

ENERGY ALERT

PENNSYLVANIA PUBLIC UTILITY COMMISSION JURISDICTION OVER MARCELLUS SHALE “MIDSTREAM” NATURAL GAS GATHERING PIPELINES IS IN QUESTION

On December 1, 2010, the Recommended Decision (RD) of the Pennsylvania Public Utility Commission administrative law judge (ALJ) was issued. The RD adopts the position of the state-wide trade association of natural gas producers, PIOGA (Pennsylvania Independent Oil and Gas Association*), PIOGA member MarkWest Liberty Midstream & Resources, LLC (MarkWest), and another gathering company, Laurel Mountain Midstream, LLC (LMM), that the gathering service proposed by Laser is not “to or for the public” because the facilities are to be designed and constructed only to serve specific, privileged individuals – producers – at the particular locations where the wells are built and to transport the raw natural gas to designated transmission pipelines and refinement facilities and, ultimately, to the market and end-users.

The ALJ concluded that that Laser does not meet the Public Utility Code definition of “public utility” as required for the Commission to issue a CPC, and that the proposed gathering service “is simply the commercial process used to carry natural gas from the producers to market.”

The ALJ’s conclusions are supported by her findings that: (1) these pipelines gather raw unprocessed natural gas that contains hydrocarbons, water, sand, contaminants and other elements that are inconsistent with interstate transmission pipelines’ gas quality specifications and consumer use; (2) these substances must be removed before the natural gas is transported in transmission pipelines or consumed by end-users; and (3) natural gas producers are sophisticated companies in a competitive business that depends upon flexibility and the ability to tailor transactions to each producer’s needs.

The proposed settlement attempted to minimize the concern of PIOGA and other non-regulated gathering pipelines that this case could subject presently unregulated gathering pipelines to PaPUC jurisdiction. However, the ALJ validated these concerns by concluding that a finding that Laser is providing public utility service “would translate into a requirement that similarly situated gathering companies also be certificated” because Section 1101 of the Public Utility Code requires that an entity providing public utility service be certificated prior to offering or providing such service.

The ALJ also concluded that the proposed settlement does not change the applicable legal standards or the result of the application of those standards to Laser’s application. The ALJ agreed with PIOGA and PIOGA members MarkWest and Superior that the proposed settlement conditions addressing environmental, eminent domain, siting, land use, health and pipeline safety concerns were beyond the PaPUC’s jurisdiction and , therefore, unenforceable and “meaningless.”

While all parties agreed on the need for and benefits of PaPUC pipeline safety regulation, the ALJ concluded that present law does not authorize the PaPUC to engage in safety regulation of gathering pipelines or the “light-handed” regulation sought by Laser and settling parties. Accordingly, the ALJ’s ultimate conclusion is that legislation is needed to subject gathering pipelines to “public utility” regulation, including either PaPUC pipeline safety regulation or “light-handed” regulation.

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While this is a welcome decision to PIOGA and its gathering pipeline members, it is only a preliminary decision and will be reviewed by the PaPUC. Exceptions to the RD must be filed by Tuesday, December 21, 2010, and replies to exceptions ten days later.

There is no time period for the Commission's review. While the Commission's *en banc* Marcellus Shale hearings earlier this year show that it is well aware of the significance of this case and the need for a timely decision, the Commission will take the time it believes it needs to review this case and render its decision.

Eckert Seamans can assist you in understanding the problems and opportunities the ALJ's decision will create if adopted, rejected or modified by the Commission. If you would like more information about the PaPUC proceeding or assistance in understanding how your interests may be affected by the Commission's resolution of this proceeding, please contact Kevin Moody, Dan Clearfield or one of our other Energy Group attorneys at Eckert Seamans.

* A copy of the original Alert can be found at www.eckertseamans.com, under *Publications, Industry Alerts*.

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