

ENERGY ALERT

THE PENNSYLVANIA PUC REAFFIRMS AND CLARIFIES JURISDICTION OVER "MIDSTREAM" NATURAL GAS GATHERING PIPELINES

The Pennsylvania Public Utility Commission ("Commission") has clarified its June 2011 Order which determined that the proposed gas gathering service of Laser Northeast Gathering Company, LLC ("Laser") satisfied the definition of a "public utility" and would be regulated by the Commission. However, this clarification still leaves unanswered questions for other gathering companies in Pennsylvania.

With Or Without An Application

Importantly, the Commission noted that a gathering company could be a "public utility" even if that company does not file an application with the Commission. In doing so, the Commission stated that it does not intend to impose economic regulation on gathering and transportation service providers as a general matter. But, it explained that it would exert jurisdiction over other gathering companies that provide services similar to Laser as long as those companies fall under the definition of a "public utility." This definition requires a case-by-case approach. So, the Commission will base its future decisions on the unique facts of each particular gathering company.

"For The Public"

A key part of the definition is holding oneself out as offering service to "the public." In its Reconsideration Order, the Commission explained that the following facts established that Laser was providing service for the public:

- Laser will be transporting or conveying natural or artificial gas by pipeline or conduit for compensation.
- Laser explicitly stated that it would serve any and all potential customers needing to move gas through the pipeline system.
- Laser stated that it intends to utilize negotiated contracts to secure customers; and that its contracts are not meant to be exclusionary, but rather to establish technical requirements, delivery points, and other terms and conditions of service.
- Laser made a commitment to expand its capacity, as needed, to meet increased customer demand.

The Commission explained that if these facts were not present, the gathering service would not qualify as "public utility" service and the service would not be subject to economic regulation by the Commission.

ENERGY ALERT

But the Commission did clarify that entities that took certain steps and operated in certain ways would not be public utilities. Specifically, the Commission clarified that a project would not be considered a public utility if it: 1.) does not (or has not) declared its intent to provide service to any producer; and 2). structures its contracts with the producer to limit the ability of other producers to demand to be served (in other contexts, these contractual provisions include limiting the ability to assign or transfer to a third party the rights under the contract.) Notably the Commission refused to say that a gathering line is not a public utility just because the entity didn't ask the PUC to certify it as a public utility

Gathering companies who do not wish to be a public utility will need to take steps to ensure that they are not offering service "for the public" or that they are otherwise excluded from the definition of a public utility by structuring their product to meet the criteria specified in the PUC's order. But, as noted above, the success of such a strategy will depend on their own unique facts.

Please note that if a gathering company falls within the definition of a public utility, it will need the prior approval of the Commission before it can begin (or continue) legal operations. There are astronomical risks for providing service that requires PUC approval as public utility service without the Commission's prior approval. In the past, for example, the Commission has ordered such de facto public utilities to refund all of the rates charged to customers. See, e.g., *Popowsky v. Pennsylvania Public Utility Commission*, 647 A.2d 302 (Pa. Commw, 1994). On the other hand, there are numerous examples of water, natural gas and electric projects that serve a specified group of customers but have been structured so as to qualify as a "private" rather than public utility. There are pros and cons to both approaches.

Conclusion

Eckert Seamans can assist you in understanding the issues and opportunities created by the Commission's decision on Laser's application. Importantly, we can also advise you how to structure your project so that it will not constitute a public utility under the PUC's Laser decision. If you would like more information about Laser's application or assistance in understanding how your interests may be affected by the Commission's actions, please contact Dan Clearfield, Carl Shultz or Betsy McCoy, or any one of our other Energy Group attorneys at Eckert Seamans.

This Energy Alert is intended to keep readers current on matters affecting energy, and is not intended to be legal advice. If you have any questions, please contact one of the attorneys listed above, or any other attorney with whom you have been working.