any service line installed or damages which may result from any defect or failure of any automatic gas regulator or for any leakage or other defect or failure of any service line installed or constructed by the applicant.

(5) 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.

(6) Nothing in this section shall be construed to restrict the right of any gas pipeline company to abandon any gas well or any gathering pipeline, or any part thereof, and to remove any such abandoned pipeline or lines. If service to any customer is terminated because of lack of gas for a period of six (6) months in a pipeline or line which served him, the company shall remove a portion of the main line so as to render it inoperable.

(7) Subject to the rules and regulations of the Public Service Commission, any service may be disconnected and discontinued by the company for failure of the customer to pay any bill as and when due and payable.

(8) Every gas pipeline company obtaining gas from producing wells within the shall offer each surface owner the right of a tap or hookup for natural gas from any gathering line which crosses the surface owner's property. The cost of the tap or hookup shall be borne by the consumer.

KRS 278.485.

Peoples is not a "gas pipeline company" within the meaning of the statute, but instead purchases gas *from* such a company, and distributes it to customers of Peoples. 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[.]" The "farm tap" statute does not govern the relationship of Peoples with its customers, but rather imposes an obligation on gas pipeline companies to allow the owner of property to tap into a producing well


or gathering line if they fall within the geographic limits established by statute. Where a company is in the business of delivering natural gas to customers at rates and through a service regulated by the Commission, and utilizing its own equipment to regulate such service, it is a “utility” under KRS Chapter 278.

CONCLUSION

Wherefore, for the reasons herein stated and as set forth in the Complaint, Complainant respectfully requests that:

1. The Commission enter an Order confirming that Peoples is a public utility under KRS 278.010(3) and subject to regulation by the Commission;
2. The Commission 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,

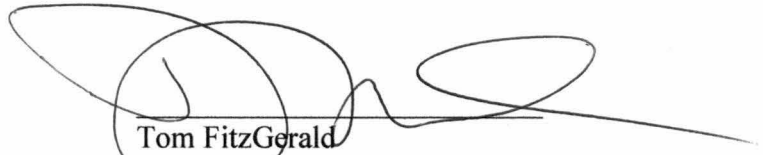


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Complaint was 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 this 24th day of September, 2018.



Tom FitzGerald
Counsel for Complainant