**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held May 19, 2011

Commissioners Present:

Robert F. Powelson, Chairman

John F. Coleman, Jr., Vice Chairman, Concurring Statement

Tyrone J. Christy, Dissenting

Wayne E. Gardner

James H. Cawley, Dissenting Statement

Application of Laser Northeast Gathering A-2010-2153371

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

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission or PUC) for consideration and disposition are the Exceptions filed to the Recommended Decision of Administrative Law Judge (ALJ) Susan D. Colwell, which was issued on December 1, 2010. The following Parties filed Exceptions on January 14, 2011: Laser Northeast Gathering Company, LLC (Laser or Company), Silver Lake Association (Silver Lake), Ms. Vera Scroggins and the Office of Trial Staff (OTS).[[1]](#footnote-1) Corrected Exceptions were filed by the OTS on January 19, 2011. On February 7, 2011, the following Parties filed Replies to Exceptions: DTE Pipeline Company and Bluestone Pipeline Company of Pennsylvania, LLC (jointly, DTE/Bluestone), Laurel Mountain Midstream, LLC (LMM), MarkWest Liberty Midstream & Resources, LLC (MarkWest), and the Pennsylvania Independent Oil and Gas Association (PIOGA).

**I. History of the Proceeding[[2]](#footnote-2)**

On January 19, 2010, Laser filed an Application for a Certificate of Public Convenience (Certificate) authorizing it to begin to offer natural gas gathering and transporting or conveying service by pipeline to the public in the townships of Apolacon, Choconut, Forest Lake, Great Bend, Jessup, Liberty, Middletown, and New Milford in Susquehanna County, Pennsylvania (Application). Notice of the Application was published in the *Pennsylvania Bulletin* on January 30, 2010, at 40 Pa. B. 687, and in the *Susquehanna County Independent* on January 27, 2010.

Several Parties filed protests to the Application, as follows: on February 19, 2010, Laurie and Brian Kaszuba; on February 20, 2010, Vera Scroggins; on February 26, 2010, Rebecca Roter; on March 1, 2010, ETC Northeast Pipeline LLC (ETC); on March 5, 2010, Rita Chirumbolo Ernstrom; and on March 8, 2010, Silver Lake.[[3]](#footnote-3)

Several Parties also filed petitions to intervene, as follows: on March 1, 2010, ETC and PIOGA[[4]](#footnote-4); on March 5, 2010, LMM; on April 2, 2010, MarkWest; and on April 12, 2010, DTE. A prehearing conference was held on April 28, 2010. At the prehearing conference, Superior Appalachian Pipeline, LLC (Superior) presented a petition to intervene. All six Petitions to Intervene were granted as unopposed.

The Office of Consumer Advocate (OCA) filed its Notice of Intervention on April 1, 2010, and the OTS filed its Notice of Intervention on April 26, 2010.

At the requests of Representatives Sandra J. Major, Tina Picket, Matthew E. Baker, and Karen Boback, two public input hearings were scheduled and held in Susquehanna County on July 7, 2010. Details regarding the witness testimony provided during the public input hearings are contained in the Recommended Decision on pages 14-47.

Evidentiary hearings were held on August 23 and 24, 2010. The record consists of a transcript of 445 pages and the Parties’ testimony and exhibits. On September 10, 2010, Laser, the OTS, Silver Lake, Vera Scroggins, and William C. Fischer (collectively, the Settling Parties) filed a non-unanimous Joint Petition for Settlement (Settlement). The Parties filed Briefs on September 27, 2010, and Reply Briefs on October 12, 2010.

As noted, the Commission issued ALJ Colwell’s Recommended Decision on December 1, 2010, in which she disapproved the Settlement and denied Laser’s Application. Laser, Silver Lake, Vera Scroggins and the OTS each filed Exceptions on January 14, 2011. DTE/Bluestone, LMM, MarkWest and PIOGA, filed Replies to Exceptions on February 7, 2011.

After the close of the record in this proceeding, on February 22, 2011, the New York Public Service Commission issued an Order, granting a Certificate of Public Convenience and Necessity to Laser and DMP New York, Inc. (DMP) pursuant to Section 68 of the New York Public Service Law, N.Y. Pub. Ser. Law § 68. *DMP New York, Inc. and Laser Northeast Gathering Company, LLC – Petition for Order Granting a Certificate of Public Convenience and Necessity and Establishing a Lightened Regulatory Regime*, Case 10-G-0462. The Certificate authorizes Laser and DMP to construct and operate Laser’s transmission line between the New York-Pennsylvania state line and the point of interconnection with Millennium Pipeline Company’s interstate transmission line in the Town of Windsor, Broome County, New York. The Order provides for lightened regulation of Laser and DMP due to the fact that they provide gas transportation service on a competitive basis. Laser provided us with a copy of the Order on February 28, 2011.

On February 24, 2011, Laser filed a Response to Extra-Record Evidence Included in the Replies to Exceptions of Certain Intervenors (Laser’s Response). On March 8, 2011, PIOGA filed a Reply to Laser’s Extra-Record Filings (PIOGA Reply), including the New York PSC’s February 22, 2011 Order and publicly available extra-record information that Laser included in and relied upon in its Exceptions. On March 9, 2011, LMM and MarkWest jointly submitted a letter in response to the Laser Response of February 24, 2011, and Laser’s February 28, 2011 filing of the New York PSC February 22, 2011 Order with this Commission. On March 22, 2011, Laser filed a letter requesting that the Commission disregard PIOGA’s Reply of March 8, 2011, as well as the joint letter submitted March 9, 2011 by MarkWest and LMM. Finally, we note that on April 14, 2011, comments were filed by Senator John P. Blake with regard to this proceeding. Because our Regulations do not provide for responses to Replies to Exceptions, replies to such responses, or comments following the filing of Replies to Exceptions, we did not consider these filings in reaching our disposition in this matter.

**II. Background**

**A. Laser’s Application**

The natural gas industry can be divided into four parts: (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 services. LMM St. 1 at 3, 5, and 7. In terms of regulatory oversight, local distribution service is a traditional state-regulated public utility service. The Commission also regulates some downstream providers. On the other end of the spectrum, exploration and production is not a Commission-regulated service. Laser falls under part two as it is a natural gas midstream company. As a midstream company, Laser’s primary function is to construct, build, own and operate natural gas gathering and transportation facilities and to provide gathering and transportation services to producers of Marcellus Shale gas in Pennsylvania and New York. Application at 2. The jurisdictional status of a natural gas midstream company is an issue of first impression as it has never been addressed in a contested, on-the-record application proceeding before this Commission.

Laser proposes to construct a natural gas gathering and transportation pipeline in Susquehanna County, Pennsylvania, in the townships of Forest Lake, Franklin, Great Bend, Liberty, and Silver Lake that will extend into Broome County, New York, to a tie-in with an interstate pipeline called the Millennium Pipeline. Laser will provide service in the townships of Apolacon, Choconut, Forest Lake, Great Bend, Jessup, Liberty, Middletown and New Milford in Susquehanna County, Pennsylvania. Application at 3. Laser’s pipeline will be either a 12-inch or 16-inch pipeline. Its proposed gathering and transportation system will span thirty miles with up to six lateral lines ranging from one to six miles each. Application at 4.

All of the gas that Laser transports through the Millennium Pipeline will be produced in wells owned by producers with which Laser has a gathering and transportation agreement. 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 indicates that it will furnish service to “any and all” natural gas producers operating in its proposed service territory. Laser M.B. at 17. The Company states that its primary business is to grow with the development of the Marcellus Shale 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 M.B. 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.

**B. The Settlement**

The Settling Parties aver that the Settlement resolves all of the issues between them and addresses many of the issues raised by individuals during the public input hearings. They agree that the Commission should approve Laser’s Application for a Certificate and, further, that numerous conditions enumerated in the Settlement should be imposed on Laser’s Certificate. The conditions and modifications in the Settlement pertain to safety, eminent domain and landowner issues and also provide for the “light-handed” regulation of Laser. The conditions and modifications include the following, in pertinent part:

**Operations and Safety**

1. The pipeline [footnote omitted] will be designed, constructed, and operated as if it qualified as a Type A regulated onshore gathering line operating in a Class 2 location under the provisions of 49 CFR Part 192 even though portions of the system otherwise would not be subject to such requirements. In the event the pipeline passes through a class 3 or 4 location the more stringent class 3 or 4 requirements of 49 CFR Part 192 shall be applicable. Any feeder gathering lines 6 inches or less will be subject to the requirements of 49 CFR Part 192.

2. The Company will register all lines with PA One-Call, and will provide to the appropriate division of the Commission, copies of the maps utilized in conjunction with the PA One-Call program.

3. The pipeline will be reasonably marked with warning signs, and the Company will provide specifics to the PUC’s gas safety division as to what constitutes reasonable marking with warning signs that are ordinarily used by the industry. Such notices shall conform with 49 CFR Part 192.707.

4. The Company will utilize proven high quality and industry standard pipe [footnote omitted] material, materials and equipment for the pipelines, and welding and inspection techniques including any applicable by law or regulation including those in 49 CFR.

a. 100% of welds will be x-rayed for the pipeline.

5. While there are no present plans for compressors in Pennsylvania, if any are installed, they will comply with all laws including environmental (including emissions).

a. The Company will use natural gas as opposed to diesel compressors.

b. The Company will employ gas capture and vapor-recovery technologies that meet lawful applicable laws or regulations, including any lawfully applicable environmental laws or regulations.

c. The Company will employ appropriate measures, including but not limited to, proximity or location, to limit any reverberant and break-out noise from compressor stations. Such measures shall consider the population and proximity thereto. The Company will comply with any lawful noise standards that are applicable.

**Eminent Domain**

6. Eminent Domain is a process the Company would use only as matter of last resort after all other reasonable options (including re-routing) are not feasible.

a. The Company agrees to exhaust all reasonable efforts to negotiate a good-faith resolution with the landowner involved before exercising eminent domain.

b. The Company will file a letter at least 30 days in advance of commencing the subject eminent domain action with the PUC Secretary notifying the Commission of any planned condemnation action, and the reason why it is being pursued.

c. The Company will not condemn property where the resulting easement would require the abandonment or destruction of existing structures, mobile homes, lakes and ponds. Structures that are not inhabited by humans and less than 100 square feet shall not be included in this restriction.

d. The Company shall provide prompt written notice to the landowner of its belief that negotiations for an easement have reached an impasse, and of the landowner’s right to request timely mediation through the PUC prior to the Company’s initiation of the eminent domain process. The Company will, upon written request of a landowner, participate in a non-binding PUC Mediation procedure, to be commenced at least 30 days before exercising any eminent domain right. The mediation process shall take no more than 30 days unless otherwise agreed by the parties to the mediation. The receipt of notice by the landowner will mark the beginning of the 30‑day period.

**Landowner Issues**

7. Without admission or concession as to the Company’s position regarding a lack of Commission jurisdiction over certain or all of the following terms, and mindful of public input comments or testimony, the parties to this Joint Petition for Settlement, after much negotiation, consideration, and give and take, agree, subject to the Commission’s approval, to the following landowner protections and easement terms 8-32 which will apply to any easement for the pipeline or any related facilities, including but not limited to any feeder or lateral lines that may be developed under Laser’s Certificate of Public Convenience, which are entered into on or after August 23, 2010.

**\* \* \***

**Assessments**

33. The Company agrees with OTS that it should be subject to assessments, provided they are determined in accordance with applicable law.

**Fact Specific Determination**

34. The Settling Parties agree that Laser shall be certificated as a public utility transporting or conveying natural gas for customers for compensation, and that such determination shall not constitute precedent for any other gatherer with different facts, who hold themselves out differently, operates differently, or serves, or may serve a different territory than sought by Laser.

35. The Settling Parties agree or do not oppose the stipulation by ETC NE and Laser that Laser is not seeking an exclusive franchise for the Townships that are the subject of this application, and that Laser’s service will occur via contract and its tariff.

36. The Settling Parties agree or do not oppose Laser’s request for light-handed regulation as proposed by Laser in its application and testimony: (1) negotiated rates like natural gas transportation with maximum rate or LDC gas alternate/competitive energy tariffs (*see e.g.*, Columbia Gas of Pennsylvania, Inc. negotiated contract rates for customers under Tariff No. 144 to Tariff Gas-Pa. PUC No. 9 Fifth Revised pages 115 and 116); (2) no affiliated interest or security certificate filings; (3) reasonably expedited Section 1102 proceedings for commencement, transfer or abandonment; safety regulation applies including any new amendments to the Statute or any new law; complaint forum remains effective; and (4) streamlined annual reporting to be developed.

Settlement at 10-16.

Many of these conditions will be discussed in more detail below. The Settling Parties request that Laser’s Application be granted “as necessary or proper for the service, accommodation, convenience, or safety of the public,” only if the conditions and modifications are also included in the approval. Settlement at 10.

**III. Discussion**

ALJ Colwell made thirty-seven Findings of Fact and reached twenty Conclusions of Law. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically address shall be deemed to have been duly considered and will be denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [Consolidated Rail Corp. v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also* see, generally, [University of Pennsylvania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

**A.** **Legal Standards**

As an applicant for a certificate of public convenience (Certificate), Laser bears the burden of proof pursuant to Section 332(a) of the Code, 66 Pa. C.S. § 332(a). Laser must prove, by a preponderance of the evidence, that it is entitled to a Certificate. That is, Laser’s evidence must be more convincing, by even the smallest amount, than that presented by the other parties. *Se Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (Pa. 1950). Additionally, the Commission’s decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (Pa. 1980).

The Commission must approve an entity’s application for a Certificate before the entity can begin to lawfully provide public utility service in Pennsylvania. 66 Pa. C.S. § 1101. The Commission will grant a Certificate if it finds that “such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” In granting a Certificate, the Commission has the authority to impose conditions that it believes are “just and reasonable.” 66 Pa. C.S. § 1103(a).

The Commission will only grant a Certificate if the applicant is a “public utility” as defined in Section 102 of the Public Utility Code (Code), 66 Pa. C.S. § 102. Section 102 provides the following, in pertinent part:

**“Public utility”**

(1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:

(i) Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power to or for the public for compensation.

\*\*\*

(v) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substance, by pipeline or conduit, for the public for compensation.

(2) The term does not include:

\*\*\*

(iii) Any producer of natural gas not engaged in distributing such gas directly to the public for compensation.

For purposes of this proceeding, Laser must prove that the natural gas gathering and transporting service it provides falls within the definition of “public utility” service. Under the Code, a public utility is an entity that produces or transports natural gas to or for the public for compensation. The term does not include a producer of natural gas that does not distribute directly to the public. Whether or not the service provided by Laser constitutes “public utility” service is a major issue in this case and has been heavily debated by the Parties.

There are numerous appellate court and Commission decisions, many to which the Parties refer, that have interpreted which entities are public utilities within the meaning of Section 102 of the Code. In analyzing these established precedents, the Commission adopted a policy statement that set forth three clear standards for determining whether utility projects or services, including alternative energy systems, are providing public utility service. 52 Pa. Code § 69.1401 (Guidelines for determining public utility status – statement of policy) (*Policy Statement*). While the Commission’s original intention was to provide guidelines that applied only to entities providing energy from alternative sources, the resulting *Policy Statement* provides guidance that applies to all entities providing utility service. The *Policy Statement* provides the following, in pertinent part:

(c) *Fact based determination*. The Commission will consider the status of a utility project or service based on the specific facts of the project or service and will take into consideration the following criteria in formulating its decision:

(1) The service being provided by the utility project is merely incidental to nonutility business with the customers which creates a nexus between the provider and customer.

(2) 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.

(3) The service is provided to a single customer or to a defined, privileged and limited group when the provider reserves its right to select its customers by contractual arrangement so that no one among the public outside of the selected group is privileged to demand service, and resale of the service is prohibited, except to that extent that a building or facility owner/operator that manages the internal distribution system serving the building or facility supplies electric power and related electric power services to occupants of the building or facility. See 66 Pa. C.S. §§ 102 and 2803 (relating to definitions).

While the *Policy Statement* is not a binding norm, it announces the Commission’s tentative intentions for the future. *See Pa. Human Relations Comm’n v. Norristown Sch. Dist.*, 374 A.2d 671, 679 (Pa. 1977). The Commission will evaluate the guidelines set forth in the *Policy Statement* for purposes of determining whether an entity’s provision of service constitutes public utility service that is subject to Commission regulation.

Additionally, we note that the Commission’s standards for reviewing a non-unanimous settlement, as proposed here, are the same as those for deciding a fully contested case. *Application of PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code and Joint Petition for Partial Settlement*, Docket Nos. R-00973953 and P-00971265, 1997 Pa. PUC LEXIS 51 (Order entered December 23, 1997). Accordingly, substantial evidence consistent with statutory requirements must support the proposed Settlement. *Popowsky v. Pa. PUC*, 792 A.2d 636 (Pa. Cmwlth. 2002).

**B. Is Laser a Public Utility Under Section 102 of the Code?**

**1. Positions of the Parties**

In its Main Brief, Laser avers that the transportation and conveyance of natural gas and related services it will provide to customers for compensation is public utility service under the definition in Section 102 of the Code and applicable case law. Laser M.B. at 16. First, Laser states that it will provide service for compensation, per its tariff, to any customer requiring transportation of gas over its system to the extent that capacity exists. *Id*. at 17; Tr. at 400, 415. Laser intends to grow with the development of Marcellus Shale and to serve as many producers, landowners, marketers, and natural gas local distribution companies (LDCs) as possible. Laser M.B. at 18; Laser St. 2R at 8; Tr. at 400, 402, and 415. These customers constitute the public or a limited portion of the public. Laser M.B. at 20. Laser states that its use of a contract with customers is not a limitation but is a vehicle, similar to the contracts used for public utility natural gas transportation service or for the gas offerings provided by LDCs. The terms and conditions of the contracts, which include negotiated rates and terms of service, are best determined by a mutually acceptable contract between the utility and sophisticated utility customers. *Id*. at 18, 20.

Laser further avers that it qualifies as a public utility because it will not provide service to itself, and it is not affiliated with any of its potential customers. Its sole business will be the gathering and delivery of natural gas. It will not hold title to the gas moved through its facilities or engage in the marketing of gas. *Id*. at 19. In support of its position that it is a public utility, Laser relies on the Commission’s determinations in *Application of Ardent Resources, Inc.*, Docket No. A-140005 (Order entered April 16, 2007) and *Application of Allegheny Land and Exploration, Inc.*, Docket No. A-125136 (Order entered March 7, 2005) as instances in which we have certificated intrastate pipeline utilities providing gathering and related services. Laser M.B. at 21.

Likewise, in its Main Brief, the OTS avers that Laser is a public utility based on OTS’ analysis of the applicable statutory language and case law. OTS M.B. at 9. The OTS states that the unambiguous and explicit statutory language of Section 102 of the Code provides that Laser is a public utility. The OTS notes that, because Laser is not a producer, it is not excluded from the definition of a public utility under Paragraph (2)(iii) of Section 102.[[5]](#footnote-5) *Id*. at 11. The OTS opines that Laser is included in the definition under Paragraph (1)(v) of Section 102[[6]](#footnote-6) because it provides service “for the public.” The OTS asserts that Laser provides service for the public because its service is available to a limited portion of the public, and it does not discriminate against potential customers within that portion. It believes the record demonstrates that Laser is ready and willing to provide gathering and transportation services to customers that may use the proposed facilities, and that Laser expects to expand the system as necessary to accommodate as many potential customers that will enter into agreements with it. *Id*. at 12-15.

In asserting that Laser qualifies as a public utility, Vera Scroggins states that Laser meets the definition in Section 102 of the Code and the criteria in the Commission’s *Policy Statement*. She avers that Laser’s pipeline is not being “designed and constructed only to serve a specific group of individuals or entities” so that “others cannot feasibly be served without a significant revision to the project.” While some facilities would need to be installed to connect new customers to the main line, the “spine” of the pipeline is being designed and constructed to accommodate any individual or entity that desires to move natural gas from the drilling site to the border of New York. Scroggins M.B. at 13; Tr. at 402-403. Additionally, Laser is not proposing to provide service “to a single customer or to a defined, privileged and limited group.” Although Laser will enter into contracts with customers, the contracts will not restrict it from providing pipeline service to other customers. The contracts are necessary to cover the terms and conditions, including technical requirements and delivery points, which are associated with the transactions between Laser and its customers. *Id.*; Tr. at 401. While Ms. Scroggins believes that Laser meets the standards to qualify as a public utility, she opines that the Commission should only grant Laser a Certificate if we approve the Settlement.

DTE takes a slightly different view than the other Parties in its Main Brief. DTE believes it is appropriate for the Commission to grant Certificates to gathering and transportation companies, like Laser, which intend to provide services to the public for compensation. Nevertheless, DTE avers that the regulation of these companies should be limited. While DTE supports Commission safety regulation over jurisdictional gathering and transportation company operations and facilities, it does not support regulation of rates or regulation over the siting of gathering pipelines. DTE M.B. at 13-14.

Several Parties take the position that Laser has not satisfied the standards under the Code for the issuance of a Certificate. In its Main Brief, PIOGA states that Laser is proposing to serve only producers pursuant to a contractual agreement for gathering and transportation services and that such service does not constitute service for the public under Section 102 of the Code. PIOGA M.B. at 10. Although Laser averred in its rebuttal testimony that it will serve “landowners, corporations, partnerships, joint ventures, municipalities, or producers,” PIOGA states that the record does not provide a basis for concluding that there are, in fact, potential customers who are not producers. Producers are the only entities with which Laser currently has contracts. *Id*. at 14 (citing Laser St. 1A at 7). It is the producers who will sever the Marcellus Shale for those who desire to move the gas through the pipelines. *Id*. at 11-12. In addition, PIOGA opines that midstream natural gas service is a competitive service that is not traditionally regulated as a public utility. It argues that the fact, that other entities, including LMM and MarkWest, are currently providing midstream services in Pennsylvania without possessing the power of eminent domain or the right to occupy public rights-of-way, shows that a Certificate is not necessary for the protection of producers served by these entities. *Id*. at 17.

Likewise, MarkWest and LMM aver that natural gas gathering does not qualify as a public utility service. Because Laser has stated in its Application that it will reserve the right to select its customers based on the requirement that the potential customers agree to the terms and conditions in its proposed tariff agreement, its service is not considered “for the public.” MarkWest M.B. at 10; LMM M.B. at 12. Additionally, MarkWest and LMM aver that natural gas gathering service is not a public utility service because it is not provided to retail end-users as gatherers only serve upstream producers. They state that the provision of retail service to end-users is a determinative factor in finding that service is “for the public.” MarkWest M.B. at 10-11; LMM M.B. at 13. They also opine that these producers are sophisticated customers that do not need the same regulatory protections that are afforded to retail consumers of regulated public utilities. MarkWest M.B. at 15; LMM M.B. at 17. Furthermore, they note that the Code’s framework for regulated monopolies is inappropriate for competitive natural gas gathering and would create barriers that prevent entry by new market participants and harm Pennsylvania’s Marcellus Shale development. MarkWest M.B. at 18; LMM M.B. at 19.

**2. ALJ’s Recommendation**

ALJ Colwell determined that Laser’s Application should be denied because the service Laser proposes to offer does not meet the definition of “public utility” service under the Code. R.D. at 91. In discussing the Commission’s *Policy Statement*, she stated that a gathering line is specifically designed to serve producers at locations where the wells are built and to transport gas to a designated transmission line and ultimately to a refining facility. Such activities are a business transaction and, therefore, fall within the definition of “constructed only to serve specific individuals.” ALJ Colwell further stated that the term “for the public” as set forth in Section 102 of the Code cannot be interpreted so broadly as to mean for the end users who purchase the gas after it has been transported to the refinement facilities and then transported back to the natural gas distribution companies (NGDCs). She opined that if such a broad interpretation was used, then “for the public” would consist of every aspect of removing gas from the ground and moving it to the NGDCs, including the well drillers, the property owners, the gas storage facilities, the plant where the raw gas is refined, and the manufacturer of the gas appliances. *Id*. at 56‑57.

ALJ Colwell also concluded that the pipeline is being designed and constructed to serve a specific group consisting of gas producers who want to take raw gas to refinement and market. She opined that “producers” are limited to entities that own a substantial area of property in the Marcellus Shale region where drilling is permitted and a well is located and, as such, is an example of a “privileged” group. *Id*. at 57. She further averred that the gas transported by gathering lines is contaminated with water, heavy hydrocarbons and other contaminants that need to be removed before the gas can be delivered to the end user and can be used by the public. *Id*. at 60.

Moreover, ALJ Colwell relied on the Commission’s decision in *Nutmeg Energy, Inc., Gas City Oil and Gas Corporation, Exley Oil and Gas Corporation*, Docket No. P-00062204 (Order entered February 26, 2007) in reaching her decision. She noted that Laser is not a public utility because it has the ability to select and control who it will serve through contractual arrangements or otherwise. She reasoned that Laser has that ability and will enter into contracts based on operational considerations such as location and ease of service. R.D. at 65. She also stated that in *Nutmeg*, “[t]he Commission had squarely faced a situation where a gathering company sought a determination regarding its public utility status and had decided that the gathering service, even with residential customers along its route, did not meet the definition of ‘public utility’.” *Id*. at 63.

**3. Exceptions**

In its Exceptions, Laser avers that the Recommended Decision reaches a critically defective conclusion that Laser, a natural gas pipeline that holds itself open to serving any member of the public requiring its service, is not a public utility. Laser Exc. at 1-2. Laser avers that its pipeline service is public utility service because it is designed to serve producers, landowners, partnerships, joint ventures, municipalities, LDCs and other large customers that seek to have gas transported or conveyed between points in Pennsylvania. Laser states that it already has three non-affiliated producer customers and is open to any other potential customers so it can serve as many producers as possible. Laser is holding itself out to serve, for compensation, any gas conveyance or transportation customer over its system to the extent that capacity exists. *Id*. at 9, 10, 20; Tr. at 400, 401. Laser notes that intrastate pipelines transporting or conveying natural gas or other petroleum products have been certificated in the past, including those serving the same types of non-consuming customers that Laser will serve. Laser Exc. at 10.

Laser further avers that the Recommended Decision’s conclusion that Laser is not a public utility because it has the ability to select and control its customers is incorrect. Laser contends that its use of contracts with its customers is not a limitation but is, instead, a vehicle similar to the contracts used for public utility natural gas transportation service or for natural gas offerings by LDCs where the terms and conditions for service are best determined by a mutually acceptable and negotiated contract. Laser notes that, if it does not agree with a customer on any item, then the Commission has the ability to establish just and reasonable terms and conditions of service under the specific circumstances subject to its tariff provisions. *Id*. at 24.

In its Exceptions, the OTS avers that the ALJ applied an overly narrow interpretation of the definition of a public utility and improperly concluded that Laser’s proposed services were not public utility services. OTS Exc. at 3. In discussing Section 102 of the Code, the OTS mentions that nothing in the Code’s definition limits public utility status to end-user products. In fact, the definition includes the transportation of crude oil and petroleum products, which are not end-user products, and the Commission has certificated entities offering transportation of those products. *Id*. at 4-5.

Moreover, the OTS provides an analysis of the Commission’s *Policy Statement*. In doing so, the OTS avers that Laser is a public utility because its proposed facilities were not designed only to serve specific individuals. *Id*. at 7. The OTS states that the fact that Laser’s customers are producers rather than property owners does not exclude Laser’s service from qualifying as public utility service. The OTS submits that the Commission has determined that a utility providing service to an indefinitely open class of customers, but not serving all classes of customers, may be considered a public utility. An indefinitely open class of customers may consist of a small number of customers. *Id*. at 8-9.

In its Exceptions, Silver Lake also argues that the ALJ erred by concluding that Laser is not a public utility. Silver Lake avers that public utility service includes service to small portions of the public including commercial entities. Silver Lake Exc. at 7. Additionally, Silver Lake avers that the record shows that Laser will be providing public utility service because it would build a “backbone” gas gathering pipeline and has invited any entity willing to comply with its tariff to connect to the pipeline. *Id*. at 8.

In her Exceptions, Vera Scroggins opines that the ALJ erred in concluding that Laser does not qualify as a public utility because Laser meets the legal standard in the Code. While Ms. Scroggins asserts that Laser is a public utility, she states that granting a Certificate to Laser would only serve the public interest if the Certificate contains the conditions that the Parties agreed to in the Settlement. Scroggins Exc. at 14‑15. She submits that the conditions will fill the gaps in the pipeline regulation by addressing safety and siting issues as well as legitimate concerns regarding health, safety, and the environment. *Id*. at 17.

In its Replies to Exceptions, PIOGA asserts that substantial and legally credible evidence supports the ALJ’s finding that Laser’s proposed pipeline and service is intended and designed to serve only producers. Laser’s Application, proposed tariff, direct testimony, and application to the Federal Energy Regulatory Commission (FERC) all consistently refer only to “producers” as the entities Laser proposes to serve. PIOGA R.Exc. at 8. Moreover, PIOGA claims that Laser’s contracts with potential producers can be used to exclude producers that refuse to agree to Laser’s terms and conditions. PIOGA compares Laser’s contracts with producers to the contracts between business ratepayers seeking special contracts with public utility distribution companies. If the ratepayer and the utility do not agree, the ratepayer can still receive standard service under the otherwise applicable rate schedules. Laser, on the other hand, has not provided any proposed standard, common or default terms and conditions of service, other than maximum rates. This further supports the ALJ’s finding that Laser has the ability to select and control who it will serve through contractual agreements. *Id*. at 15.

In its Replies to Exceptions, MarkWest endorses the Recommended Decision finding that Laser’s proposed service is not “to or for the public” within the meaning of Section 102 of the Code. MarkWest agrees with the ALJ’s conclusion that a gathering system, such as Laser’s, is specifically designed and constructed to serve natural gas producers by transporting natural gas from locations where wells are built to a designated transmission line or processing facility, and others cannot feasibly be served without a significant revision to the project. MarkWest R.Exc. at 6. MarkWest posits that Laser did not contest or refute this finding. Laser did not show that its system is presently designed and constructed to serve as many potential customers as will enter into agreements with it or that expanding and extending its system would not be a “significant revision.”

Additionally, MarkWest disagrees with Laser’s assertions that it holds itself open to serving all members of the public because these assertions are inconsistent with the facts in the record and the commercial realities of the midstream natural gas industry. MarkWest maintains that natural gas gatherers select and control the customers they serve through contracts and that they serve a defined, privileged, and limited group consisting of sophisticated producers. In fact, MarkWest acknowledges that, in an April 2, 2010 amendment to its Application, Laser “agreed that it will provide service only to producers who have entered into a contractual agreement with Laser for gathering and transportation services.” *Id*. (citing Laser St. 1-A at 7). MarkWest notes that, in its testimony, it explained the significant role of a contract agreement in the context of natural gas gathering. MarkWest’s witness, Ms. Sander, explained that every producer has unique needs, and that commercial considerations, such as volume and gas composition, dictate that each contract with each producer will be unique. *Id*. (citing MarkWest St. 1 at 10, 16). MarkWest also believes that, in comparison to the tariffs of LDCs, Laser’s tariff is lacking in essential terms of service that need to be negotiated individually. *Id*. at 11-12.

LMM also agrees that the ALJ properly determined that Laser’s proposed service is not service “to or for the public.” LMM R.Exc. at 6. LMM concurs in the finding that Laser’s natural gas gathering pipeline service is designed and constructed to serve only a specific group of entities, as opposed to the public. It also submits that Laser cannot credibly hold itself open to serving the public when its business has been structured so that only entities with which it has negotiated and executed a contract are privileged to receive service. *Id*. at 8. LMM avers that the record demonstrates that Laser intends to serve only producers. It also notes the many distinctions between the competitive operations of natural gas gatherers and traditional natural gas public utilities, including the following:

the competitive nature of the natural gas gathering business; the provision of service to producers which are “upstream” of the gatherer; the transport of raw, unprocessed gas unsuitable for transportation in “downstream” interstate transmission pipelines, or for consumption by the public; the sophistication and privileged status of gathering customers; the unique pricing and other terms and conditions of each contract for gathering service to meet the customer's needs; and the siting, design and construction of the gathering system based upon the ability of the gatherer to exclude producers who cannot agree to contractual terms from the use

of the gathering system.

*Id*. at 13 (citing LMM St. 1 at 4, 7, and 11; MarkWest St. 1 at 10, 11, 15-16).

**4. Disposition**

Based on our review of the record, the applicable law, and the positions of the Parties, we 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. Pursuant to Paragraph (1)(v) of Section 102, a natural gas midstream company, such as Laser, qualifies as a public utility if it is “[t]ransporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substance, by pipeline or conduit, for the public for compensation.” The critical inquiry in this case is whether Laser’s provision of service as a midstream gathering pipeline operator that transports natural gas from producer wells to an interstate pipeline constitutes service “for the public.” In analyzing this question, we reviewed the relevant case law as well as our *Policy Statement*.

The phrase “for the public” 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*, 418 Pa. 430, 435, 212 A.2d 237, 239 (Pa. 1965), [[7]](#footnote-7) *Borough of Ambridge v. Public Service Comm’n*., 108 Pa. Super. 298, 165 A. 47 (1933).

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 at 239 (emphasis in the original). “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 at 1224; *Masgai v. Public Service Comm’n*, 124 Pa. Super. 370, 188 A. 599 (1936). In *Waltman*, the Commonwealth Court found that a telecommunications 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 at 1224‑1225. The Commonwealth Court later upheld the Commission’s determination that a facilities-based competitive local exchange carrier was serving the public, in that 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) (emphasis added).

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 that group. Laser testified that it will serve the following:

any and all potential customers needing to move gas through the pipeline system. So that would include large capital, largely capitalized producers, small 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.

Tr. at 400; Laser M.B. 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.

In addressing Laser’s public utility status, we have also considered our *Policy Statement* at 52 Pa. Code § 69.1401, which sets forth the 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, the following: whether 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, and whether 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 M.B. 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. Our Regulations state, “[t]ransportation 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 Exc. 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 of the Code, 66 Pa.C.S. §§ 1301, 1304, and 1501.

Regarding the second criterion of the *Policy Statement*,[[8]](#footnote-8) we are 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 has made 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.[[9]](#footnote-9)

We also do not agree with the application of *Nutmeg Energy, Inc., Gas City Oil and Gas Corporation, Exley Oil and Gas Corporation*, Docket No. P-00062204 (Order entered February 26, 2007) to this case. A review of *Nutmeg* shows that the jurisdictional status of the gathering component of Nutmeg’sservice was not at issue in the case.  Rather, the issue in *Nutmeg* was whether the provision of natural gas distribution service to a specific class of end-user property owners (twenty five in number) was public utility service.  Nutmeg asked the Commission to find that its distribution service did not constitute public utility service.  It did not request, and the Commission did not provide, any determinations regarding the public utility status of Nutmeg’s gathering system.  Additionally, Nutmeg filed a settlement agreement with the Commission in which it expressly stated that it was not holding itself out to serve the public. As the Commission made clear, the jurisdictional determination was based on “the specific factual scenario” in that case.

We note that, while natural gas gathering and transportation service can meet the definition of “public utility” service, and in the case of Laser’s proposed operations, does meet the definition of “public utility” service, not all gathering and transportation service providers will be considered public utilities and subject to the Commission’s jurisdiction. Whether the Commission will approve an application from a pipeline and issue a certificate of public convenience for the pipeline to be a public utility turns on the specific facts surrounding each pipeline’s operations, including whether the gathering and transportation services are offered “for the public.” At this point, Laser has merely satisfied the threshold issue that its proposed service meets the definition of “public utility” service. *See* 66 Pa. C.S. § 1101 (“Upon the application of any proposed public utility…”). Next, the Commission must determine whether the granting of a Certificate of Public Convenience for Laser’s service, under the conditions proposed in the non-unanimous Settlement and otherwise, 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).

**C. Settlement Terms**

**1. “Light-Handed” Regulation**

Having determined that Laser’s proposed services fall within 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, as part of the non-unanimous Settlement, Laser requests 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.

**a. Positions of the Parties**

Laser’s position is that light-handed regulation will draw natural gas gathering companies to Pennsylvania, thereby promoting the local and state economies by providing direct and indirect employment and other ancillary spending. If Pennsylvania’s regulatory environment is deemed burdensome by the natural gas gathering companies, they may focus their investment activities toward other neighboring states with little or no regulatory obligations. Laser M.B. at 34. Laser’s position also includes streamlined and relaxed regulation of rates, terms and conditions of service, affiliated service agreements, securities certificate filings, annual reports, and similar requirements under the Code. Laser states that these items are currently regulated under the Code as a protection for end-users, which is not required here because the gathering and transportation services it will offer are purely competitive activities. Laser M.B. at 34, 35.

On the other hand, MarkWest avers that there is no legal authority to forbear from applying the Code’s requirements without going through the appropriate legislative process. Additionally, while MarkWest opposes regulation of financial matters of gathering lines, MarkWest and other members of the natural gas industry are currently working to pass legislation that will clearly establish the Commission’s authority to require, audit, and enforce the requirements found in 49 C.F.R. Part 192 as a certified agent of the Federal Pipeline and Hazardous Materials Safety Administration, regardless of the utility status of a pipeline. MarkWest believes it is also important to note that all gathering lines are subject to the regulatory oversight of an agency that monitors safety: the only question is whether that is a federal or state level agency. Further, MarkWest supports any requirement that all gathering pipelines participate in the Pennsylvania One-Call Program. MarkWest M.B. at 3-4; R.D. at 84, 85.

LMM’s position is that the regulatory treatment of gatherers should be developed on a statewide basis and not piecemeal in proceedings involving applications for Certificates. LMM also supports Commission jurisdiction over pipeline safety, however, legislation,[[10]](#footnote-10) which LMM is currently pursuing, is needed to provide for such authority. LMM defines light-handed regulation as complaint-based regulation. LMM M.B. at 22; R.D. at 85.

**b. ALJ’s Recommendation**

The ALJ found that there is no legal support for a finding that Laser should or could be excused from the responsibilities of a Certificate when it is taking advantage of the benefits. “Light-handed regulation,” similar to that applied to natural gas suppliers (NGSs) and electric generation suppliers (EGSs), must be established by legislation. Unlike the NGSs and EGSs, a natural gas gathering company subject to Commission supervision would entail inspection of many miles of pipelines, which will incur substantial cost to the Commission and should be subject to assessment to cover those costs. R.D. at 85.

**c. Exceptions**

In its third Exception, Laser states that the ALJ erred in concluding that there is no legal precedent for light-handed regulation. Laser states that despite no opposition to the result of light-handed regulation, the ALJ rejected it without a material discussion of the multiple instances where the Commission has allowed such regulation in the past. Laser also cites to Section 1301 of the Code, 66 Pa. C.S. § 1301, which charges the Commission with assuring that rates shall be just and reasonable and in conformity with the Regulations or Orders of the Commission. Thus, under the provisions of the Code, Laser opines that the Commission has the requisite authority to determine whether a contract or negotiated rates between sophisticated entities are just and reasonable. Laser Exc. at 26.

In her sixth Exception, Vera Scroggins states that the ALJ erred in concluding that legislation is necessary before the Commission can promulgate Regulations governing gathering lines. R.D. at 66-67, 86, 90-91; Scroggins Exc. at 11. She opines that the Code authorizes the Commission to promulgate Regulations relative to the siting of electric transmission lines and their environmental impacts, as well as Regulations coordinating the consideration of eminent domain applications and siting applications filed by electric transmission utilities. Therefore, she concludes that it is within the Commission’s jurisdiction both to grant Laser’s Application with the conditions presented in the Settlement followed by a rulemaking process to develop a comprehensive regulatory framework for gathering line companies who provide public utility services. Scroggins Exc. at 12.

In its Replies to Laser’s third Exception, MarkWest states that Pennsylvania lacks the necessary statutory authority for light-handed regulation of natural gas gatherers. MarkWest R.Exc. at 17, 18. MarkWest further asserts that light-handed regulation is very different than the Commission’s normal discretion under Section 1301 of the Code, 66 Pa. C.S. § 1301, to determine just and reasonable rates. Also, the Commission’s powers must arise from the express language of the Code or by strong and necessary implication therefrom. Thus, the necessary statutory basis for light-handed regulation is absent here. MarkWest R.Exc. at 18. LMM’s Reply Exceptions on this issue are consistent with those presented by MarkWest. *See,* LMM R.Exc. at 15, 16.

In its Replies to Exceptions, PIOGA avers that the Settling Parties rely upon various Chapters of the Code to support the concept of light-handed regulation for Laser and other natural gas gatherers. PIOGA further states that the ALJ correctly determined that the provisions of Chapters 22, 28 and 30 of the Code are alternative forms of regulation which are restricted by their terms and do not provide any authority for light-handed regulation in another context. Further, PIOGA’s position is that legislation is needed to enable any new form of regulation to become applicable to natural gas gathering companies. PIOGA R.Exc. at 18.

**d. Disposition**

We 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 with 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.

We also do not believe that Laser has produced any public policy justifications to grant its request for light-handed economic regulation. 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 Certificate.  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 change.

Nevertheless, consistent with our regulation of utility pipelines, we 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.

**2. Other Settlement Terms**

**a. Positions of the Parties**

Laser has recognized that the Commission has no jurisdiction over environmental issues, such as Conditions 5, 5b, and 5c of the Settlement, relating to Operations and Safety, and has stated that it worked closely with representatives of the Pennsylvania Department of Environmental Protection (DEP) in preparing and filing applications for permits that address several of the concerns identified in Ms. Scroggins’ direct testimony. The Applicant has also stated that it understands that DEP is the agency with authority over the environmental issues identified in Ms. Scroggins’ direct testimony. Additionally, Laser believes that the Commission has no authority over environmental issues which are under the jurisdiction of the DEP. Laser St. 5-R at 2; R.D. at 72.

The OTS took the position that the Settlement terms do not require the Commission to engage in declarations of law or adjudications of private rights and, therefore, do not purport to confer jurisdiction where none exists. OTS R.B. at 17. Additionally, the OTS argued that the presence of conditions which cannot be enforced by the Commission should not serve as the basis for rejection of the non-unanimous Settlement. It was also the OTS’s position that, to the extent the Commission lacks jurisdiction over any issues addressed in the Joint Petition, such jurisdiction is not required to enforce the settlement terms, voluntarily proposed by Laser. OTS R.B. at 16. The OTS further averred that portions of the Settlement would fall under the jurisdiction of other state and federal agencies, as well as civil courts. *Id*.; R.D. at 74.

LMM argued against imposition of the conditions appearing in the non-unanimous Settlement because they include those for which the Commission has no jurisdiction, therefore, no ability to enforce. LMM R.B. at 6. In its Main Brief, LMM stated there is no law conferring jurisdiction upon the Commission to regulate compliance with environmental laws, noise ordinances, or matters involving property easements. LMM M.B. at 25. LMM averred, “[i]t is well-settled that the Commission does not have jurisdiction over compliance with either federal or Commonwealth environmental laws” (citing *Pickford v. Pa. PUC*, No. 1156 C.D. 2009, 2010 WL 3447770, \*4-6 (Pa. Cmwlth. 2010); *Country Place Waste Treatment Co. v. Pa. PUC,* 654 A.2d 72, 75-76 (Pa. Cmwlth. 1995); *Rovin v. Pa. PUC,* 502 A.2d 785, 787 (Pa. Cmwlth. 1986)). LMM R.B. at 7.

**b. ALJ’s Recommendation**

The ALJ disapproved, along with all other non-jurisdictional Settlement conditions, those applicable to environmental concerns. R.D. at 72, 73. The ALJ stated that while the Settlement’s purpose to enforce conditions which would result in best practices from Laser is laudable, the Settlement will not accomplish that purpose. R.D. at 75. Additionally, the ALJ stated that it is important to note that the non-unanimous Settlement does not, and cannot, confer jurisdiction by agreement where none exists without the agreement. R.D. at 76.

The ALJ also stated it is clear that the Commissioners themselves are interested in supervising the safety of the gathering lines which do not fall under federal jurisdiction, as evidenced by the quotes appearing in the Parties’ briefs from the Commission’s *en banc* proceeding. In fact, the companies participating in this proceeding do not object to safety supervision by the Commission. The local populace understands the situation and simply asks that the Commission obey the existing law and that the Legislature oversee the safety issues. R.D. at 86. Additionally, the ALJ found that the fact that an industry requires regulation does not mean that the Commission has the authority to impose it. The Commission’s jurisdiction is statutory and cannot be extended to those activities which are not covered by the Code. R.D. at 86.

**c. Exceptions**

Laser asserts that the Settlement is in the public interest because it addresses, in a reasonable and appropriate manner, the concerns of the Settling Parties and those of the public who testified at the July 2010 public input hearings. Laser Exc. at 31, 32. Further, Laser believes the ALJ erred in rejecting the Settlement on the basis that the Commission lacks jurisdiction to enforce its conditions. Laser asserts that this finding by the ALJ mischaracterizes the Settlement and ignores prior Commission case law. Laser Exc. at 34. In support of its position, Laser cites to *Joint Application of UGI Utilities, Inc.,* Docket No. A-2008-2034045 (Order entered August 21, 2008), in which the Commission approved voluntary conditions regarding continued employment of the transferred employees at the same compensation levels, continuation of the existing collective bargaining agreement and continued charitable contributions at existing levels for five years. Laser Exc. at 35.

In its Exception 1A, Silver Lake states that the ALJ erred in rejecting the Settlement based upon the insufficiency of its terms. Silver Lake Exc. at 2. Silver Lake also asserts that the Commission has jurisdiction to approve the Settlement terms pursuant to its broad authority over public utility service and facilities under the Code. Silver Lake further asserts that the broad definitions of facilities and service at Section 102 of the Code, and the Commission’s authority to enforce the provision of safe and adequate service in Section 1501 of the Code provide the Commission with independent jurisdiction to approve these conditions. Silver Lake Exc. at 3.

Silver Lake next asserts in its Exception 1B that under Section 1501 of the Code, the Commission may still approve the Petition and enforce the conditions of the Settlement. Silver Lake also asserts that the Commission may, based upon the voluntary nature of the conditions, approve the Settlement and enforce those voluntary conditions even though the Commission could not order those voluntary conditions on its own. Silver Lake Exc. at 4.

In her Exceptions, Protestant Vera Scroggins states that the ALJ erred in concluding that the Commission cannot attach safety and environmental conditions to its consideration of an Application for a Certificate. Scroggins Exc. at 7-9. Vera Scroggins also cites to Section 501(a) of the Code, 66 Pa. C.S. § 501(a),[[11]](#footnote-11) which she believes authorizes the Commission to impose just and reasonable conditions ensuring that the operation of public utilities will protect public safety. Scroggins Exc. at 8. Vera Scroggins avers that the Commission may exercise its authority to include such conditions without usurping the power of DEP. Should DEP determine that Laser has violated an environmental law, then the Commission could arguably use this determination as the basis for enforcement of conditions established in a Certificate which may include revocation of the Certificate. Vera Scroggins next states that the Commission may decline to exercise its jurisdiction over environmental issues, but it should not pretend that it lacks such jurisdiction. Lastly, she avers that if the Commission grants a Certificate to Laser without environmental conditions, it is not in the public interest, and the Application should be denied. Scroggins Exc. at 10.

In their combined Replies to Laser’s Exception No. 5, DTE/Bluestone assert that it is well established that the Commission lacks jurisdiction over environmental matters specifically regulated by statutes administered by other state and federal agencies.[[12]](#footnote-12) This well established jurisdictional principle clearly applies to the Settlement at Paragraphs 15 through 18, and 21 regarding conditions on soil, hydrology, air and water quality, and erosion and sedimentation. DTE/Bluestone R.Exc. at 14. DTE/Bluestone conclude by stating that since Paragraphs 15 through 18, and 21 of the Settlement are beyond the Commission’s jurisdiction, the Settlement is unlawful and must be rejected. *Id.* at 15.

In support of its position that the Commission may not reach beyond its jurisdiction, as suggested by Laser in this proceeding, DTE/Bluestone state the following:

As a general principle, subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police,* 619 A.2d 390 (Pa. Cmwlth. 1992). The Commonwealth Court recently reaffirmed this principle when it held that, “[a]s a creature of legislation, the Commission possesses only the authority the state legislature has specifically granted to it in the Code. 66 Pa. C. S. §§ 101-3316.” *Pickford v. Pa. PUC,* 4 A.3d 707, 713 (Pa. Cmwlth. 2010). Therefore, subject matter jurisdiction may not be conferred by agreement of the parties where none exists. *Roberts v. Martorano,* 427 Pa. 581, 235 A.2d 602 (1967); *Commonwealth v. VanBuskirk,* 449 A.2d 621 (Pa. Super. 1982). Nor can jurisdiction be conferred by waiver or estoppel. *In re Borough of Valley-Hi,* 420 A.2d 15 (Pa. Cmwlth. 1980). Therefore, the Commission’s jurisdiction must arise from the express language of the pertinent enabling legislation or by necessary implication. *Feingold v. Bell,* 477 Pa. 1, 383 A.2d 791 (1977).

DTE/Bluestone R.Exc. at 5.

PIOGA, in its Replies to Exceptions, supports the position of DTE/Bluestone that the Settlement cannot confer jurisdiction on the Commission which the Commission could not otherwise impose or enforce. PIOGA R.Exc. at 19. As PIOGA explains:

[*Western Pennsylvania Water* *Co. v. Pa. PUC*, 471 Pa. 347, 370 A.2d 337 (1977)] relied upon by the ALJ and criticized by the Settling Parties as distinguishable is merely one of the initial and often-cited cases for this legal proposition, but the appropriateness of the application of this legal proposition is not limited by the particular facts of the *Western Pennsylvania Water* case for its validity. *Id*. The Commission’s action in the *Ardent/ZHW* case shows that the Commission recognizes this. *Id.*

There, the Commission rescinded its order granting a CPC because the Commission determined that the pipeline’s business changed so that it was no longer a public utility, but nonetheless imposed obligations on the pipeline. When the pipeline objected that this was inconsistent with the PUC’s determination of non-public utility status, the PUC agreed and removed the conditions. *See Petition of Ardent Resources, Inc. and ZHW Oil and Gas Inc.,* (Order entered August 11, 2009).

PIOGA R.Exc. at 19.

Regarding the safety issue, PIOGA states that there appears to be no dispute among the Parties that regulatory oversight is needed. PIOGA R.Exc. at 20. PIOGA notes that the ALJ also found regulatory oversight to be a good idea and necessary, but found that legislation is needed to address this issue. R.D. at 91; PIOGA R.Exc. at 20. PIOGA also notes that the Commission has also stated that it cannot lawfully issue a Certificate to an otherwise non-jurisdictional entity solely to address this regulatory safety inspection gap. *Implementation of the Alternative Energy Portfolio Standards Act of 2004,* *Final Policy Statement*, Docket No. M-00051865 (Order entered November 16, 2005) at 20; PIOGA R.Exc. at 20. Additionally, PIOGA points out that the ALJ further references ongoing legislative efforts that are expected to resolve this issue. R.D. at 89; PIOGA R.Exc. at 20. PIOGA lastly asserts that if the Commission acts on the instant Application before gas pipeline safety legislation is enacted, the Commission could direct Laser to submit to the Commission’s pipeline safety inspections under 52 Pa. Code § 59.33 as the Commission has done in other non-jurisdictional entity cases. PIOGA R.Exc. at 21.

In its Replies to Exceptions, LMM avers that Commission enforcement of noise and environmental provisions goes beyond the jurisdiction conferred upon the Commission by the Legislature. LMM R.Exc. C at 17. As LMM stated in its Main and Reply briefs, municipalities have jurisdiction to regulate noise and DEP has the responsibility to preserve environmental quality. *Id.*

In its Replies to Exceptions, MarkWest states that the Settling Parties, except Mr. Fischer, challenge the ALJ’s disapproval of the Settlement. MarkWest asserts that once the ALJ determined that Laser was not a public utility under Pennsylvania law, it was not necessary to consider the Settlement. MarkWest R.Exc. at 20.

**d. Disposition**

We disagree with the ALJ that the Settlement terms would not be enforceable. Our enforcement authority exists under Section 502 of the Code, 66 Pa. C.S. § 502,[[13]](#footnote-13) which gives us the power to enforce Orders approving certificates of public convenience, as well as under 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.*, Docket No. A-2010-2176520 (Order entered March 8, 2011).

We agree with the Office of Trial Staff that this case is distinguishable from *Western Pennsylvania Water Co., supra,* 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 Pennsylvania Water Co*. As such, the Commission is not imposing extra-jurisdictional conditions, and hence, *Western* *Pennsylvania Water Co.* 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 we disagree with the ALJ’s determination that acceptance of these Settlement terms would be an unlawful expansion of our jurisdiction, we believe that the Settlement terms should be remanded to the Office of Administrative Law Judge (OALJ) for further development of the record regarding whether the terms are in the public interest. Of particular interest to us, is the Settlement term providing that Laser agrees not to seek an exclusive service territory.

As we believe that Laser meets the definition of a public utility, we shall remand this case 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). Specifically, the record should be developed so that the following questions may be answered:

(1) If a Certificate of Public Convenience is determined to be necessary or proper, should any conditions be imposed as conditions precedent?

(2) Should an exclusive service territory be considered?

(3) Should Laser’s interconnect contracts be publicly available to police and prevent unreasonable discrimination in violation of Section 1304 of the Code?

(4) Is Laser’s proposed tariff reasonable under the Code?

(5) Are the Settlement terms in the public interest?

Because new hearings will be conducted on the above subject matter, consistent with Sections 5.71-5.76 of the Commission’s Regulations, 52 Pa. Code

§§ 5.71-5.76, the OALJ shall permit intervention by interested persons not currently participating in the proceeding for a limited time as deemed appropriate by the OALJ.

**IV. Conclusion**

We have reviewed the record as developed in this proceeding, as well as the Joint Petition for Settlement, the ALJ’s Recommended Decision, and the Exceptions and Replies to Exceptions filed thereto. Based upon our review, evaluation and analysis of the record evidence, we shall modify the ALJ’s Recommended Decision, consistent with this Opinion and Order. Moreover, as we believe that Laser has met the threshold issue of whether its proposed service meets the definition of “public utility” service, we will remand this case to the OALJ to determine 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), and for further development of the record in order to address the questions set forth in the foregoing discussion; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions of Laser Northeast Gathering Company, LLC, the Office of Trial Staff, the Silver Lake Association and Vera Scroggins are granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the Recommended Decision of Administrative Law Judge Susan D. Colwell is modified, consistent with this Opinion and Order.

3. That the non-unanimous Joint Petition for Settlement signed by Laser Northeast Gathering Company, LLC, Silver Lake Association, William C. Fischer, Vera Scroggins, and the Office of Trial Staff, is remanded to the Office of Administrative Law Judge for further proceedings, consistent with this Opinion and Order.

4. That the 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, is remanded to the Office of Administrative Law Judge for further proceedings, consistent with this Opinion and Order.

** BY THE COMMISSION**

Rosemary Chiavetta,

Secretary

(SEAL)

ORDER ADOPTED: May 19, 2011

ORDER ENTERED: June 14, 2011

1. The Parties requested, and were granted, an extension of time to file Exceptions and Replies to Exceptions. Exceptions were due on January 14, 2011, and Replies to Exceptions were due on February 7, 2011. [↑](#footnote-ref-1)
2. More procedural details relating to the Parties’ filings, including Preliminary Objections and responses thereto, various motions and answers thereto, and testimony and exhibits are contained in the Recommended Decision on pages 2-8. [↑](#footnote-ref-2)
3. Laurie and Brian Kaszuba withdrew their protest on March 30, 2010, Rita Chirumbolo Ernstrom withdrew her protest on April 12, 2010, and Rebecca Roter withdrew her protest on June 3, 2010. On April 2, 2010, Laser filed an amendment to its Application which resolved ETC’s protest. [↑](#footnote-ref-3)
4. By letter, the Independent Oil and Gas Association of Pennsylvania (IOGA) reported that, effective April 1, 2010, it had changed its name to the PennsylvaniaIndependent Oil and Gas Association, thereby, becoming “PIOGA.” [↑](#footnote-ref-4)
5. This provision provides that, “[a]ny producer of natural gas not engaged in distributing such gas directly to the public for compensation” is excluded from the definition of “public utility.” [↑](#footnote-ref-5)
6. This provision provides that an entity is a public utility if it engages in “[t]ransporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substance, by pipeline or conduit, for the public for compensation.” [↑](#footnote-ref-6)
7. 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. [↑](#footnote-ref-7)
8. The guidelines in our *Policy Statement* are not binding and do not trump the standard established in the case law discussed herein, which provides 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). [↑](#footnote-ref-8)
9. The significance of the cost of revisions varies according to the industry involved. [↑](#footnote-ref-9)
10. This includes the possibility that the legislature could create a special gathering public utility status which “would not be subject to economic or rate regulation, but would provide an avenue for overcoming the blocking tactics that gatherers are facing when acquiring rights-of-way in the state.” LMM M.B. at 22; R.D. at 85. [↑](#footnote-ref-10)
11. Section 501(a) provides the following:

    In addition to any powers expressly enumerated in [the Code], the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of [the Code], and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in [the Code] shall not exclude any power which the commission would otherwise have under any of the provisions of [the Code]. [↑](#footnote-ref-11)
12. *PECO Energy Co. v. Township of Upper Dublin,* 922 A.2d 996, 1002 (Pa. Cmwlth. 2007). [↑](#footnote-ref-12)
13. Section 502 provides as follows:

    Whenever the commission shall be of opinion that any person or corporation, including a municipal corporation, is violating, or is about to violate, any provisions of [the Code]; or has done, or is about to do, any act, matter, or thing herein prohibited or declared to be unlawful; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse, to perform any duty enjoined upon it by [the Code], or has failed, omitted, neglected or refused, or is about to fail, omit, neglect, or refuse to obey any lawful requirement, regulation or order made by the commission; or any final judgment, order, or decree made by any court, then and in every such case the commission may institute injunction, mandamus or other appropriate legal proceedings, to restrain such violations of the provisions of [the Code], or of the regulations, or orders of the commission, and to enforce obedience thereto. [↑](#footnote-ref-13)