PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

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: August 25, 2011
2153371-OSA
Docket No. A-2010-2153371

DISSENTING STATEMENT OF COMMISSIONER JAMES H. CAWLEY

I.

As our order notes (page 9, footnote 7), Laser amended its application to clarify that it will provide service only to producers who have entered into a contractual agreement for gathering and transportation services (although, as noted below, it will provide only gathering services). The majority continues to rely on Laser's representations that (1) it will serve any producer requesting service and (2) that its negotiated contracts will not be used to exclude any customer but instead will merely establish technical requirements, delivery points, and other terms and conditions of service.

The first representation is a bald statement that is not borne out by the facts. As related at length in my earlier dissent, Laser's proposed negotiated contracting permits it to select its customers as it pleases. The chief criterion for public utility service is an indiscriminant holding out to the indefinite public to provide service to the extent of one's capacity to do so. We can accept promises of holding out to the public only when the method of doing so bears out the assertion. Here the statement cannot be accepted because the intended method of operation allows Laser to pick and choose its customers. That is not public utility service.

Of course, if the three contracts that Laser averred it had already entered into were available to the Commission, we could test the validity of the second representation. Rather than faulting the protestants for not demanding copies of those contracts and for not introducing them into evidence, we should instead, *sua sponte*, require their production, although the defect is likely to be cured during the hearings on remand to determine whether Section 1103(a)'s public interest standard has been met. Until the contracts are produced, we should not be confident in proclaiming that they are not meant to be "exclusionary" because they only establish "technical requirements, delivery points, and other terms and conditions of service."

If we see those contracts, they are likely to confirm the protestants' allegation that natural gas gathering is a competitive industry with key terms negotiated on a producer-by-producer, well-by-well basis, particularly the all-important price. But, even if we never see the contracts, the fact that the price is effectively left to Laser's complete discretion is enough to exclude it from our jurisdiction. Our setting or occasional resetting of a maximum price far in excess of market reality, so that Laser is free to set any lesser, more realistic price with individual

customers, is no real oversight by this Commission because Laser will be able to discriminate between and among producers as it sees fit.

Again, an entity that can pick and choose its customers is not a public utility. Laser is such an entity.

Laser's business model, therefore, is the *epitome* of the exception to public utility service embodied in the third criterion of our Policy Statement at 52 Pa. Code § 69.1401(c)(3) patterned on the seminal case of *Drexelbrook Associates v. Pa. Public Utility Commission*, 418 Pa. 430, 212 A.2d 237 (1965): whether the service will be provided "to a defined, privileged and limited group when the provider reserves its right to select its customer by contractual arrangement so that no one among the public outside of the selected group is privileged to demand service."

The inquiry is always fact specific. The exception to PUC-jurisdictional public utility service applies when the entity providing service so structures its affairs as to be excluded from our jurisdiction and requests by application that the exception apply, as was the case in *Drexelbrook Associates*. In such instance, we may grant the application. The exception also applies, as here, when an entity so structures its affairs as to be included within our jurisdiction and requests by application for a Certificate, but it has maintained too much control over the selection of its customers to exclude itself from the exception. In such instance, we may not grant the application.

It is no answer to say that aggrieved producers will have recourse to the Commission. By the time such complaints are adjudicated, with its concomitant expense, there may be no adequate relief available because of pipeline capacity constraints and changed market conditions. It is more likely that the producer can be made whole only by a costly action for damages, which we are without jurisdiction to award. Consequently, producers will effectively be forced to accede to Laser's monopolistic demands rather than seek relief from this Commission or a state or (more likely) federal court of law. While Laser now claims that this Commission is the "relief valve," it can later interpose the defense that this Commission lacks jurisdiction to provide any relief.

It is no answer to say, as we do in the present order (page 6), that Laser's method of operating by negotiated contracts should be approved because "our Regulations allow negotiated contracts for natural gas transportation pipelines." As I had hoped my earlier dissent made clear, transportation by pipeline and gathering are two distinct animals. The Federal Energy Regulatory Commission has long since established the criteria, which could be adopted by us, of distinguishing between the two. It is undisputed that Laser intends to be a gathering, not a gas transportation, business (despite its labeling of it as including transportation, which is not controlling).

Nor is it an answer to say that we have previously approved transportation tariff riders (in the nature of gathering services) submitted for approval by Equitable Gas Company and T.W. Phillips Gas and Oil Company as relatively minor ancillary services to their primary businesses as natural gas distribution companies. Unlike those services, Laser's business is solely gathering, which we have never regulated. Moreover, rather than repeat our errors here, we

should revisit them by reconsidering our prior approvals of the Equitable and T.W. Phillips riders.

It is true that this Commission certificated the Bradford Transit Company and the National Transit Company for the transportation of crude oil, as noted by Vice Chairman Coleman in his Concurring Statement (page 3, footnote 7) to our June 14, 2011 order. Again, transportation is different from gathering, and, further, an examination of those entities' tariffs indicates that, rather than approving a maximum volumetric price as here, a tariffed fixed volumetric price per barrel was approved, which is the usual public utility model to prevent discrimination between and among customers.

II.

Finally, although I have no objection to the "clarification" given, it adds nothing to existing law and does nothing to dispel the confusion that already reigns as a result of our June 14, 2011 order. We said there that "not all gathering and transportation service providers will be considered public utilities and subject to the Commission's jurisdiction" without defining how we shall make the distinction. It appears from that order that any gatherer may be granted a Certificate of Public Convenience on the mere promise to serve all customers indiscriminately to the extent of one's capacity *even if it may freely discriminate between and among customers because key terms are completely within its discretion and its customers are effectively powerless to complain.*

James H. Cawley
Commissioner

August 25, 2011