

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

Application of Laser Northeast Gathering Company, LLC for Approval to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering and Transporting or Conveying Service by Pipeline to the Public in Certain Townships of Susquehanna County, Pennsylvania

**Public Meeting held May 19, 2011
2153371-OSA**

Docket No. A-2010-2153371

MOTION OF COMMISSIONER WAYNE E. GARDNER

Before the Commission for disposition is the Application of Laser Northeast Gathering Company, LLC (Laser) for a certificate of public convenience to begin to offer natural gas gathering and transporting services by pipeline in the Townships of Apolacon, Choconut, Forest Lake, Great Bend, Jessup, Liberty, Middletown, and New Milford in Susquehanna County. The gathering system will be constructed to accept natural gas from wells in Susquehanna County and will extend into Broome County, New York, to the tie-in with the Millenium interstate pipeline. Laser will accept gas from wells that will be drilled by unaffiliated producers with which Laser will enter into gathering and transportation agreements. Application at 3.

To date, Laser has entered into gathering agreements with three unaffiliated producers, and six wells have been drilled that could connect to its pipeline. *Id.*, Laser St. 1a at 7. Laser's proposed project is a backbone style gathering system which will span 30 miles with up to 6 lateral lines ranging from 1-6 miles each. Application at 4. Laser states that it will furnish service to "any and all" natural gas producers operating in its proposed service territory. Laser MB at 17. The Company states that its primary business is to grow with the development of the Marcellus Shale play and to serve as many customers as possible. Laser further states that it will invest additional capital to expand and extend the system as needed. Laser MB at 17-18. If granted a certificate, Laser will negotiate contracts with customers for technical terms of service and will establish a maximum rate in a filed tariff. Application Attachment C.

By way of background, the natural gas industry can be divided into four basic sectors: (1) exploration and production; (2) natural gas gathering, treating, and processing or "midstream" services; (3) natural gas transportation or "downstream" services; and, (4) local distribution service. In terms of regulatory oversight, local distribution service is a traditional state regulated public utility service. The Commission also regulates some downstream providers as well. On the other end of the spectrum, exploration and production is not a Commission-regulated service. The sector at issue in this proceeding is gathering and "midstream" services. Specifically, Laser proposes to construct a natural gas gathering and transportation pipeline that will collect gas from wells and deliver it via pipeline to the Pennsylvania state line for further transportation to New York. The jurisdictional status of the sector at issue here is an issue of first impression in a contested, on-the-record application proceeding at the Commission.

Public Utility Status

A natural gas public utility is defined as “any person or corporation owning or operating facilities for transmitting natural gas to or for the public for compensation or transporting or conveying natural gas by pipeline or conduit for the public for compensation.” 66 Pa. C.S. § 102. The term does not include anyone who furnishes service only to themselves nor does it include any producer of natural gas who does not distribute the gas directly to the public for compensation. *Id.*

I disagree with the ALJ’s decision that the service proposed by Laser is not “for the public” and, that therefore, Laser is not a public utility. This case turns on the definition of the phrase “for the public”. The phrase has been developed through vigorously contested case law which spans the better part of the past century. Whether an enterprise is private or public does not depend on the number or types of persons served but upon whether or not it is open to all members of the public who may require the offered service. Drexelbrook Associates. v. Pa. PUC, 212 A.2d 237, 239 (Pa. 1965), Borough of Ambridge v. Public Service Comm’n., 165 A. 47 (Pa. Super 298).¹

According to Pennsylvania courts, the test for determining whether utility services are being offered “for the public” is as follows:

Whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or *to any limited portion of it*, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

Waltman v. Pa. PUC, 596 A.2d 1221, 1223-24 (Pa. Cmwlth. 1991), citing Drexelbrook, 212 A.2d 237, 239. “The fact that only a limited number of persons may have occasion to use a utility’s service does not make it a private undertaking if the general public has a right to subscribe to such a service.” Waltman, 596 A.2d 1221, 1224, Masgai v. Public Service Comm’n., 124 Pa. Super. 370, 188 A. 599 (1936). In Waltman, the Commonwealth Court found that a telecommunication provider was a public utility even though its services would only be used by individual commercial entities and other common carriers. It was significant to the Court that the company would offer its services to any person or company that wished to subscribe to it. However, the Court found it irrelevant that only a few large customers would wish to do so. In finding that the applicant was providing service for the public, the court noted the Commission’s policy of regulating other bulk utility services including gas transportation and WATS long distance service, even though large volume customers are generally the only users of those services. Waltman, 596 A.2d 1221, 1224-1225. The Commonwealth Court later upheld the Commission’s determination that, Core, a facilities-based competitive local exchange carrier, was serving the public, in this case, internet service providers, finding that, “the public is not confined to *the entire public*. Offering a service to a limited class of customers constitutes public utility service.” Rural Telephone Co. Coalition v. Pa. PUC, 941 A.2d 751, 760 (Pa. Cmwlth. 2008) (*Core*) (emphasis provided). Thus, offering service only to a customer group limited by its business characteristics, such as natural gas producers, can be service “for the public” as long as the service provider holds itself out as offering service to all members of the group. Laser testified that it will serve, “any and all potential customers needing to move gas through the pipeline system. So that would include large capital, largely capitalized producers, small

¹ In Drexelbrook, the Pennsylvania Supreme Court found that an apartment complex landlord who sold water, electric, and natural gas services to tenants was not a public utility because only a privileged group, tenants accepted for residency, could subscribe to the services.

capitalized producers, individual landowners owning wells, marketers, or LDC companies, landowner groups who aggregate together. Any and all opportunities to serve people seeking to take natural gas out of the ground and move it through pipelines.” Laser MB at 17. The record evidence supports a finding that Laser is holding itself out to all members of the customer group that have a need for its service and as such, is providing service “for the public” under Section 102 of the Code.

The Commission has developed a policy statement which sets forth guidelines the Commission will use for determining public utility status. The guidelines state that the Commission will make a fact based determination and will take into consideration, among other things, if the facility is designed and constructed only to serve a specific group of individuals or entities and others cannot feasibly be served without a significant revision to the project; the service is provided to a defined, privileged and limited group when the provider reserves its right to select its customers by contractual arrangement so that no one outside the group is privileged to demand service. 52 Pa. Code § 69.1401(c).

As noted above, Laser has made it clear that it will serve any customer requiring transportation of gas over its system to the extent capacity exists. Laser MB at 17. While Laser does intend to utilize negotiated contracts to secure customers, it states that the contracts are not meant to be exclusionary but rather to establish technical requirements, delivery points, and other terms and conditions of service. The fact that Laser will be using contracts is not a deterrent to conferring public utility status as the Commission’s Regulations allow negotiated contracts for natural gas transportation pipelines which are public utilities. “Transportation service shall be provided under a contract between the jurisdictional natural gas utility and the customer.” 52 Pa. Code § 60.2(6). Laser has also conceded that “like any utility service, if Laser and the customer cannot agree upon any item, the Commission has the ability to establish just and reasonable terms and conditions of service under the specific circumstances subject to the tariff.” Laser Exceptions at 24. Indeed, as a public utility, Laser would be subject to Commission jurisdiction to establish just and reasonable rates and terms of service under Sections 1301, 1304 and 1501.

Regarding the second criterion of the *Policy Statement*,² I am not persuaded that limitations in capacity serve as colorable grounds to deny public utility status to an entity that is otherwise holding itself out as willing to serve all members of the applicable customer group and makes a commitment on the record to expand its capacity, as needed, to meet increased customer demand. The need to be able to expand capacity is no different than with our other jurisdictional utilities, which often are called upon to expand their systems to meet customer needs. Additionally, there does not appear to be any record evidence quantifying the costs of such revisions and establishing that such revisions would be, in fact, significant.³ Therefore, I do not believe that there is adequate evidence to conclude that Laser is not a public utility under this criterion.

Further, while natural gas gathering and transportation service can meet the definition of “public utility,” and in the case of Laser’s proposed operations, does meet the definition of “public utility,” not all gathering and transportation service providers will be considered public utilities and subject to the Commission’s jurisdiction. Whether such entities are public utilities turns on the specific facts surrounding each pipeline’s operations, including whether the gathering and transportation services are offered to or for the “public.”

² As a Policy Statement, these guidelines are not binding and do not trump the standard established in the case law discussed herein that service to a limited customer group can constitute public utility service. Pa. Human Relations Comm’n v. Norristown Area School Dist., 473 Pa. 334, 374 A.2d 671 (1977).

³ The significance of the cost of revisions varies according to the industry involved.

"Light-Handed" Regulation

Having determined that Laser meets the definition of public utility under Section 102 of the Code, the next issue is Laser's request for what it calls "light-handed regulation." Specifically, Laser requests, as part of the non-unanimous settlement, the following: (1) to charge negotiated contract rates with a maximum rate; (2) no affiliated interest or security certificate filings; (3) reasonably expedited Section 1102 proceedings for commencement, transfer or abandonment of authority; and (4) streamlined annual reporting to be developed.

I do not believe the Commission has any express forbearance authority in the Code to refrain from applying the Chapter 11 (Certificates of Public Convenience), Chapter 19 (Securities and Obligations), and Chapter 21 (Relations Affiliated Interests) statutory provisions to Laser. Also, good cause has not been shown for any streamlined annual reporting process. Therefore, Laser's request for light-handed regulation in these areas is denied.

I also do not believe that Laser's request for light-handed economic regulation should be granted. Just like any other jurisdictional utility, including our other pipeline utilities, Laser is required to provide a tariff and a schedule of rates prior to obtaining its certification. Once the tariff and schedule of rates are approved and effective, Laser will need to obtain Commission approval of any request to change existing rates by submitting a proposed tariff and justification for the increase.

Nevertheless, consistent with our regulation of utility pipelines, I believe that approving negotiated rates as tariffed rates is permissible. Such an approach is consistent with what we have seen from other jurisdictional utilities. See, e.g., Equitable Gas Company, LLC, Pa. P.U.C. No. 22, 4th Revised Page No. 98 (Rate AGS – Appalachian Gathering Service). Such an approach is also consistent with Chapter 13 of the Code which appears to give the Commission additional discretion in setting pipeline utility rates. Specifically, Section 1308(d) of the Code, which gives the Commission the ability to suspend and investigate general rate increases, excludes gas pipeline public utilities like Laser from the suspension and investigation process. This exclusion implies that the Commission has greater discretion regarding the nature and degree of economic regulation to be applied to those entities, including Laser.

Other Settlement Terms

I disagree with the ALJ that the Settlement terms would not be enforceable. Our enforcement authority exists under Section 502 of the Code, which gives us the power to enforce orders approving certificates of public convenience, as well as Chapter 11 and related case law, which gives us the power to revoke certificates of public convenience for, among other things, a violation of an express settlement term approved by Commission order. The Commission has, on numerous occasions approved settlements of utility mergers/acquisitions subject to voluntary conditions proposed by applicants that address issues beyond the Commission's jurisdiction. See, e.g., In re: Joint Application of West Penn Power Co. for approval of a change of control of West Penn Power Co. and Trans-Allegheny Interstate Line Co., A-2010-2176520 (March 8, 2011).

I agree with the Office of Trial Staff that this case is distinguishable from Western Pennsylvania Water Co. v. Pa. PUC, 370 A.2d 337 (Pa. 1977) (Western), which has been cited to support that the Commission cannot impose conditions on applications *that would expand its jurisdiction*. In this case, the settlement terms represent voluntary commitments agreed to by

Laser as part of its Application for a certificate. The settlement terms do not constitute conditions unilaterally imposed by the Commission as part of its order granting an application, which was the case in Western. As such, the Commission is not imposing extra-jurisdictional conditions, and hence, Western is not on point. Moreover, as mentioned above, the Commission routinely approves voluntary conditions proposed by applicants that address issues beyond the Commission's jurisdiction.

Because I disagree with the ALJ's determination that acceptance of these settlement terms would be an unlawful expansion of the Commission jurisdiction, I believe that the Settlement terms should be remanded to the OALJ for further development of the record regarding whether they are in the public interest. Of particular interest to me, is the Settlement term providing that Laser agrees not to seek an exclusive service territory.

Conclusion

As I believe that Laser meets the definition of public utility, this case should be remanded to the OALJ for the limited purpose of determining whether the granting of a certificate of public convenience is "necessary or proper for the service, accommodation, convenience, or safety of the public" under Section 1103(a) of the Code, 66 Pa. C.S. § 1103(a).

The record should be developed so that the following questions may be answered:

- If a Certificate of Public Convenience is determined to be necessary or proper, should any conditions be imposed as conditions precedent?
- Should an exclusive service territory be considered?
- Should Laser's interconnect contracts be publicly available to police and prevent unreasonable discrimination in violation of Section 1304 of the Code?
- Is Laser's proposed tariff reasonable under the Code?
- Are the Settlement terms in the public interest?


Because new hearings will be conducted on the above subject matter, consistent with Chapter 5 of the Commission's Regulations, the OALJ shall permit intervention by interested persons not currently participating in the proceeding for a limited time as deemed appropriate by the OALJ.

THEREFORE, I MOVE THAT:

1. The Office of Special Assistants draft the appropriate Order consistent with this Motion.

May 19, 2011

Date


Wayne E. Gardner, Commissioner

