**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Peregrine Keystone Gas :

Pipeline, LLC for Approval on a Non- :

Exclusive Basis to Begin to Offer, Render, : A-2010-2200201

Furnish, or Supply Natural Gas Gathering, :

Compression, Dehydration, and Transportation :

Or Conveying Service by Pipeline to the :

Public in All Municipalities Located in :

Greene and Fayette Counties and in East :

Bethlehem Township in Washington :

County, Pennsylvania :

**RECOMMENDED DECISION**

Before

Susan D. Colwell

Administrative Law Judge

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I. INTRODUCTION

This Recommended Decision recommends disapproval of this Application because it fails to meet the standard for certification of a public utility under the Public Utility Code for the following reasons explained in detail in the discussion which follows: (1) the service it will offer and the facilities it plans to build will, first and foremost, be used to provide service to affiliated producers; (2) the Application fails to meet the standard set in the *Laser*[[1]](#footnote-1) case; (3) the proposed tariff is inadequate to inform prospective customers of terms of service; (4) the type of service to be offered cannot meet the stated intent to serve the public indiscriminately; (5) the market is providing robust competition that eliminates the claim that this service is necessary or proper within the meaning of the Public Utility Code; and (6) the Pennsylvania General Assembly has passed legislation, signed by the Governor, which provides Commission oversight for pipeline safety issues while eliminating the need for the exemption from the restrictions of local zoning laws.

II. HISTORY OF THE PROCEEDING

On September 17, 2010, Peregrine Keystone Gas Pipeline, LLC, (Peregrine or Applicant) filed its Application for a certificate of public convenience to offer, render, furnish, or supply natural gas gathering, compression, dehydration, and transportation or conveying service by pipeline to the public, on a non-exclusive basis, in all municipalities located in Greene and Fayette Counties and in East Bethlehem Township in Washington County, Pennsylvania (Application). Notice of the Application was published in the *Pennsylvania Bulletin* on October 2, 2010, 40 *Pa. B*. 5662, and the deadline for protests and interventions was set for November 1, 2010.

On November 1, 2010, petitions to intervene were filed by Superior Appalachian Pipeline, LLC (Superior), Columbia Gas of Pennsylvania, Inc. (Columbia), and Caiman Energy, LLC (Caiman). Applicant filed answers to each petition on November 15, 2010.

On October 27, 2010, a Motion for Special Admission *pro hac vice* was filed on behalf of Kurt L. Krieger, Esq., to represent Caiman Energy, LLC. The Motion was not opposed and was granted in the Order dated December 16, 2010.

Notices of appearance were filed by the Office of Trial Staff, now known as the Bureau of Investigation & Enforcement (I&E) on November 2, 2010, and by the Office of Consumer Advocate (OCA) on November 1, 2010.

Protests were filed by: MarkWest Liberty Midstream & Resources, LLC (MarkWest) on November 1, 2010; Laurel Mountain Midstream, LLC (LMM or Laurel Mountain) on November 1, 2010; by Mary Grace Butela on November 1, 2010; by James E. Rosenberg on November 1, 2010; and the protest of Veronica Coptis is stamped into the Secretary’s Bureau on November 4, 2010. On November 15, 2010, Applicant filed an answer to each protest, and on December 1, 2010, Protestant Rosenberg filed a reply to Applicant’s answer to his protest.

Applicant filed preliminary objections to the protests of Laurel Mountain Midstream and MarkWest on November 12, 2010, and each protestant filed an answer on November 22, 2010. Applicant filed a reply to the answer, along with leave to file the reply, on November 24, 2010.

On December 8, 2010, the case was assigned to me.

On December 16, 2010, a notice of prehearing conference was issued, which set the prehearing conference in this matter for January 24, 2011 in Hearing Room 2 of the Commonwealth Keystone Building. By Prehearing Order dated December 16, 2010, the Preliminary Objections were denied and the parties directed to file prehearing memoranda.

On December 15, 2010, FirstEnergy Solutions Corp. (FES or FirstEnergy) filed a Petition to Intervene, and on January 4, 2011, Applicant filed its Answer opposing the intervention.

On December 23, 2010, Applicant filed a Motion for Continuance of Initial Prehearing Conference. The Motion indicates that all parties on the service list had been contacted and that no party had voiced opposition. By Order issued January 7, 2011, the Motion for Continuance was granted and the intervention of FES was allowed.

In July 2011, counsel for Applicant indicated in a telephone call that his client was ready to proceed and asked that the prehearing conference be rescheduled for the end of August. By Notice issued July 5, 2011, and published in the *Pennsylvania Bulletin* on July 16, 2011, 41 *Pa.B*. 3946, the prehearing conference was set for Wednesday, August 31, 2011 in Harrisburg.

The prehearing conference was held in Harrisburg with the following attending in person: Daniel P. Delaney, Esq., for Peregrine; Brian J. Knipe, Esq., for MarkWest; Kurt L. Krieger, Esq., and Brian Pulito, Esq., for Caiman; Alan M. Seltzer, Esq., for Laurel Mountain Midstream; Adeolu A. Bakare, Esq., for I&E; Theodore J. Gallagher, Esq., for Columbia; James A. Mullins, Esq., for OCA; Elizabeth U. Witmer, Esq., for Superior Appalachia; and Jeffrey A. Franklin, Esq., for FirstEnergy. Protestants Marigrace Butela and James Rosenberg participated by telephone from the Pittsburgh Office of Administrative Law Judge.

MarkWest, Laurel Mountain, Caiman, FirstEnergy Solutions, and Superior Appalachian filed a Joint Motion to Suspend the Proceedings on August 9, 2011, making the response due two days prior to the prehearing conference. Peregrine filed its answer in opposition on August 29, 2011.

At the prehearing conference, all interventions (Caiman, Columbia and Superior) were granted as unopposed.

The parties were informed that the Directed Questions issued by the Commission in the case captioned *Application of Laser Northeast Gathering Company, LLC* at Docket No. A‑2010-2153371 (*Laser)* were required to be addressed in this proceeding as well. The parties submitted an agreed-upon schedule following the prehearing conference, which was adopted in the Scheduling Order (Fourth Prehearing Order) issued September 12, 2011 along with agreed-upon discovery modifications. The Order of September 12, 2011, also denied the joint motion to suspend proceedings.

On September 15, 2011, Applicant filed an Application for Protective Order, which indicated that there was a need for confidentiality but that the parties had a disagreement over the wording of one specific issue. On September 21, 2011, MarkWest and Laurel Mountain filed a joint answer in opposition to the proposed protective order. The Protective Order (Fifth Prehearing Order) was issued on October 11, 2011.

On October 26, 2011, two public input hearings were held: at 1:00 pm in Uniontown and at 7:00 pm. in Waynesburg. A total of 37 witnesses testified at the public input hearings.

On November 17, 2011, Peregrine filed a motion to compel discovery responses by both MarkWest and Laurel Mountain. Answers to the motion were filed on November 21, 2011. The Sixth Prehearing Order denying the motion was issued on December 5, 2011.

Evidentiary hearings were held on January 10 and 11, 2012, in Harrisburg, with Mr. Rosenberg and Ms. Butela participating by telephone from the Pittsburgh Office of Administrative Law Judge. Eight witnesses testified, and a transcript ending on page 536 was generated.

The following parties filed main briefs: Applicant (public and proprietary), Mr. Rosenberg, Ms. Butela, Columbia Gas, Superior Appalachian, OCA, I&E, MarkWest, Caiman (public and proprietary), Laurel Mountain, and Pennsylvania Independent Oil & Gas Association (PIOGA) *Amicus Curiae.* Reply briefs were filed by Applicant, Ms. Butela, Mr. Rosenberg, Laurel Mountain, MarkWest, and Superior Appalachian, and the record closed upon their filing on February 23, 2012.

The matter is ripe for decision.

III. FINDINGS OF FACT

1. Peregrine Keystone Gas Pipeline, LLC, is a natural gas midstream company organized under the laws of Texas, with its primary purpose to construct, build, own, and operate natural gas pipelines and related facilities to provide gathering, transportation, and related compression and dehydration service to natural gas producers in Pennsylvania. PKGP Stmt. 1 at 3.

2. OCA is a statutorily created public advocate empowered to represent the interests of consumers before the Public Utility Commission pursuant to Act 161 of the General Assembly, as amended, 71 P.S. §§ 309-1 *et seq.* OCA Notice of Intervention.

3. The Commission's Office of Trial Staff filed its Notice of Appearance. The name of this Commission office was renamed pursuant to an internal reorganization and is known as the Bureau of Investigation & Enforcement (I&E). *Implementation of Act 129 of 2008 Organization of Bureaus and Offices,* Docket No. M-2008-2071852 (Order entered August 11, 2011).

4. Protestant James E. Rosenberg is a private citizen residing in Grindstone, PA 15442.

5. Protestant Marigrace Butela is a resident of Dunbar Township, Fayette County, PA.

6. Protestant Veronica Coptis is a private citizen residing in Mt. Pleasant, PA 15666.

7. Columbia Gas of Pennsylvania, Inc., is a Pennsylvania corporation providing gas service pursuant to certificates of public convenience issued by the Commission in proceedings docketed at A.87616, A.95490 and A.96176. Columbia serves approximately 413,000 customers in 26 counties. Columbia Petition to Intervene at 1-2.

8. Superior Appalachian is a wholly owned subsidiary of Superior Pipeline Company, LLC, and is a midstream company engaged in the gathering, processing and treating of natural gas. Superior Appalachian is registered to do business in Pennsylvania. Superior owns pipeline rights-of-way in Centre, Armstrong and Jefferson Counties and intends to build natural gas pipelines in those counties as well as associated facilities to provide compression and dehydration services. Superior Appalachian Petition to Intervene.

9. MarkWest Liberty Midstream & Resources, LLC, owns property located in Washington and Greene Counties, where it operates a natural gas gathering system for the purpose of gathering and transporting raw gas from wells in Southwestern Pennsylvania to processing facilities and/or transmission lines, pursuant to individually negotiated contracts with unaffiliated natural gas producers. MarkWest owns a processing facility in Houston Borough, Washington County.

10. Caiman Energy, LLC, is a limited liability company organized and existing under the laws of Delaware and registered to do business in Pennsylvania. Caiman is a midstream energy company focused on designing, building, owning, operating and acquiring midstream assets to provide services to producers and currently has over 400,000 acres dedicated to it in the Marcellus Shale region.

11. Laurel Mountain Midstream, LLC, currently operates a natural gas gathering system for the purpose of gathering and transporting raw gas from wells located in Fayette, Greene and Washington Counties to a transmission line, pursuant to individually negotiated contracts with independent natural gas producers. LMM has on-going pipeline projects in Fayette, Greene and Washington Counties, and is affiliated with the Williams companies.

12. Peregrine's proposed system will span approximately nine miles with lateral lines connecting to wellheads ranging in length of approximately 0.2 to 5 miles each. The entire system will consist of approximately 58,800 feet of pipeline varying in size between 4" and 6" diameter steel and polyethylene pipe. PKGP Stmt. 1 at 8-9.

13. Peregrine's business will be the gathering and delivery of natural gas. PKGP Stmt. 1 at 6.

14. Peregrine will not hold title to the gas moved through its facilities, nor will it engage in the marketing of gas for others. There will be no direct sales from Peregrine's gathering and transportation system. PKGP Stmt. 1 at 6.

15. Peregrine proposes to provide transportation and related compression and dehydration services to any producer in its service territory to the extent that it has the capacity to provide the service. PKGP Stmt. 1 at 7.

16. Peregrine proposes to design and construct its facilities to provide service to as many customers as possible and will increase its size and capabilities to meet increased customer demand. PKGP Stmt. 1 at 7.

17. Peregrine proposes to enter into Natural Gas Gathering Agreements with its customers pursuant to and subject to its tariff. PKGP Stmt. 1 at 14.

18. Peregrine's affiliates own and operate gas gathering systems in Texas, New Mexico and Arkansas, comprising approximately 150 miles of pipe. PKGP Stmt. 1 at 15.

19. The audited financial statement of Peregrine Partners attached as "highly confidential" indicates that there is sufficient financial ability to function as a regulated utility. PKGP Stmt. 1, Exhibit D.

20. There are no certificated public utilities providing natural gas gathering, transportation, and related services in the proposed service territories. PKGP Stmt. 1-R at 21-22.

21. There are multiple uncertificated gathering companies offering gathering and treatment services to affiliated and unaffiliated entities in the Commonwealth of Pennsylvania, including in the service territory proposed by Applicant. Tr. 343.

22. The Application Tariff and the Testimony Tariff indicate that they are negotiable regarding material terms.

23. Contract terms that are negotiable empower both parties to the contract to agree or withhold agreement on a contract term.

24. Peregrine will serve a customer if sufficient capacity exists in its pipeline to provide service. Application Tariff and Testimony Tariff Sections 2.

25. No party submitted independent studies or any analysis concluding that there is a need for the services to be offered by Peregrine.

26. No other entity provided testimony or evidence supporting the need for certificated services proposed by Peregrine.

27. Peregrine's proposed tariff contains inadequate information for a public utility tariff.

28. Natural gas gathering is a competitive business. Sander Direct at 7, line 18.

29. In certain production areas, the qualities of the natural gas produced are very similar, the geology is well understood, and the services required by producers are known and consistent over distinct geographical areas. PKGP Stmt. 1-R at 3; Tr. 340.

30. Greene County has two types of gas: on the west side is rich gas which has to be processed prior to being pipeline quality, and on the east, the gas does not have to be processed and is pipeline quality with only a few steps prior to transmission. Tr. 340.

31. A landowner asking an exorbitant price for a right-of-way is tantamount to "last resort" and might trigger the exercise of eminent domain. Tr. 414.

32. The Application does not request authority to provide distribution or natural gas for end-use consumption, nor does it seek authority for natural gas storage, banking, sales, or other end-use services. Tr. 420.

33. Pipelines limit the landowner's use of the property. Tr. 95-98.

34. Property owners have legitimate concerns regarding the proposed application of eminent domain versus negotiation for the right to use their land. Public input hearings, Tr. 84-243.

35. Granting public utility status to this gathering company would unfairly distort the balance between a company and the property owners' negotiations. Tr. 98-100; 173-174; 212-215; 216-220; 228-230.

36. Other companies related to the gas extraction industry which are operating in the proposed territory have acted unfairly towards landowners. Tr. 108-111; 111-112; 115-119; 138-146; 156-159; 161-162; 175-180; 231-235.

37. Use of eminent domain can result in senseless destruction which could be prevented with meaningful negotiation with landowners. Tr. 108-111; 113-115; 175-180; 202-206; 207-211; 212-215; 216-220; 231-235; 235-237.

38. There are four basic components to the natural gas business: (1) exploration and production, or "upstream" services, (2) natural gas gathering, treating and processing, or "midstream" services, (3) natural gas transportation or "downstream" service, and (4) local distribution services. LMM Stmt. 1 at 7.

39. Gathering is a service provided to a discrete set of sophisticated producers, a service which is tailored to the producer's needs. LMM Stmt. 1 at 11-13.

40. Because the gas gathering business is competitive and the customers are highly sophisticated, market forces control the participants' behavior. The unique and individualized contracts with customers are based upon market-based rates negotiated by the parties rather than standard terms, rates and conditions of service specified in the approved tariffs of public utilities. LMM Stmt. 1 at 13.

41. LMM, as a private, non-public utility natural gas gatherer, is currently operating a competitive gathering business in Pennsylvania. LMM and its affiliates *today* own and operate natural gas gathering facilities in substantial portions of the geographic area encompassing Peregrine's proposed service territory. LMM St. 1 at 15; LMM MB 15; LMM RB at 4.

42. LMM Exhibit FB-1 illustrates the prevalence of Williams' facilities in the very service area Peregrine seeks to obtain in this proceeding. LMM FB-1.

43. Peregrine's proposed service territory directly overlays a dedication area of over 1,200 square miles under contract to MarkWest. MarkWest Stmt. 2 at 14.

44. MarkWest has invested approximately $3 billion in developing its natural gas system in support of the Marcellus Shale and any action by the Commission in authorizing certificated territory could put that system at risk. MarkWest Stmt. 2 at 12; MarkWest MB at 28.

45. Granting a certificated service territory to a gathering entity could eliminate the market forces that create competition, foster efficiency and result in cost-effective service for producers. LMM MB at 33; MarkWest Stmt. 2 at 11.

IV. PUBLIC INPUT HEARINGS

Two public input hearings were held on October 26, 2011. The first was in the Fayette County Courthouse at 1:00 pm., and the second at Waynesburg University at 7:00 pm. The testimony of the witnesses is summarized below.

**A. Fayette County Courthouse**

Evelyn Hovenac, retired from Penn State, compared the Marcellus Shale phenomenon to the coal, coke and steel era in Western Pennsylvania, which dominated the area from around 1870 to 1950. "We are still paying the price for the mistakes, undisciplined greed and irresponsible behavior of those who could see only immediate profits while giving no thought to the consequences of their actions for the future of this state or this region." Tr. 86. She cited polluted ground water, creeks and rivers, untold acres of prime farmland now covered with ash and pollution from those industries. Fayette County is one of the poorest counties in the Commonwealth, with a collapsed infrastructure and tax base that affects everything from services to education. With the Marcellus Shale "boom," there should be accountability and responsibility, with a demand that only state-of-the-art technology and environmentally sound practices used, including a certified reclamation plan, full disclosure on health and land issues, and a plan to keep some of the profits in Fayette County. She asks how a power delegated from the government can be given to a company that is purely for profit? She asks for an escrow fund to pay for problems that will arise later from actions which occur now. She points out that planning and zoning commissions were required to develop plans for land use but that these plans will not be used if eminent domain is permitted.

She is happy that this is not one of those decisions made by unelected officials hundreds of miles away, without consultation with local officials and concerned citizens, as the public input hearing is giving her an opportunity to participate. She asks that the Commission give working definitions of certain terms: commonwealth, public/private, and public interest. She urges the Commission to take its time and do this right. Tr. 84-95.

Rosemary Matway, farmer, expressed her frustration with the prospect of eminent domain, which she characterized as the easy way for a company to proceed. As a privately owned company, Peregrine will profit. Landowners should not be forced to have pipelines through their property, and if they do, they should be paid fairly and quickly. Pipelines limit the landowners' use of the affected area, and if there is a problem, it could affect future use of the land, too. If the company is going to make a profit, it should not be able to use eminent domain. Tr. 95-98.

John Cofchin, retired, opposes granting Peregrine public utility status. Natural gas midstream activities are not public utility activities. This is a transparent effort to circumvent the rights of property owners to determine how their land is used by whom and at what price. The assumption that Peregrine should be granted the power to take from an unwilling property owner what they could not accomplish through negotiations is unacceptable. Mr. Cofchin cannot imagine any instance in which failure to reach agreement with a property owner should result in the use of eminent domain. Granting such status would unfairly distort the balance between the rights of property owners negotiated with midstream gathering companies and those companies. The concept of willing buyers and willing sellers is fundamental to the way we do business in the United States and should be preserved. He has no objection to drillers, midstream gatherers, processors or any other legitimate energy operations in Fayette County. However, the property rights of the individuals should not be trampled upon to accommodate the self-serving interests of a single entity, in this case Peregrine Keystone, LLC. He urges the Commission to deny the application. Tr. 98-100.

Jan Kiefer, unemployed, is a graduate of the Pennsylvania State Rural Leadership Program, whose graduates engage in public issues, networking, effective public decision-making, strategic design and sustainability. He believes that the issue is a health issue because the lines will lead to stations every few miles which will emit gasses which will cause cancer. He characterized the citizenry of Fayette County as having real heart but reluctant to speak up or get involved, which made the fact that so many turned out for the hearing so remarkable. He believes that the community is being victimized by international concerns under the false or at least debatable pretense of national energy, national economics, or national security. He stated that the communities and properties are becoming corporate commodities, and that the public interest of the local citizens is not being served by gathering line construction or the industry as a whole. Landowners should have the right to decide how their property should be impacted and not forced by eminent domain. In response to Ms. Hovenac's request for escrow, he stated that there is no escrow amount large enough to cover a super-fund cleanup for this industry, and no long-range plan for the containment of the toxins that are being stored underground. Tr. 101‑107.

Walter R. Stinger, owner of an asphalt company, testified that he has had trouble with oil and gas companies. He owns 500 acres in Greene County but does not own the mineral rights. Chesapeake "came in, traced my land, tore down my gates, tore down the fence line, cut down the trees, burned the trees, burnt the stumps. They did not have permission to come on my property, but they still did." Tr. 109. He stated, "We have no contract, we signed no papers. They offered me almost nothing, what I call nothing, to do it. Their exact words was, 'If you don't take the money that we offer you, we're going to claim eminent domain and put the gas lines in regardless of what you do.” They told him that they have more money and attorneys on retainer and to go ahead and sue if he wants to. They tore down the gate and fence to his hunting camp, and expanded his roadway from eight feet to eighty feet, and left the area a mess. Now he says that the pipeline will be put wherever the company wants it, and if he doesn't agree, they'll take it by eminent domain. He has already been to court and will go again. Tr. 108-111.

Joe Stark, employed by Oracle Corporation, does not believe that Peregrine will only use eminent domain as a last resort. He believes that it is a tool which will be used to get what the company wants. He has dealt with other midstream companies, and they are not pleasant. They have threatened to sue him, and he has hired an attorney to fight them. Tr. 111‑112.

Carl Wade, retired, spoke eloquently:

Well, not everyone needs natural gas or profits from its development. All that we are interested in is being protected from it. Now we have a proposal that would give big business and Wall Street the freedom to forever dominate us.

We pay taxes on our land to prevent its seizure by government. Government tells us what we can do with it by zoning. Now government wishes to allow others to use it without our consent or negotiation on its value. This makes us question who really owns the land. It seems we only dwell on it.

Now we know that the state is anxious to collect taxes from these employees in the gas industries, but let's not sell out all these citizens who own property for the sake of state coffers.

I own two one-acre lots in different locations. If a major pipeline passes through one acre, what value is it to me, or its resale to another person?

There are many questions pertaining to eminent domain for for-profit companies. How do we protect our rare or very old trees on property, vineyards or orchards? Will this gas be exported abroad? Will a main line be paid in one cash payment or by the volume of the gas that passes through it over time?

Will this be leased to others over time, like the telephone company or the power company? They gave me a dollar for the right-of-way to go through my property and then they rented a pole to the cable company and the telephone company.

Will property taxes be reduced? A pipeline should reduce the value of the property considerably. Will herbicides be used on rights-of-way? Will fences and stone walls be protected? Any future development of that property would be impeded.

In the past, I have seen the devastation of pipelines; as an example, the sewage line in Hopwood. We had stone walls up there that were probably 200 years old, and they were torn down. Large oak trees were sacrificed that didn't need to be.

Eminent domain is a bad plan for the property owner, period. We should not be forced by the court to protect what we have labored many years to keep. It's our right to determine what is the final value for our land. Any other plan smacks of communism.

I would suggest that those of you who have internet access go to eminent domain, Pennsylvania, the CPA's low rates as to the protecting property. There is much there for you to learn. Thank you.

Tr. 113-115.

Bill Rittenhouse, self-employed in insurance, lives on a farm that has been in his family for eight generations. When it came time to negotiate with the gas companies, he did what most people in the room did – sat down and negotiated and signed leases. It was fair. However, a larger company visited a neighbor and wanted more, and they came with written agreements and a notary. That company threatened to sue his neighbor, and it was ugly, but over time, they were able to work out an agreement. If that company had eminent domain, there would not be a good ending to that story.

In short, the present system works well as the companies are forced to negotiate and land owners can negotiate where the line will be located, and where it will have the least impact on the landowner's life as well as his descendants' lives. He asks that this application be denied in order to keep the system as is – working well. Tr. 115-119.

Ken Schrock, cattle farmer, appeared in order to tell a story of the aftermath of having gas wells on property. His family owns two parcels, 27 and 30 acres. The gas rights were owned by others even before he bought the property. The gas companies cut off two gas lines across the property and just left them there with risers sticking up in the middle of the field. They moved over three feet and put in another. Now there are five gas lines across the property. Because of the configuration, there is nothing that can be done with the property except pasture it for cattle. There's an old gas well that has a tank with brine water in it, which leaks. He echoed the sentiment of an earlier witness who cautioned that there should be a plan for clean up after the boom is over. Tr. 119-120.

Veronica Coptis, a formal complainant, chose to testify at the public input hearing instead of participating in the formal evidentiary hearing. She is a community organizer with Mountain Watershed Association, a non-profit environmental advocacy group with over 800 members. She testified that granting this application is not in the best interest of the public in the affected counties. There is no guarantee that the gas which will travel through the gathering lines will be for the greater good of Pennsylvania. Much of it will not be used here but will be transported elsewhere. In addition, there is no increase in the demand for natural gas right now because a glut exists. She states that it isn't needed, and that another utility to supply it is not necessary. The construction of a pipeline on someone's property inhibits future use of that property, and that decision should not be made by the use of eminent domain. This will not inhibit the development of the area's gas production as there must be at least ten midstream companies that are not asking for eminent domain. This process is not needed. Midstream companies operate well with negotiating and do not need eminent domain. She asks that the application be denied. Tr. 120-125.

Carla Ruddock, also employed with the Mountain Watershed Association, stated that most of her opinion had already been expressed by others. First, she does not see the public interest, as not everyone uses natural gas. As each company has its own gathering lines, she does not see a public interest. Next, the gas can be transported anywhere, and that weighs against a finding of public interest. Landowners’ rights are next, as property owners have worked hard, especially difficult in this economy, to keep their property, to work hard and pay taxes. These landowners should have the right to decide if they want to have an easement on their property. They have a choice of whether to work with individual companies. Eminent domain removes the choices. Tr. 125-127.

Sara Sickle is retired but still farms with her husband. Farming is her second job. She stated that most of the points were already covered, but she wants to make a few additional points. She is one who did not sign on with a gas company for her hundred acres. She made that choice, and she has not received the benefit of a negotiated agreement like some of the other property owners, so why, she asks, should she be forced to have the impact of a pipeline through her farm? A neighbor has a well that is within 75 feet of her fence, so the gas under her farm is being taken out by this well. In addition, her well water has been contaminated, but proving that has been difficult. Peregrine, she points out, doesn't even have any Pennsylvania owners. Tr. 127-131.

Phyllis Carr, unemployed, has lived in Fayette County for 45 years and is a landowner. She produced photographs of her granddaughters, Rhonda, age 15, and Emily, 18, and her daughter, Jeannie, as well as her grandson Nathaniel, 11, and his twin 12-year-old brothers, Patrick and Daniel. They all live beside three compressor stations. After a dehydrator got hooked up and running, there were emissions from that which caused a burning throat and instant headache, followed by shakiness for hours on end afterwards. After her daughter spent three to four minutes in that smell, she woke up the next day with blisters on her neck and on her arms, which were the areas not covered by clothing. She began to lose weight and suffer serious headaches to the point where she could not get out of bed. Doctors could not pinpoint a cause and asked whether they lived near a chemical plant.

The same thing happened to Rhonda and Nathaniel, who now have to live with medicine constantly in their noses after inhaling the emissions. Without the medicine, the area blisters. Emily and Rhonda are on blood pressure medication because of uncontrollable high blood pressure. Twelve-year-old Patrick is too young to take the medicine but already suffers from high blood pressure. Eventually, Patrick was referred to an occupational therapist who told the family about a program for people who cannot afford to have environmental testing done. The results were that there are 48 chemicals emitted from these plants. The family cannot go outside when the emissions are there. Her daughter would have liked to come, but she can hardly stand at times and has difficulty speaking.

She and her family are living in pure hell. The owners of the compressors give out no information, and there is monthly trouble at the plants. She asks the Commission to please not grant the power of eminent domain, as she and her family have been through enough and they just cannot take anymore. Tr. 131-137.

Mel Apicella, self-employed in heating and air conditioning, wanted to share some experience that he has had at his property in Manellen Township regarding some pipeline conflicts. He entered a gas lease because he is not against natural gas development but he wants to be sure that it's done the right way. He stated:

This eminent domain – I find it amusing that any of these pipeline companies would even be interested in using it for the fact that we have so much vacant land in these counties. Why would you need to force pipelines in places where they shouldn't be?

There's plenty of land out there not being utilized. I'm sure they want to maximize their profits, as all corporations do, so that part of it I could understand. However, I don't think maximizing profits should come ahead of public safety.

Tr. 139.

He expressed concern regarding the number of explosions that occur with gas pipelines, and mentioned the well-publicized Allentown explosion and the one which occurred in California.

He signed a lease, and as a former realtor, he included provisions to protect his family, including the right to agree to anything that the company wants to place on his property. However, this particular pipeline, the company that bought the lease threatened to force him into a lawsuit, which would be prohibitively expensive. He asks, how many people in this room could withstand a lawsuit brought by a large company?

Mr. Apicella stated that eminent domain forces everyone who was smart enough to get into a lease with these guys into a position where they are defending their agreement. He read from the dissenting statement of Commissioner Cawley in *Laser I*. He chose to not live on a pipeline. He purchased land to preserve it for development later, and the imposition of pipelines by eminent domain will ruin that plan. Tr. 138-146.

Frank Mutnansky, Senior, is retired from a factory job but has farmed all of his life. He is president of the Fayette County Cattlemen Association and vice chairman of the Fayette County Conservation Board. He declined to repeat some of the statements already given. What he wants the Commission to know is that a lot of the people have farms, some third or fourth generation, which they worked since they were able to walk. Many chose to work other jobs, come home and change clothes, and work until midnight and then go back to work the next morning. The property means a lot to them. They can tell you stories of what happened in this field and that field 40 years ago. It is just wrong to give this company eminent domain and the power to take away rights. Tr. 148-150.

Mary Jean Rosenberg, self-employed as an artist, pointed out the difference between a human person and a corporate entity that is also given personhood. Tr. 150-151.

Mary Ann Schmidt, retired professional nurse, agreed with prior speakers and asked whether any politicians were present, as she would consider voting for one who attended. It is unbelievable to her that the PUC would approve eminent domain in Pennsylvania for a privately owned company. The expansion of pollution of the environment in Pennsylvania that has progressed with this boom raises the obvious conclusion: money and politics will do whatever is necessary to give oil and gas companies free reign and unencumbered access to the Marcellus Shale. It appears that the public will be damned. Eminent domain is the final nail in the coffin. Tr. 152-155.

David Headley, unemployed except for farming on the side, testified that gas companies came onto his property and placed roads, gas lines and three gas wells. He ended up buying another piece of property because these wells were placed in his front yard. The nice fields are gone, and there is almost nowhere left to build a barn. He tried to have his property taxes reduced, but the local tax office told him that the value of the land has increased, and no reduction was granted. He sacrificed half of an apple orchard to put in a road, and the Marcellus well vents into the air for hours at a time. When he called to report it because he thought something was wrong, a company representative (Atlas America) complained to him because he called DEP.

He asked for gravel on the road that was his driveway, and the company complained that he was shorting them. He sold a pipeline right-of-way to another company, which told him to accept the deal that was offered or they would go back to the old agreement with a former landowner which was for 70% less. He has no bargaining power.

Seeing this kind of behavior when there is no right of eminent domain, he is frightened to think about what would happen if they had that right. The local citizens live with the gas. They have achy joints, and they breathe and smell the odors. His house is three miles from the home of Phyllis Carr, and he can hear the compressors from his house. He does not believe that this private company should be granted the power of eminent domain. Tr. 156‑159.

Joe Petrucci, retired, stated that a lot of good points had already been made. The one additional point is that the PUC is opening a can of worms if this application is granted. If one company obtains the right, then all of them will be seeking it, and there will be no way to deny it. This will cost the Commonwealth millions and millions of dollars to defend if the next company is denied. As a township supervisor, he knows what lawsuits look like. His final word is, "caution." Tr. 159-161.

John Delara, employed by Verizon Communications, owns a 96-acre farm with his fiancée. They did not purchase the gas and mineral rights, and there were already small wells there, so they assumed that there would be no more. They were offered another deal, which they declined, and the company is working on the land now. Eminent domain gives the landowner no choice. Tr. 161-162.

Delma J. Burns, retired, testified that many families in her community have become ill. One that she knows has been compensated financially but had a gag order placed on it. She asks, "Why can these people not tell the rest of us what happened?" She read from the written testimony of Theo Colburn, Ph.D., President of TEDX, Colorado, before the House Committee on oversight and government reform hearing on the applicability of federal requirements to protect public health and environment from oil and gas development, October 31, 2007. Her own health issues include headaches, persistent productive cough, acute bronchitis, memory loss, neuropathy, confusion, abnormal fatigue, irritated nasal passages, eye irritation, itchy scalp and skin and stomach problems, among others. She lives near Phyllis Carr. She believes that soon the companies will be gone, the wells will be left, and the people will continue to make money for gas companies and those who transport it, and the people will be left with the mess to clean up or die trying. After all this, they have the audacity to ask for access to and to dig and lay pipes wherever they choose. Tr. 162-166.

Vince Zabatosky, Chairman of the Fayette County Board of Commissioners, submitted a letter which was read at the public input hearing opposing the grant of a certificate of public convenience to the Applicant. It was referred to the public comment file. Tr. 168.

Stanley Burns, retired school teacher, testified that Phyllis Carr lives down in a hollow, and that he lives at the head of the hollow. The wind tends to come in his direction. He testified that he can smell the odors that she complained of on his property, which he characterized as a turpentine smell, and there was no turpentine around. Tr. 168-169.

Zona Butler, not employed, stated that her husband has worked for the Texas Eastern Transmission Corporation for 30 years and retired as an equipment operator. They own 40 acres of land and there are two Texas Eastern pipelines running through it. They were replaced twice in the 36 years that they have owned the property. She and counsel for the Applicant discussed the nature of the pipelines and the difference between FERC and PUC certification. She closed by stating that she doesn't see the benefit of certifying Applicant's proposed pipeline. Tr. 170-173.

Angela Zimmerlink, Fayette County Commissioner, testified that she has heard from many members of the community who are against certificating the Applicant. Other like companies have been negotiating with local property owners, and they should continue to do that without the necessity of eminent domain, which means that negotiations can occur freely. Tr. 173-174.

Robert Holchin, employed by Costabile Construction, has a pipeline on his property and has recently negotiated for a second. The second company is using coercive tactics to circumvent his wishes regarding the placement of the second pipeline. Eminent domain would give them a license to act this way. The second company is Laurel Mountain Midstream, which wants to place the pipe somewhere other than where he agreed. As a landowner, he wants to be able to tell the company where on the property to place the pipe rather than out in the middle where the value of the property overall will be decreased. Tr. 175-180.

Clarence Johnson, retired Dominion Gas worker and township supervisor in Perry Township, supports the views expressed by Mr. Mutnansky and Mr. Stark. Tr. 180-181.

**B. Waynesburg University**

Barbara Butler, retired, asked some questions regarding eminent domain and stated her opposition to granting it to gathering companies. The final use of property belongs to the property owner, not to a private for-profit company answerable to its shareholders[[2]](#footnote-2). Next, eminent domain will go to the drilling companies if we head in this direction. Eminent domain removes the landowners’ knowledge of the geological peculiarities and uses from the equation. Her land has numerous lines crisscrossing it already, and after her husband walked the land with an engineer, it was moved 25 feet out of the forest and onto an existing road, preserving hundreds of trees and saving the company thousands of dollars. This was not on the engineer's map. On another occasion, her husband walked the route with the engineer and they moved the line out of their neighbor's 60-year-old forest and into their open pasture, which was listed on the map as forest, again saving trees and thousands of dollars for the company.

These occurred during the negotiation process, which would not have occurred if the company had eminent domain. Another example of the strength of negotiation is that during negotiations for the most recently installed line on her property, she requested that the company pay them the amount that it would cost them to reseed the pasture since it was an organic pasture and required special seed and mulch. The company agreed, and after the company finished, she seeded and mulched the hillside. The company took care of the neighbor's hillside across the road in their customary manner. Fifteen months later, she has six inches of clover and no slips. The neighbor, however, has rebuilt the hillside twice, reseeding it each time, and there is still very little grass and several slips. If you give a company eminent domain, you remove the necessity for negotiation that preserves forests and hillsides and also saves the company money itself. Tr. 202-206.

Kenneth Dufalla, retired, stated that people in Greene County realize that they are in the gas belt and they do not mind providing the energy necessary for the development and economic growth in the area but they believe that their own rights are being disregarded. He has leased property to Chesapeake with a stipulation that no foreign gas be transported through it. Chesapeake called and proposed a 90-foot right-of-way through his standing timber (he has selectively harvested his 190 acre farm for management of animals and tree sales). He has worked hard for money to buy the property, and has managed it well. He pays taxes on the property. He was able to deny Chesapeake the right to go through the remaining wooded area, and if the company had eminent domain, he would not have had that right.

He believes that the people who own the land, either through inheritance or purchase, must have a right in saying what goes on there. He opposes any private industry receiving public utility status.

He has enough experience with companies to know that the words spoken – that it would be used as a last resort – and what actually happens, are not the same. He asks that the Commission consider the taxpayer who pays the bill. If a person wants a pipeline through real property, that person should be able to negotiate the terms. No company should be able to come in and take privately owned property for private growth.

Mr. Dufalla asks, if this gas is going to benefit the citizens of Pennsylvania, why are we building so many liquefying ports to send this gas overseas?

Mr. Dufalla asks that the Commission put the power of the property back into the hands of the owners who have purchased and who have paid taxes on it. Tr. 207-211.

Charles Evans Hunnell, retired teacher of US history and economics from Upper Saint Clair High School in Allegheny County, owns 136 acres in Greene County. In 2009, his property was placed into the Pittsburgh History and Landmarks Foundation by virtue of his giving them a deed of historic preservation and conservation easement. His property is to be farmland for perpetuity. He is a victim of eminent domain in another case where West Penn Power, acting as a proxy for Foundation Coal Company, put in a 138 kV transmission line, a 2.2 mile line, across part of his property. They clear-cut a hundred-foot swath through his woods, and there is 110- to 120-foot steel pedestal pole on top of a prominent point on his property. They could have used another route that they already had, a 25 kV right-of-way, but because of convenience, they decided to use the route they chose. At no time did they come to the property owners prior to telling them what they were going to do.

He asks how far are we going to go to take away the rights of the property owners? He stated that this is getting ridiculous. He believes that eminent domain is needed for roads, and for those things that will benefit all people. This only benefits one company.

He is opposed to the application. In his experience, companies with eminent domain will use it and will not negotiate. Tr. 212-215.

Corbly Orndorff, Franklin Township Supervisor and part-time horse farmer, supports the sentiments expressed by the prior two speakers. There are several transmission lines crisscrossing Franklin Township and the county in general. Those all have eminent domain rights, and they have not negotiated with landowners. He had a line from Dominion Transmission cross his property recently, and the very first contact was a pamphlet with a map and one full page explaining the eminent domain proceedings. Once eminent domain is introduced, it's like the elephant in the room during negotiations. Both sides know where the case can end up.

Most local folks are welcoming the new play, and most have lines across their properties of some sort or another and have had interaction with the companies. Locals are not running them out, they just want the right to negotiate fairly. That cannot be done when one side has eminent domain.

A plot of land may have only so many building sites on it. One hundred acres may have only one or two decent home sites.

His land was bought by his grandfather in 1905, and he has two daughters. There are 450 acres, and two very nice homesites. In negotiations with a gas company, he has final say to siting. Those two spots are not on the table, and he told the company that. If his daughters can work locally, he does not want to have to say to them that he stood back and did nothing while the PUC granted a company public utility status. In short, he should have the ability to direct the siting of the pipelines away from his homesites. It's about citizens' rights. Tr. 216-220.

Richard Yanock, retired from Ford Motor Company, is opposed to extending public utility status to this pipeline. He cannot believe that it is even being considered. That status will do nothing to add to public good, and he urged the Commission to consider the long-term effect of the proposed public utility status and public confidence effect it will have on the Commission itself. Tr. 220-222.

Beth Wallach, self-employed as a psychologist, is concerned about her neighbors in Greene County, whose experiences with gas companies have not always been pleasant. She owns 33 acres which has been clear-cut and replanted. She wants to see it reforested, and she is afraid that some company can come in, tear out the trees, and drill already, as she does not own the mineral rights. Citizens have little control over the environmental consequences of this industry, and they are hamstrung on how much help they will get with pollutants and other environmental degradation. She asks that the Commission not take away the little control over their own land that they do have. Pipelines are cutting through swaths of wildlife habitat now.

Mr. Delaney has indicated that public utility status will give the citizens a government entity to ask for help, and that no help will be forthcoming unless there is eminent domain attached to it. To her, this makes no sense, as it means giving up control over real property. She is concerned with the precedent that will be set here, and she does not trust the industry to use eminent domain properly. Tr. 222-226.

Sonja Parkinson, unemployed, agrees with the previous five speakers and believes that eminent domain is wrong for Greene County. She owns 22 acres and would agree to a pipeline, but she wants to be able to negotiate it. She has been here for 22 years and believes it to be quite beautiful, with excellent spring water. She implores the Commission to deny eminent domain to this company. Tr. 226-227.

Attilia Shumaker, retired school teacher, agreed with the preceding speakers regarding the fact that eminent domain is not right for Greene County or anywhere else in Pennsylvania. It disrupts the rights of property owners. In her experience, government does not make regulations to the benefit of the citizens but for the industry.

The Constitution says that citizens have rights to life, liberty and the pursuit of happiness, including the right to own property and to control how it is used. That is what should continue. Citizens own property, they pay for it, they pay taxes on it, and they should not be forced to use it in any way, shape or form that they do not wish to have it used.

She has a lease with a gas company. She has 100 acres, and has no objections to them doing what they feel they need to do to extract and transport gas, but she does object to the property owner not having a say in where or whether the gas is extracted. Tr. 228-230.

Kenneth J. Gayman, class three technician for a hydraulics outfit, opposes the grant of eminent domain to Peregrine. He owns a farm in Washington County where his nephew lives, and now lives in Greene County. He used to be the Vice President of the State of Pennsylvania Archeological Society, Monyock Chapter III, attached to California University, and he is still a member. He is also a member of Coal Fuel for Justice, the Isaac Walton League and Chairman of the Aesthetics Program, which deals with archeological historical sites, and chairman of the health and air quality.

His objection is to the destruction of Native American archeological sites by drilling and pipeline companies. He can document where they have bulldozed a tombstone away and pushed it in rubble 45 feet away.

According to the Constitution of Pennsylvania, government must provide pure water, clean air and aesthetics. This includes archeological sites. The state gamelands which are being drilled belong to the people. He states:

What did I go to Vietnam and fight for the rights of freedom for the people in this country and my rights are going to be taken away by right of eminent domain? I don't think so. That's the way I feel.

It's my Constitutional rights to own a piece of ground that my father gave to me. He bought that farm – my mom and dad bought that farm in 1948, and I enjoyed that farm. You're not going to destroy my forest on there. You're not going to destroy anything. I'm sorry, that's just the way I feel.

I am an American, and I believe in the Constitution of the United States, the government of the people, by the people and for the people. Tr. 233.

Companies should be checking with local colleges and historical organizations and property owners, but they just come and destroy. He has photographs of sites where such destruction has occurred. He states that it's time for people to take a stand for the rights and freedom of the people. He has been contacted several times about drilling on his property, and he has actually been threatened by a company. The industry has no respect for people. Tr. 231‑235.

Dorothy Dunning, retired, [[3]](#footnote-3) stated that pipelines should not be certificated as public utilities because the processes involved may well have environmental impacts beyond those surrounding the pipeline itself. Appalachia is different from Texas in terms of types of rock and sedimentation, and more rainfall that causes more erosion. For these reasons, a trench for a pipeline must have roadways constructed to permit access for the heavy equipment necessary for the digging. These will cover an area considerably wider than the pipeline itself, especially on steep terrain, and the vegetation which now holds the soil in place will be destroyed over that entire area. These will erode rapidly, and if taken by eminent domain, there will be no control over the harm done, and the property owner will suffer as a result. Without contracts obtained without eminent domain, there is no hope. Tr. 235-237.

Rebecca Trigger, employed as a behavioral health care nurse for APS Health Care, for Fayette and Greene Counties, moved into a home built in 1891 by Benjamin Draft, who fought in the Civil War. She owns approximately 135-plus acres. Her home was "undermined" pursuant to Act 54, in 1999, and severe damage resulted. The damage was finally repaired in the last year. There have been articles written regarding the damage to people due to undermining. In about 2007, the TrailCo project came about, to bring high voltage lines through the valley where she lives, and bisect her property. She was told by a company representative that her cooperation was not necessary as the land would be taken by eminent domain.

Eminent domain has the effect of causing a really deep pain, psychological and physical suffering that the individuals are never compensated for. There is no provision to sue for pain and suffering. She began to wonder what she was doing living where she could not be left in peace on her own farm with over a mile of walking trails? She was greatly relieved when the TrailCo project was withdrawn.

Now she sees compression stations being built on a property adjoining hers and wells on the property behind hers. Should eminent domain be granted, it will be for companies to bulldoze across farms to have their way and to leave devastation behind. Some of these farms have been in the families of the owners for generations. She, like the other citizens, has nothing against gas drilling, but it needs to be done with a great deal of consideration for the citizens of Pennsylvania, with regulations, responsibility, and accountability to protect citizens and future generations.

Environmental issues are implicated here, as well. She pointed out the health issues associated with coal mining, the use of Agent Orange in Vietnam, as well as around power lines to control weeds. Companies are not always forthright, like the tobacco companies which testified before Congress that cigarette smoking did not cause lung cancer.

Decisions regarding the use of property should be left to the owners of the property, not under the threat of eminent domain. The companies which have contacted her – Atlas, which has been bought by Chevron – have changed their approach from a congenial willingness to talk to a "we have ways of making these things happen the way we want to" approach. This should just plain not be allowed. Tr. 347-243.

Note that the following individuals signed up to speak but declined when called because others had already stated what they wanted to say: Frank Wililosky, Norman Zimmerman, T.A. Sobek, Joseph E. Webster, Gilbert Churney, John Burnham, and Robert F. Brown.

V. DISCUSSION

**A. Burden of Proof**

Applicant bears the burden of proving its entitlement to certification by a preponderance of the evidence. The proponent of a rule or order in any Commission proceeding has the burden of proof, 66 Pa. C.S. § 332, and therefore, the Applicant has the burden of proving its entitlement to certification and must do so by a preponderance of the evidence, or evidence which is more convincing than the evidence presented by the other parties. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950); *Samuel J. Lansberry, Inc. v. Pa. Publ. Util. Comm’n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

Additionally, any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mill v. Comm., Pa. Publ. Util. Comm’n*, 447 A.2d 1100 (Pa. Cmwlth. Ct. 1982); *Edan Transportation Corp. v. Pa. Publ. Util. Comm’n,* 623 A.2d 6 (Pa. Cmwlth. Ct. 1993), 2 Pa. C.S. § 704. 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. V. Pa. Publ. Util. Comm’n,* 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Com. Bd. Of Review*, 166 A.2d 96 (Pa. Super. Ct. 1960); *Murphy v. Comm., Dept. of Public Welfare, White Haven Center,* 480 A.2d 382 (Pa. Cmwlth. Ct. 1984).

**B. Legal Standard for approval of an application for certification as a public utility**

**1. General**

Before rendering public utility service, an entity is required to obtain a certificate of public convenience (CPC). 66 Pa. C.S. § 1101. A certificate of public convenience will be issued “only if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. . . .” 66 Pa. C.S. § 1103(a); *Laser Order I* at 11.

If the service to be offered is public utility service, then it cannot be offered in the Commonwealth unless and until the Commission has determined that the proposed service is necessary or proper for the service, accommodation, convenience or safety of the public and a certificate of public convenience is issued. The evaluation includes a determination of whether the applicant is financially and technically fit to provide the service.

**2. *Laser* Case**

Peregrine's is not the first application for a CPC filed on behalf of a gathering company as a result of the Marcellus Shale boom. On January 19, 2010, Laser Marcellus Gathering Company LLC filed an Application for a certificate of public convenience to begin to offer gathering and transporting or conveying service by pipeline to the public in specified townships of Susquehanna County, Pennsylvania at PUC Docket No. A-2010-2153371. Following numerous interventions and protests, the parties embarked on nearly two years of litigation which ended at the Commission level when Laser withdrew its Application prior to the issuance of a final Commission Order. However, the Commission issued a number of orders which were not rescinded when the petition to withdraw was granted. One in particular made certain findings and remanded the case for development of specific issues. Thus, the evaluation of this case is made in the context of those orders which give the Commission's standard for evaluating gathering companies' applications for CPCs. The Commission's *Laser* orders will be referred to as follows: *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, A-2010-2153371, Order entered June 14, 2011 (*Laser Order I);* Order entered July 15, 2011 (*Laser Order II);* Order entered August 24, 2011 (*Laser Order III);* andOrder entered December 5, 2011 (*Laser Order IV).*

There are four specific questions that the parties in *Laser (Laser* Questions)were directed to address on remand:

(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?

*Laser Order I.*

These four questions will be addressed as they apply to Peregrine following the discussion regarding whether the service to be offered is public utility service.

**3. Is the Proposed Service “Public Utility Service?”**

From the outset, and without entering into an analysis as to *why* Peregrine is seeking a CPC from the Commission, the threshold question to be answered is whether the service proposed by Peregrine is “public utility service.” For the reasons explained below, Peregrine’s proposed service is not “public utility service.”

The definition of “public utility service” is set forth in the Code at Section 102, the “Definitions” section of the Code.

**§ 102. Definitions**

\* \* \*

“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.

\* \* \*

(vi) 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.

\* \* \*

66 Pa. C.S. § 102 (in pertinent part).

The essential element of the definition of “public utility service,” as applied to Peregrine, is whether Peregrine is “transmitting . . . natural or artificial gas . . . to or for the public for compensation under subsection (1)(i) of the statutory definition of “public utility.”

However, in *Laser Order I*, the Commission looked to Section 1308(d) of the Code in considering whether the service proposed by Laser constituted “public utility service,” stating:

Such an approach [negotiated rates] is also consistent with Chapter 13 of the Code, which appears to give the Commission additional discretion in setting pipeline 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 regulation 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.

*Laser Order I* at 32-33.

In assessing whether an entity is a public utility, it is necessary to have consistency in our definitions. A fundamental principle of statutory construction is that statutes, or parts of statutes, that refer to the same thing must be construed together:

**§ 1932. Statutes in pari materia.**

(a) Meaning. -- Statutes or parts of statutes are *in pari materia* when they relate to the same persons or things or to the same class of persons or things.

(b) Construction. -- Statutes *in pari materia* shall be construed together, if possible, as one statute.

1 Pa.C.S. § 1932.

The Pennsylvania Superior Court noted in *Habecker v. Nationwide Insurance Co.*, 299 Pa. Superior Ct. 463, 445 A.2d 1222 (1982):

In addition, the Statutory Construction Act disfavors surplusage. This Act requires that "every statute shall be construed, if possible, to give effect to all its provisions," 1 Pa.C.S.A. § 1921(a), and permits the presumption that the Legislature "intends the entire statute to be effective and certain," 1 Pa.C.S.A. § 1922(2). The Legislature is presumed to have intended to avoid mere surplusage in the words, sentences and provisions of its laws. Courts must therefore construe a statute, if possible, so as to give effect to every word. *Commonwealth v. Driscoll*, 485 Pa. 95, 401 A.2d 312 (1979); *Masland v. Bachman*, 473 Pa. 280, 291, 374 A.2d 517, 522 (1977); *Daly v. Hemphill*, 411 Pa. 263, 273, 191 A.2d 835, 842 (1963); *Pa. Ind. for Blind and Handicapped v. Larson*, 50 Pa.Cmwlth. 95, 411 A.2d 1305 (1980).

*Laser Order I*  points out that transmission line utilities are specifically excluded from Section 1308(d) of the Public Utility Code. However, and again construing the statute (i.e. the Code) *in pari materia*, the fact that gathering lines carry gas does not make them transmission lines under applicable law. By way of further clarification, the Commission's regulations explain transmission lines and gathering lines as follows:

*Gathering line—*A pipeline that transports gas from a current production facility **to a transmission line** or main.

\* \* \*

*Transmission line—*A pipeline, **other than a gathering line** that does one of the following:

(i) Transports gas from a gathering line or storage facility to a distribution center or storage facility.

(ii) Operates at a hoop stress of 20% or more of SMYS

(iii) Transports gas within a storage field.

52 Pa. Code § 59.1 (definitions)(emphasis added).

There has been no evidence presented to support a finding that a gathering line is a transmission line, and the definitions, above, make it clear that there is a difference between the two. See also LMM RB at 5. Section 1308(d) does not exclude gathering line utilities from its application. Therefore, Applicant's proposed service must first be "transmitting . . . natural or artificial gas . . . to or for the public for compensation" under Subsection (1)(i) of the statutory definition of public utility.[[4]](#footnote-4) 66 Pa. C.S. § 102.

Peregrine also runs afoul of the basic principle that the term "public utility" does not include "any person or corporation, not otherwise a public utility, who or which furnishes service only to himself or itself." 66 Pa. C.S.A. § 102. Peregrine explains that it will construct natural gas gathering and transportation facilities and provide service in all municipalities in the named areas initially to provide service to an affiliate. Peregrine Stmt. 1 at 6-7. Additional facilities are anticipated to be constructed to provide service to the public in additional areas of the service territory as natural gas production increases in those areas. Peregrine MB at 8.

Peregrine intends to immediately hold itself out to unaffiliated producers and other customers to provide gas transport and compression and dehydration services to the extent of its system capacity. Peregrine will expand the capacity of its facilities in the future as necessary to provide service to these customers. Peregrine will furnish service to affiliated and unaffiliated natural gas producers and other customers operating in the service territory pursuant to its tariff. (PKGP Stmt. No. 1 at p. 6-7).

\* \* \*

. . . . Although Peregrine will be providing service to several affiliates after its facilities are constructed, Peregrine will be simultaneously offering to provide transport, compression and dehydration services to any party that requires it in the proposed service area *to the extent that it has pipeline capacity and the facilities to provide that service*.

Peregrine MB at 9 (emphasis added).

These two characterizations are not the same. The first characterization states Peregrine's intention to hold itself out to other customers and pledges to expand "the capacity of its facilities" (capacity, not the actual facilities), but the second characterization restricts the first by stating that Peregrine will provide service *to the extent that it has capacity and facilities*. A public utility must offer service to all who seek it, *not only to the extent that it is convenient for the company.* Of course, the terms of service must be reasonable, and those terms are spelled out in great detail in a traditional tariff. See Tariff discussion, Section (V)(B)(3)(e), below. As MarkWest argues in its Main Brief:

It has long been established that under Pennsylvania law "[t]he true character of the appellant's operations is to be determined by what he is doing, rather than by what he says he is doing." *Phillips v. Public Service Commission,* 127 Pa. Super. 341, 348, 191 A. 641, 644 (1937). Peregrine's general statements of intent in its Main Brief are contradicted by its actual proposed operations as set forth in its pro forma gathering agreement. . . . Examination of the actual language of the gathering agreement contradict Peregrine's assertions.

MarkWest RB at 10.

The OCA agrees that the pivotal issue is whether the service to be offered will be "to and for the public for compensation." OCA MB at 5. In its analysis, the OCA reviews the Commission's reasoning in *Laser Order I,* and points out the following:

The Commission found that by holding itself out to serve all members of the customer group of producers, Laser was providing service "for the public." [*Laser Order I*] at 26. The Commission went on to state that "while natural gas gathering service 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 Commission jurisdiction." Id. at 28.

The dilemma presented by the reliance on the stated business model of the requesting entity, however, became apparent shortly after the Commission entered its Order in Laser. The Commission remanded the Laser case back to the ALJ for development of a record on specific questions regarding the operations of Laser as a public utility. Laser Order at 41-42. Before that remanded hearing could commence, Laser determined that it no longer wished to be a public utility and withdrew its Application before the Commission. See, Application of Laser Northeast Gathering Company, LLC, Docket No. A-2010-2153371, Order Granting Withdrawal at 11 (Order entered December 5, 2011) (Laser Withdrawal Order). The Commission approved this request. Id. at 19. Laser stated that it intends to continue with its plans to provide gathering service, but it has now determined to change its stated business model and no longer seeks to provide that service as a public utility. Id. at 11. At the same time as the Laser case remand was pending, an Application of Pentex Pipeline (Application of Pentex Pipeline Company, Docket No. A-2011-2230314), was also winding its way through the Commission hearing process. Following Laser's withdrawal of its Application, Pentex also announced that it had determined to change its stated business model and would no longer seek to provide gathering service as a public utility. Tr. 375; See also, Petition for Leave to Withdraw Application of Pentex Pipeline Company, Docket No. A-2011-2230314 (December 5, 2011).

The OCA submits that the determination of whether an activity constitutes public utility service that must be provided pursuant to a Certificate of Public Convenience should not be left to the individual business decisions or stated intentions of each entity. **It is the nature of the service that requires a legal determination of the Commission as to its public utility status**. The nature of the service being provided may have individual factual circumstances that must be considered by the Commission, but ***the stated business model selected by a private entity should not be the determinative factor.*** (emphasis added)

Under the Commission's decision in Laser, a business entity ultimately decides when it wants to be a public utility, and when it does not. The OCA respectfully submits that such an option to the business entity would not be consistent with sound public policy. The circumstances where such an option would lead to an unreasonable result are many. To provide just one example, under this approach, an entity seeking to provide gathering service could first state a business model that would grant it public utility status so that it could obtain the power of eminent domain and then, after exercising this power to take private property, change its business model to get out from under the requirements of regulation. One of the greatest concerns raised by members of the public at the public input hearing in this proceeding involved the use of eminent domain by Peregrine to achieve its business purposes. Tr. 89, 96-97, 100, 204-205.

\* \* \*

Given the developments since the time of the Commission's Order in Laser, the OCA submits that the Commission should revisit its analysis of the public utility status of gathering service to producers and place greater consideration on the nature of the service and the question of whether gathering service to producers of natural gas through individual contractual arrangements should be considered service to or for the public for compensation. The current proposed business model of the Applicant here – to provide its service by contractual arrangement to any producer that requests it to the extent of pipeline capacity – again squarely presents this issue to the Commission. See, Peregrine St. 1 at 7.

At the time of the Laser decision, the OCA fully understood the benefits to the public of a determination that entities providing gathering service were public utilities. At the time, one of the most significant public benefits was that the grant of such status would bring these pipeline facilities under the safety jurisdiction of the Commission. The Applicant here also identified this safety jurisdiction as an important aspect of the regulation that will obtain if a certificate is issued. Tr. 385. Since the Commission's decision in Laser, however, the Gas and Hazardous Liquids Pipeline Act was signed into law. Tr. 385; 2011 Pa. Laws No. 127. The Act gives the Commission jurisdiction over all pipeline operators, whether public utilities or not, for the purposes of the Federal pipeline safety laws. Specifically, the Act states:

**Section 501. General powers of Commission**.

(a) Commission authority.—The commission shall have general administrative authority to supervise and regulate pipeline operators within this Commonwealth consistent with Federal pipeline safety laws. The commission may adopt regulations, consistent with the Federal pipeline safety laws, as may be necessary or proper in the exercise of its powers and perform its duties under this act.

Gas and Hazardous Liquids Pipeline Act of 2011, 2011 Pa. Laws No. 127. The Act describes a pipeline operator as:

A person that owns or operates equipment or facilities in this Commonwealth for the transportation of gas or hazardous liquids by pipeline or pipeline facility regulated under Federal pipeline safety laws. The term does not include a public utility or an ultimate consumer who owns a service line on his real property.

Id. Clearly, the gathering lines being developed in Pennsylvania by Peregrine and other gathering service providers now fall under the Commission's jurisdiction for federal pipeline safety purposes.

OCA MB at 6-10 (emphasis added).

The OCA urges the Commission to adopt a standard which does not turn on the stated business plan of a business entity when determining public utility status *but instead is based on the specific nature of the service being provided*. OCA MB at 10.

Peregrine's response is to characterize the OCA's request as a petition for reconsideration of *Laser, Allegheny Land and Exploration, Inc*.[[5]](#footnote-5), *Equitable Gas Company*,[[6]](#footnote-6) and *Peoples TWP*,[[7]](#footnote-7) and then argue that the OCA has not met the standard for reconsideration. Peregrine RB at 42. Peregrine mischaracterizes the situation.

As discussed, *supra,* Allegheny Land sought and received authority to transport gas from producers to a stripping/fractionating plant owned by its parent company. This is extremely limited authority and was specifically characterized as serving producers, with the limitation: Allegheny was not seeking approval from the Commission to transport gas to the public for consumption. *Allegheny Land, supra,* at 3. The other two companies have gathering facilities which serve groups of customers directly off the gathering lines or contain and serve numerous distribution systems that serve customers. PIOGA MB at 6. These cases have little in common with the present Application.

The approach advocated by the OCA is the approach that is used in the public utility industry. How a company characterizes its proposed service and the actual proposed service may be two different things, and the actual offering of the company, not its own characterization, is the correct factor to be examined. In other words, *saying* that it is holding itself out to the public is not conclusive. Whether or not it does, or in this case, reasonably *can* hold itself out to the public, is determinative. For example, Caiman states:

The very nature of negotiation involves Peregrine reserving its right to not agree with a prospective producer customer to terms of service in the Contract; that is, through the negotiation process, it can decide which customers it will serve. In doing so, and with respect to another key factor required for public utility status, Peregrine is not serving "any and all potential customers," [[8]](#footnote-8) but, rather, is using its Contract to "determine which producers are privileged" to receive service from Peregrine. Thus, Peregrine is not a public utility.[[9]](#footnote-9)

Caiman MB at 6.

In fact, in the present case, the scenario envisioned by the OCA, above, may well play out if the Application is granted

Peregrine’s operations must be determined by what Peregrine is doing, rather than by what Peregrine says it will do. *Phillips.*  *Bucks County Board of Commissioners v. Pa. Pub. Util. Com.*, 11 Pa. Commonwealth Ct. 487, 313 A.2d 185 (1973) and a case cited therein, *Independence Township School District Appeal*, 412 Pa. 302, 194 A. 2d 437 (1963), each concerned a pipeline. In each case, the pipeline claimed status as a public utility, and that status was challenged by other parties, on the grounds, *inter alia*, that the pipeline served only a limited number of customers. In each case the court ruled that the pipeline was a public utility. In one case, the pipeline had filed tariffs and had marketed its service to all shippers that could use its service. In the other case, the pipeline intended to file tariffs and to offer its services to all shippers that might use it. *UGI Utilities, Inc. v. Pa. Pub. Util.Com.*, 684 A.2d 225 (Pa. Cmwlth. 1996) is also similar to these. Essentially, each of those pipelines volunteered to be a public utility and to subject itself to the duties of a common carrier, i.e., to serve all who might want to use its facilities. Peregrine's firm customers at the outset are Peregrine affiliates. Peregrine Stmt. 1 at 8-9.

Finally, as there is no dispute that the proposed service is to transport natural gas and to offer related services of compression and dehydration,[[10]](#footnote-10) and as there will undoubtedly be compensation, the crucial question is whether the service will be "for the public."

**4. Whether the proposed service is for the public**

**a. Laser case**

In *Laser Order I,* the Commission stated that Laser was offering its services as a midstream gathering pipeline operator that transports natural gas from producer wells to an interstate pipeline "for the public," and thus had satisfied that portion of the analysis. "For the public," the Commission opined, can be evaluated as follows:

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), *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).

In Laser, the Commission accurately stated the applicable standard; however, it did not have the level of detail in *Laser* that has been supplied by the parties in the present case. The Commission had remanded *Laser* for further development of the record but the application was withdrawn before the development could take place. In contrast, more detail has been developed in the present case.

It is the nature of a gathering system to be designed and constructed to serve the specific customer/producers for which the system is built. Because of the reservation that the customers must meet the requirements of the gatherer, there is, undeniably, the right to select customers by contractual arrangement so that no other producer has a right to service.

In addition to the statute, the Commission applies its policy statement to determine public utility status. While the guidelines are aimed at the developers of alternative energy projects or systems, they are consistent with the case law cited above:

**§ 69.1401. Guidelines for determining public utility status – statement of policy.**

\* \* \*

(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 serviced 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 the extent that a building or facility owner/operator that manages the internal distribution system servicing the building or facility supplies electric and related electric power services to occupants of the building or facility. See 66 Pa. C.S. 102 and 2803 (relating to definitions).

\* \* \*

52 Pa. Code § 69.1401 (Guidelines)(in pertinent part); *Laser*

*Order I* at 12-13.

**b. Peregrine facts**

Peregrine seeks a CPC to offer typical gas gathering services in a stated territory, in addition to compression and dehydration services. It has not begun to provide services and states that its firm customers are affiliates. Peregrine must prove that the service it describes is public utility service, that it is necessary and proper for the service, accommodation, convenience, or safety of the public, that it is technically and financially fit to provide such service. This analysis will be performed in the context of the four specific questions from *Laser,* the specific facts of this case, and the applicable statutes, regulations, policy statements and case law.

Peregrine has adequately fulfilled the requirement that it establish its financial capacity, and a propensity to operate legally and safely. *See Seaboard Tank Lines, Inc. v. Pa. Publ. Util. Comm'n*, 502 A.2d 762 (Pa. Cmwlth. Ct. 1985). Its recitation of affiliates already operating in other states, and the experience of its senior vice president, Mr. Fuller, satisfies the requirements of the Commission. PKGP Stmt. No. 1 at 15-16.

The audited financial statement of Peregrine Partners attached as "highly confidential" indicates that there is sufficient financial ability to function as a regulated utility. PKGP Stmt. 1, Exhibit D.

There is nothing in the record to indicate that the Company does not have a propensity to operate legally and safely, and the fact that the Applicant has not begun to operate while this Application is pending supports a finding of a propensity to operate legally. Peregrine has testified that it will construct, operate and maintain its system in accordance with the pipeline safety regulations in effect, PKGP Stmt. No. 1 at 4, and will apply for all necessary environmental permits. PKGP Stmt. 1 at 9-12.

However, two factors outweigh these requirements: the fact that the only customers are affiliates, and the inadequacy of the proposed tariff. The Supreme Court of Pennsylvania clarified that a single customer is not “the public,” in its decision in *Bethlehem Steel Corporation v. Pa. Publ. Util. Comm’n*, 552 Pa. 134, 713 A.2d 1110 (1998), unless the reason for the single customer was the entity’s inability to secure other customers despite actively seeking additional customers to no avail. *See also Pilot Travel Centers LLC v. Pa. Publ. Util. Comm’n*, 933 A.2d 123 (Pa. Cmwlth. Ct. 2007).

The service proposed by Peregrine is not "to or for the public" within the meaning of the Public Utility Code. 66 Pa.C.S.A. § 102. In *Bethlehem Steel Corp. v. Pa. Publ. Util. Comm'n,* 713 A.2d 1110, 552 Pa. 134 (Pa. 1998), the Supreme Court concluded that a single end user is not the "public," within the meaning of the public utility code section defining public utility. Peregrine will service Arrington Oil & Gas Operating, LLC (owner and affiliate) and Peregrine Keystone Field Services (affiliate). Peregrine Keystone Field Services, LLC (affiliate) may in some circumstances take title to the gas at the producer's wellhead. Pursuant to an executed gas gathering and transportation agreement with Applicant (itself), Peregrine Keystone Field Services, LLC (itself) will compensate Peregrine Keystone (itself) consistent with its tariff for providing the natural gas gathering, compression, dehydration, and transportation services. (PKGP, Statement No. 1, Pg. 5, Direct testimony of D. Loren Fuller)(Application for Certificate of Public Convenience, Pg. 8) Therefore, Peregrine should be considered a single end user and does not meet the required definition as stated above.

Butela MB at 5 (Mr. Fuller admitted that all were owned by Mr. Arrington, Tr. 131).

Again, and from the outset, this Application runs afoul of the statute and should be denied. The service proposed by Peregrine is not "for the public" as recognized in the law, but for its *affiliated* end users. *Bethlehem Steel Corp. v. Pa. Publ. Util. Comm'n,* 713 A.2d 1110, 552 Pa. 134 (Pa. 1998); *See* Rosenberg MB at 1[[11]](#footnote-11)**.**

In addition, this fact situation falls squarely within subsection (3) of the Guidelines, above. While Peregrine states that it will hold itself out to serve the public, it has specifically reserved the right to serve only those customers who agree to the contractual terms demanded (they are not listed in the tariff) and only if there is sufficient capacity**.**  While claiming to offer its services to the public, Peregrine has in fact reserved its right to select its customers by contractual arrangement. This is inconsistent with the basic tenets of public utility service and is not in the public interest.

As Peregrine points out, the Commission has granted a certificate of public convenience to a natural gas gathering line operator. In *Application of Allegheny Land and Exploration, Inc. for approval of the right to offer, render, furnish or supply gas transporting or conveying service by pipeline to the public in Glade and Meade Townships, Warren County, Pennsylvania*, Docket No. A-125136 (Order entered March 7, 2005)(“*Allegheny Land*”), the Commission granted a CPC to Allegheny for a 4.2 mile gathering line which would transport gas from natural gas producers to a stripping or fractionation plant owned by the operator’s parent. The Commission granted Allegheny’s request to expand its authority at Docket No. A-2008-2029743 (Order entered October 14, 2008).

In *Allegheny Land,* the application was granted pursuant to an agreement between the applicant and one intervenor which quoted the stipulation as follows:

5. The purpose of Allegheny’s Application is to receive approval from the Commission to transport low quality, high Btu natural gas for natural gas producers to a Stripping/Fractionating Plant located in Meade Township, Warren County, Pennsylvania, that is owned by Allegheny’s parent company, PAPCO, Inc.

6. Allegheny is not seeking approval from the Commission to transport gas to the public for consumption.

7. The public customers that Allegheny will serve in Warren County, Pennsylvania, are natural gas producers.

*Allegheny Land,* at 3, noting that the intervenor, National Fuel Gas Distribution Corporation, agreed to not assume an active role due to this stipulation. In that case, the authority granted was specific and severely limited. Note, too, that the Commission granted the application based on a finding that the stipulation was in the public interest under *City of York v. Pa. P.U.C.*, 449 Pa. 136, 295 A.2d 825 (1972), a standard used in acquisitions and mergers.

However, there is a striking contrast between *Allegheny* and the present situation. In *Allegheny*, the gathering company and the destination for the gas were owned by the parent company. Here, the producers for which the gathering system is to be designed and built – the "public" to whom service is offered is comprised of the producers -- *are affiliates of the Applicant*. The "public" which will be served under the Peregrine Application, are sister companies with a common owner.

In *Application of Ardent Resources, Inc. for approval of the right to offer, render, furnish or supply natural gas transporting or conveying service by pipeline to the public in Jordan and Chest Townships, Clearfield County, Pennsylvania,* Docket No. A-140005 (Order entered April 16, 2007)(“*Ardent”),* the CPC was rescinded upon request of the applicant, (Order entered April 17, 2009), because Ardent was the pipeline operator and the pipeline was owned by another company, which agreed to limit its service “to an extremely narrow, limited group of affiliated natural gas producers, not to the public.” (Order of April 27, 2009 at 6). Again, the authority granted was very limited and very specific.

Neither *Allegheny Land* nor *Ardent* was subject to appellate review, and therefore, the standard set forth in *Drexelbrook*, adopted in the Commission’s policy statement, is still the applicable binding law for this agency.

A substantial weakness in Peregrine's arguments is Peregrine's persistence in citing unrelated cases, as described by MarkWest:

These include, cases in which the Commission has certificated intrastate pipelines, Peregrine MB at 11, cases in which the Commission has exercised jurisdiction over intrastate petroleum products gathering and transportation lines, Peregrine MB at 11 n. 1, 13, cases in which the Commission has certificated the intrastate transportation of gas, Peregrine MB at 12, cases in which the Commission has "asserted its jurisdiction" over compression & dehydration services, Peregrine MB at 12, the Commission's certification and approval of tariff pages for the transfer of bulk water, Peregrine MB at 12 n. 3, the Commission's alleged "certification" and approval of tariff pages for Equitable Gas Company's and People's gathering services, Peregrine MB at 12 n. 3, at 17-198, the Commission's certification of oil transportation pipelines, Peregrine MB at 13-14, and the Commission's certification of alleged intrastate gathering pipelines, Peregrine MB at 16-17.

Peregrine provided no evidence regarding the operations of these pipelines. Peregrine simply alleges similarities, *see, e.g.,* Peregrine MB at 13-15 (contending transportation of oil is "similar to the gathering and transmission of natural gas that Peregrine is proposing here"), without providing a shred of evidence to support the comparison. In cases that are fact-sensitive, such comparisons should not be entertained.

MarkWest RB at 19.

For its claim that the Commission has previously asserted its jurisdiction over compression and dehydration services, Peregrine cites *Peoples Independent Producers Group v. The Peoples Natural Gas Company, d/b/a Dominion,* Docket Nos. C-20054393 and P-00052162 (Opinion and Order entered September 13, 2005), Peregrine MB at 12. From a procedural stance, the Commission Order adopted the ALJ’s Initial Decision on a petition for emergency order which also denied a motion to dismiss. The Opinion and Order identified disputed questions of fact, and the Commission stated:

Based on the foregoing, and in light of the state of the record, we find that the formal complaint and record present claims which may arise pursuant to the primary jurisdiction of this Commission. Any issues over which this Commission potentially has jurisdiction could, after a full evidentiary hearing, be modified by the forthcoming Initial Decision of the presiding ALJ on the merits. Pennsylvania agencies, while not permitted to conclusively determine the scope of their jurisdiction, have the authority to make an initial determination as to the nature and extent of their jurisdiction in a particular case. *See Apollo Gas Company v. Fred A. Heilman and Beulah May Heilman;* Docket No. C-00924405 (Order entered March 10, 1994) and case citations therein. We find that the identification of potential issues as set forth in the June 14, 2005 Initial Decision to be sufficient for a denial of the Dominion People's Motion to Dismiss.

Opinion and Order entered September 13, 2005 at 12-13.

The Opinion and Order, while acknowledging that the Commission may have jurisdiction **over changes to a Master Agreement** between the utility and the producers (under Section 508 of the Public Utility Code, 66 Pa. C.S. § 508)[[12]](#footnote-12), did not state that the Commission has jurisdiction over gas dehydration service, as erroneously indicated by the Peregrine Main Brief at 12. Peregrine's subsequent statement that "[T]he services proposed by Peregrine clearly qualify as public utility service as that term is defined in both the Public Utility Code and the Commission's Decisions," Peregrine MB at 13, is not supported by the citations found therein.

It is important to note that the *Laser* application did not seek authority to provide compression and dehydration services, and thus, these services were not considered by the Commission in *Laser*.

PIOGA distinguishes Peregrine's citations as follows:

Peregrine's testimony relies upon the ownership and operation of gathering facilities by PUC regulated natural gas distribution companies as support for the issuance of a certificate to Peregrine.[[13]](#footnote-13) Peregrine mentioned only Equitable Gas and Peoples TWP, but Peoples Natural Gas Company also owns and operates gathering facilities. Peregrine, the party with the burden of proof, has failed to present any evidence as to how these utilities use their gathering facilities to provide distribution service, perhaps because it is clear that a comparison of these utilities' gathering facilities and Peregrine's proposed "public utility" activities is comparing apples to oranges. In Peoples 2011 Section 1307(f) case, the ALJ recommended approval of a settlement addressing, among other issues, Peoples lost and unaccounted for gas (LUFG) without attribution to specific gathering, distribution and transmission functions because of the integrated nature of these systems and operations.[[14]](#footnote-14) The settlement agreement relied upon by the ALJ and approved by the Commission in that case included Peoples' Exhibit 20 (Appendix A to the settlement petition), which describes the integrated nature of these systems:

Our system-wide gathering pipelines include various gathering facilities located throughout our pipeline network. These gathering facilities are not isolated systems where gas is simply gathered from a group of wells, moved along gathering lines, pumped through a gathering compressor and then delivered into transmission lines for eventual delivery into our distribution system. Instead, many of these gathering facilities contain groups of customers that are served directly off of the gathering lines or contain and serve numerous distribution systems that in turn, service customers.[[15]](#footnote-15)

The same is true for the gathering facilities of Equitable Gas and Peoples TWP. Accordingly, the operation of these gathering facilities by these distribution utilities does not support granting Peregrine's application.

Finally, as Caiman's Main Brief (p. 20) observes, no producer – including Peregrine's producer affiliate – has participated in this case in support of Peregrine's application. That absence speaks volumes. **The only producers participating in this matter, albeit as *amicus curiae*, oppose Peregrine's application.** Hopefully this will be interpreted by Your Honor and the Commission as demonstrating a complete lack of producer support for granting Peregrine's application, and against public utility regulation of midstream pipelines operations and companies generally.

PIOGA *Amicus Curiae* Brief at 5-6 (emphasis added).

**c. The Nature of Gas Gathering**

In *Laser,* the Commission believed that the applicant there would be able to provide service to the public, as it proposed to do. In the present Application, the parties have argued convincingly that the Applicant will not be able to provide the service it "intends" to offer "to the public," and that the very nature of gathering prevents indiscriminate service to the public.

It is the nature of the service which determines whether it is public utility service or not: either the service is public utility service, or it is not. Either all entities offering the service are offering public utility service, or none is doing so. The legal determination of whether the service is public utility service cannot depend on the business plan of the entity providing the service. The determination does not depend on the companies, it depends on the Pennsylvania Public Utility Commission's finding that *a type of activity* either is, or is not, public utility service.

If Peregrine's service is public utility service, then so are those services offered by MarkWest, LMM, Superior, and Caiman, and any other gathering company which offers gathering service in the Commonwealth – including those which have been providing it for a hundred years.

A detailed perspective is provided by the testimony offered by LMM witness Frank Billings in the present Application. LMM witness Frank Billings testified as Vice President, Eastern Region Onshore Gathering and Processing for The Williams Companies, Midstream. His responsibilities include overseeing Williams' Onshore, Midstream business in the northeastern United States, including Pennsylvania. LMM Stmt. 1 at 1-2. He points out that there are four basic components to the natural gas business: (1) exploration and production, or "upstream" services, (2) natural gas gathering, treating and processing, or "midstream" services, (3) natural gas transportation or "downstream" service, and (4) local distribution services. LMM Stmt. 1 at 7. Peregrine seeks authority to provide midstream services. Mr. Billings testified:

. . . except in the rarest of cases, regulatory Commissions in states where Williams has operations do not regulate natural gas gathering lines as public utilities. These midstream operations are not regarded as "public utility" services for a number of reasons, including but not limited to the fact that gatherers provide service to sophisticated natural gas producers who do not need the kind of protection the Commission provides to the "public." At most, some states have engaged in a light-handed form of complaint-based regulation[[16]](#footnote-16). Natural gas gathering is a competitive industry where market forces govern behavior, particularly with respect to siting. Safety regulation can be adequately ensured through the enforcement of existing federal pipeline safety standards. This treatment can apply equally well in Pennsylvania.

LMM Stmt. 1 at 6.

The Williams Companies will be directly affected by the Commission's holdings in this case because of its investment in the industry in the Commonwealth:

In Pennsylvania, Williams Midstream in 2009 entered into a joint venture with Atlas Pipeline Operating Partnership, L.P., predecessor-in-interest to Chevron, regarding natural gas gathering and processing operations, which is LMM. Based in Moon Township, LMM has about 1,000 miles of natural gas gathering pipeline connecting 4,620 gas wells, with a throughput in excess of 150 million cf/d. LMM also has two small scale processing facilities in southwest Pennsylvania. In addition to these existing assets, LMM has a planned expansion system consisting of over 150 miles of new gathering lines. In addition to the LMM partnership, Williams Midstream is currently constructing a project not far from Williamsport called Springville Gathering. This 31-mile gas gathering system is located in Susquehanna, Luzerne and Wyoming counties and construction is expected to be completed and the system in service by late 2011.

LMM Stmt. 1 at 9-10.[[17]](#footnote-17)

Mr. Billings testified:

Q: Should natural gas gathering operations be considered a public utility service?

A: No. Gathering is not a service provided to the general public. Gathering is a service provided to a discrete set of sophisticated producers. Gatherers provide tailored services based on the producer's needs. In the wet gas areas (areas where the gas contains NGLs), gathering is almost always upstream of processing. Additionally, even in areas where the gas may not contain significant amounts of NGLs, other contaminants or water often needs to be removed before the gas is marketable. Midstream service providers use economies of scale to provide service to similarly situated producers. The natural gas in gathering systems is normally not fungible in interstate pipelines without some level of processing, treating, or dehydration.

Natural gas gathering customers are sophisticated companies involved in the exploration and production business, not retail consumers. Public utility status has historically been used to protect less sophisticated customers, often the end-user/retail customer, who is in need of protection from a monopoly public utility. In contrast, gathering is a competitive business. For example, this competition is clearly evident by the number of gatherers actively competing for business currently in the Marcellus Shale play in Pennsylvania. Besides the competitive differences between gatherers and public utilities, there are also important differences in how they provide services. Public utilities provide service at uniform tariff rates, terms and conditions. The natural gas gathering business depends on flexibility and the ability to tailor transactions to each customer's specific needs. This includes being able to construct facilities quickly (implicating both siting certificate regulation and right of way issues). Importantly, because the gas gathering business is competitive and the customers are highly sophisticated, market forces control the participants' behavior. Accordingly, the unique and individualized contracts with customers are based upon market-based rates negotiated by the parties. In contrast, traditional public utility rates are generally administratively established under cost-of-service principles and the legal "just and reasonable" standard. To the extent contracts are utilized by regulated public utilities, they largely implement standard terms, rates and conditions of service specified in approved tariffs.

LMM Stmt. 1 at 11-13.

In *Laser*, the Commission noted that capacity limits are not necessarily a bar to the ability to provide public utility service:

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*,[[18]](#footnote-18) 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.[[19]](#footnote-19)

*Laser Order I at 24-27.*

LMM points out that Peregrine's proposal falls short of public utility service:

Indeed, Peregrine's numerous restrictions on expanding its gathering capacity to serve prospective customers justifies a complete rejection of the Application.

And, at a more basic level, Peregrine's self-serving statements of its intention to serve the entire public indiscriminately are completely at odds with the record evidence of how (i) the natural gas gathering business operates via specially negotiated and unique contracts tailored to the needs of each specific customer and (ii) Peregrine itself expects to operate with its so-called "standard" gas gathering contract.

LMM RB at 2.

In short, Peregrine is not a public utility. It will begin service to only affiliated companies, which means that its facilities will be designed to serve those entities. Affiliated companies cannot accurately be defined as "the public," and the intent to provide service for others, as long as it is convenient for the provider, is not service for the public.

While there is no reason to paint Peregrine as anything other than sincere, at the heart of the Commission's mission is the obligation to protect the public interest. It is, therefore, prudent to take a step back and to consider that approval of this Application under these circumstances would be to permit a private company to drill the wells, and then to use an affiliate for the purpose of transporting that gas to market – with the right to take real property by eminent domain under the guise of "public use," when no such public use exists. Then, after establishing its network through any method it chooses, including severely restricting the property ownership rights of tax-paying, voting citizens of this Commonwealth, who are not members of the class (specifically, contracted *affiliated* producers) which benefit from the service, a gathering company could tell the Commission that it has changed its business plan and no longer wishes to provide that service to all takers, just to those it chooses. As a matter of consistency and regulatory certainty, there should be a finding that all gathering companies are – or are not – public utilities.

Gathering companies are prospering in Pennsylvania without the use of eminent domain. This particular item is of great importance as was shown at the public input hearing through the testimony of pro se witnesses. It is in their communities that any company will exercise this right, not only for the placement of gathering pipes, but for the even more intrusive placement of the processing facilities.

Gathering companies, as convincingly argued in great detail by the parties to this Application, are not public utilities. The nature of gas gathering is such that a gathering company cannot reasonably be expected to provide service to all who request it as a matter of course, *only to those who fit into its business plan*. As stated throughout this Recommended Decision, this is not consistent with what is required of a public utility.

**d. Eminent domain**

**i. Traditional public utility authority**

Two advantages to holding a CPC are granted by statutes over which the Commission has no authority: the Business Corporation Law of 1988 and the Municipalities Planning Code.

The Business Corporation Law of 1988 grants public utility corporations the power of eminent domain to condemn property, and provides that the *power* of the utility to condemn the property or the procedure followed by it shall not be an issue in the commission proceedings. 15 Pa. C.S. § 1511(c). Further the Commission has acknowledged that it has no jurisdiction over the exercise of eminent domain power by a natural gas utility. *Nelson v. Columbia Gas of PA, Inc.,* Docket No. C-20028763 (Order entered April 23, 2003).

[Section 1511(c)](https://www.lexis.com/research/buttonTFLink?_m=d300b2c1a2f6e7df20f96a6de01a1c98&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b991%20A.2d%201021%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=31&_butInline=1&_butinfo=15%20PA.C.S.%201511&_fmtstr=FULL&docnum=27&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=7b98ea094c4104eb42197c61c5584c1e) states that a public utility may begin the process of  condemnation:

only after the Pennsylvania Public Utility Commission . . . has found and determined . . . that the service to be furnished by the corporation through the exercise of those powers is necessary or proper for the service, accommodation, convenience or safety of the public. The power of the public utility corporation to condemn the subject property or the procedure followed by it shall not be an issue in the commission proceedings held under this subsection . . . .

[15 Pa. C.S. § 1511(c)](https://www.lexis.com/research/buttonTFLink?_m=d300b2c1a2f6e7df20f96a6de01a1c98&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b991%20A.2d%201021%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=32&_butInline=1&_butinfo=15%20PA.C.S.%201511&_fmtstr=FULL&docnum=27&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=88de1e1b2be40ed0c169adb458ecfeca). Under this provision, the only role of the PUC is to consider if the project is necessary or proper for the benefit of the public, and it is expressly barred from considering the power of the utility to condemn. After the PUC authorizes a utility to exercise the power of eminent domain, a condemnation is far from final, as [15 Pa. C.S. § 1511(g)](https://www.lexis.com/research/buttonTFLink?_m=d300b2c1a2f6e7df20f96a6de01a1c98&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b991%20A.2d%201021%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=34&_butInline=1&_butinfo=15%20PA.C.S.%201511&_fmtstr=FULL&docnum=27&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=66ae61cdc157cf1e09b2eb653d5fa0e9) makes clear that before taking the land, the utility must prevail in a condemnation action at the Court of Common Pleas. As our Supreme Court held, in interpreting an earlier but substantially similar version of the statute: "Once there has been a determination by the PUC that the proposed service is necessary and proper, the issues of scope and validity and damages must be determined by a Court of Common Pleas exercising equity jurisdiction."

[*Fairview Water Co. v. Pa. Pub. Util. Comm'n*., 509 Pa. 384, 393, 502 A.2d 162, 167 (1985)](https://www.lexis.com/research/buttonTFLink?_m=d300b2c1a2f6e7df20f96a6de01a1c98&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b991%20A.2d%201021%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=35&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b509%20Pa.%20384%2c%20393%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=27&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=411ad71a7a1c2732c6572a5c755eea68).

In other words, the Commission may not grant a certificate of public convenience but withhold the power of that utility to exercise eminent domain. Once the Commission determines that the work performed is so vital that it achieves public utility status, the power of eminent domain attaches – under a statute that the Commission does not have the authority to interpret or limit.

Peregrine has made assurances regarding its intent to use eminent domain sparingly in siting its gathering lines:

Examples of matters of last resort that may necessitate the use of eminent domain are when a landowner cannot be located after all reasonable efforts for contact are exhausted, and where there is no practical alternative route for Peregrine's pipeline. (PKGP Stmt. No. 1-R at p. 34; 10-2). A landowner will be able to use the right-of-way after Peregrine constructs its facilities. The landowner will be permitted to utilize the right-of-way for farming and other uses as necessary as long as they do not pose a safety hazard to Peregrine's pipeline facilities. The only restrictions will be the planting of deep-rooted trees and the construction of permanent structures that may cause a safety hazard. The landowner may cross the right-of-way with his farm equipment. Peregrine will not take title to the land where the right-of-way is located, it will remain in the ownership of the landowner. Peregrine will install its facilities in public roads or public rights-of-way where that is feasible. Public utilities are permitted as of right under the Business Corporations Law to occupy public rights-of-way. The use of public rights-of-way should reduce the need to install Peregrine's facilities in rights-of-way on landowner property. (PKGP Stmt. No. 1-R at p. 36: 5-16). These commitments are a reasonable response to the concerns expressed by the protestants in this case and the testimony of the public input hearings.

Peregrine MB at 44-45.

There is, however, no mention of Peregrine's intentions regarding siting of its compression and dehydration facilities except on cross-examination. In response to an inquiry by Caiman's counsel, Mr. Fuller indicated that production-related facilities are designed and installed and secured by another affiliate. Tr. 359. However, Peregrine states that it would use eminent domain as a last resort. Tr. 399.

In response to Caiman's recommendation that the Commission condition certification with a prohibition against using eminent domain to furnish service to its affiliates, Peregrine states:

Peregrine submits that the Commission does not have authority pursuant to the Business Corporations Law to control eminent domain exercised by natural gas intrastate pipelines. The Commission only reviews the siting of certain electric transmission lines pursuant to Section 1511(c), of the Business Corporation Law ("BCL"), 15 Pa. C.S. § 1511(c), which requires Commission approval for the siting and condemnation of property for aerial electric or telephone lines outside of a public right-of-way. There is no similar legislative requirement for the Commission's siting of natural gas gathering pipelines. Similarly, the Commission does not have the authority to restrict any eminent domain authority conferred upon public utilities by the General Assembly through the BCL. Peregrine submits that the Commission does not have jurisdiction to restrict public utility eminent domain authority in a manner inconsistent with Section 1511(c) of the BCL. The certificate conditions proposed by Caiman should be rejected by the Presiding Officer and Commission.

Peregrine RB at 41.

Peregrine is correct. Certification of this gathering company would grant it the unfettered use of eminent domain, with no Commission overview.

The second statute granting an advantage to a holder of a CPC is the Municipalities Planning Code, which provides that local zoning will be preempted where the Commission has found the siting of a building of a public utility is reasonably necessary for the convenience or welfare of the public (after notice and public hearing), which prevents local governments from governing the placement of utility facilities and thus, preventing a public utility from providing safe, reliable, efficient service to the public.

**ii. Act 13's effect on zoning**

Under Act 13, which provides that pipelines and natural gas compressor stations and processing plants are part of oil and gas operations, 58 Pa.C.S.A. § 3301, municipalities must allow compressor stations as a permitted use in agricultural and industrial zoning districts, and as a conditional use in all other districts, if the compressor building meets specific standards. Section 3304 of Act 13, 58 Pa.C.S.A. § 3304(b)(7). The commitments made by Peregrine fall short of these standards. Should Peregrine be granted a CPC, it will be exempt from local ordinances, short-changing the public of the protections built into this legislation. Superior Appalachian RB at 7.

Due to the nature of public utilities, the Pennsylvania Supreme Court has long held that municipalities have no power to zone with respect to publicutility facilities. [*Duquesne Light Co. v. Upper St. Clair Twp.*, 377 Pa. 323, 105 A.2d 287 (1954);](https://www.lexis.com/research/buttonTFLink?_m=870e889eab3ba02a24dbd116250525a7&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2010%20Pa.%20PUC%20LEXIS%201605%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=54&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b377%20Pa.%20323%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=25&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=6cd634e46cf7c3a734d49a18189c4eea)  [*Duquesne Light Co. v. Monroeville Borough*, 449 Pa. 573, 580, 298 A.2d 252, 256 (1972)](https://www.lexis.com/research/buttonTFLink?_m=870e889eab3ba02a24dbd116250525a7&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2010%20Pa.%20PUC%20LEXIS%201605%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=55&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b449%20Pa.%20573%2cat%20580%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=25&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=4ae407c938a9cbf9e788475f920eda15) (the PUC has exclusive regulatory jurisdiction over the implementation of public utility facilities). See, also, [*County of Chester v. Philadelphia Electric Co.*, 420 Pa. 422, 425-426, 218 A.2d 331, 333 (1966)](https://www.lexis.com/research/buttonTFLink?_m=870e889eab3ba02a24dbd116250525a7&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2010%20Pa.%20PUC%20LEXIS%201605%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=56&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b420%20Pa.%20422%2cat%20425%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=25&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=c7dd979b4f0e6325497200c4e4aad6a2) (regulation by a multitude of jurisdictions would result in "twisted and knotted" public utilities with consequent harm to the general welfare of the public); [*Commonwealth v. Delaware & Hudson Railway Co.*, 19 Pa.Cmwlth. 59, 61, 339 A.2d 155, 157 (Pa. Cmwlth. 1975)](https://www.lexis.com/research/buttonTFLink?_m=870e889eab3ba02a24dbd116250525a7&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2010%20Pa.%20PUC%20LEXIS%201605%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=57&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b19%20Pa.%20Commw.%2059%2cat%2061%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=25&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=4db6cba31a6b535ff0fb76e297ed4e30) **("**public utilities are to be regulated exclusively by an agency of the Commonwealth with state-wide jurisdiction rather than a myriad of local governments with different regulations").

The first power is not affected by recent legislation, but the need to exempt a utility from zoning restrictions no longer exists for gas companies.

In passing Act 13, the Legislature has established the standards which it expects gas companies to follow. Chapter 33 of Act 13 supersedes any local ordinance, except those passed pursuant to the Flood Plain Management Act, which purports to regulate oil and gas operations covered by Chapter 32 of the Act. Chapter 33 spells out the content permitted by the new zoning ordinances in order to "allow for the reasonable development of oil and gas resources." § 3304(a). The Act requires local ordinances to allow for placement of well and pipeline facilities consistent with Federal and State laws and to be no more stringent than the conditions, requirements or limitations imposed on other industrial uses or other land development within the particular zoning district where the oil and gas operations are situated within the local government. Local zoning must authorize oil and gas operations as a permitted use in all zoning districts, and must not exceed the specific set-back for placement of facilities, among other things. 58 Pa. C.S. § 3304.

In Act 13, the Legislature has set out its standardized requirements for the treatment of gas companies statewide – there is need for an exemption from local zoning. In other words, the Legislature has removed the need for a gathering company, even one with compression, dehydration or other treatment facilities, to seek exemption from the restrictions of local zoning. All that is left is the acquisition of the land for placement of facilities.

Peregrine has applied for a certificate of public convenience that includes compression and dehydration services, not only gathering. Compression and dehydration require sizeable facilities and have their own environmental and real property concerns. Granting a certificate of public convenience to Peregrine would effectively exempt its siting of facilities from the protections offered by local zoning ordinances. Eminent domain would permit Peregrine to place its compression and dehydration facilities at its convenience.

If it were granted a Certificate, Peregrine would be exempt from local zoning regulation of buildings as a public utility, and while Peregrine also summarizes in its Main Brief its commitments as to the location of facilities, it does not make any commitments about the location of its compression facilities with regard to setbacks and provides a limited commitment as to noise suppression:

Peregrine will design and operate its compressors to limit emissions and noise and apply its standard levels of noise suppression of 5 decibels above ambient at a hundred feet in populated areas. (PKGP Stmt. No. 1 at p. 10: 11-19; Tr. p. 398).

Superior Appalachian RB at 6-7.

This type of industrial facility should not be placed at the discretion of a single party but as a result of arms-length negotiation and purchase of the necessary land. No other industry has the ability to place its production facilities pursuant to eminent domain. In addition, the Legislature has spoken regarding its desire to expressly regulate placement of gas facilities, and the zoning restrictions in place will reflect those limitations (or the municipalities will not be permitted to accept funds generated under the Act). Granting a CPC will remove the zoning restrictions expressly dictated by the Legislature, upon a finding of "necessary and proper" by this Commission.

A final point is that the "map" of Peregrine's initial proposed gathering line is too general to determine the exact location of facilities, thereby not permitting a proper evaluation of it. See Butela MB and RB at 4. Mr. Rosenberg points out that Peregrine has not offered any evidence that its facilities will be designed to connect to as many non-affiliated customers as possible – just a vague map which shows the general location of its planned connections to its affiliate. Rosenberg RB at 2.

The ability of a community to apply its zoning laws to the placement of midstream facilities would allow some level of control regarding their location. The character of those facilities are the same whether the operating entity possesses a CPC or not, Butela RB at 2; however, the zoning laws would be inapplicable if the entity placing those facilities exercised the power of eminent domain. *See* discussion above.

Peregrine points out that it has committed to building its compressors to be:

. . . natural gas engine driven utilizing lean burn technology with catalytic convertors designed to achieve ½ grams of No(x) per brake horsepower hour. Noise mitigation will be achieved by varying measures depending upon proximity to population with higher measures being utilized in areas with higher population density. The noise attenuating technology to be deployed will be based on noise attenuation studies which will be performed at the compressor locations. Examples of compressor engine noise attenuation technologies which Peregrine has utilized in the past and would be prepared to utilize in the proposed service area include hospital grade mufflers, noise attenuating buildings and sound walls. (Peregrine Stmt No. 1 at p. 10:11-19). In his cross examination, Mr. Fuller agreed that Peregrine would apply the Company's standard concerning compressor noise in populated areas. (Tr. p. 398). The Company standard is 5 decibels above ambient noise at 100 feet from the compressor station.

Peregrine MB at 38-39.

While Peregrine has included "processing" in its stated question for Commission consideration, Peregrine MB at 4, MarkWest points out:

Throughout this proceeding, in its Application and Direct Testimony, Peregrine represented that "there are no plans for acid gas removal (Co2 and H2S) or gas processing facilities on Peregrine Keystone's gathering and transportation systems." Peregrine Ex. 2¶11; PKGP St. 1 at 9l. Peregrine has never stated on the record that its plans have changed. Because this significant additional service has not been submitted to the ALJ and Commission for its consideration, MarkWest submits that the reference in Peregrine's Main Brief to "processing" is in error and should be disregarded.

MarkWest RB at 22.

The Application should be denied for the reasons already discussed; however, even if the Commission grants a CPC for gathering, it should not extend the authority of the CPC to production facilities.

**e. Tariffs**

Here, there is no reliable, enforceable mechanism to establish comparative rates for purposes of determining whether proposed or existing rates charged by Peregrine are fair or discriminatory.

The Public Utility Code requires a publicly available tariff. 66 Pa. C.S. § 1302.

Case law establishes the necessary content of a utility tariff:

A tariff is a set of operating rules imposed by the State that a public utility must follow if it wishes to provide services to customers. It is a public document which sets forth the schedule of rates and services and rules, regulations and practices regarding those services. It is well settled that public utility tariffs must be applied consistently with their language. [66 Pa.C.S. § 1303](https://www.lexis.com/research/buttonTFLink?_m=4b9dc5f1bb65c80e8f39ff6e9e93c868&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b912%20A.2d%20386%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=106&_butInline=1&_butinfo=66%20PA.C.S.%201303&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAl&_md5=14a3cf3d849486016015ad2fcfdfe2c5). Public utility tariffs have the force and effect of law, and are binding on the customer as well as the utility. [*Pennsylvania Electric Co. v. Pennsylvania Public Utility Commission, 663 A.2d 281, 284 (Pa. Cmwlth.1995)*](https://www.lexis.com/research/buttonTFLink?_m=4b9dc5f1bb65c80e8f39ff6e9e93c868&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b912%20A.2d%20386%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=107&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b663%20A.2d%20281%2c%20284%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAl&_md5=fa8cf7c7a20cf5f831466237a13eeffa)*.*

One of the purposes of the tariff system is to inform the public of a public utility's rates. Publication of a utility's tariffs is an essential part of the Public Utility Code's "great purpose." [Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission, 808 A.2d 1044, 1056, fn. 16 (Pa. Cmwlth. 2002)](https://www.lexis.com/research/buttonTFLink?_m=4b9dc5f1bb65c80e8f39ff6e9e93c868&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b912%20A.2d%20386%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=109&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b808%20A.2d%201044%2c%201056%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAl&_md5=73d3342d58e6fad685fbca5187d3b727). Public utilities are required to keep copies of such tariffs open to public inspection. **[12](https://www.lexis.com/research/retrieve?_m=20774eb99c7376c91a328fffa14e899e&csvc=le&cform=&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAl&_md5=f3d7f2e69b131d5fe16914bbe8b9ef66" \l "fnote12" \t "_self)** They are also required under PUC regulations to set forth in the tariff, "definitions of technical terms and abbreviations used in the tariff, the meanings of which are not common knowledge and cannot be gathered exactly from the context in which used." [52 Pa. Code § 53.25](https://www.lexis.com/research/buttonTFLink?_m=4b9dc5f1bb65c80e8f39ff6e9e93c868&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b912%20A.2d%20386%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=110&_butInline=1&_butinfo=52%20PA%20CODE%2053.25&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAl&_md5=656405882bb5239e299e6fb6d2a9aaa0).

*PPL Electric Utilities Corporation v. Pennsylvania Public Utility Commission,* 912 A.2d 386 (Pa. Cmwlth. Ct. 2006), 2006 Pa. Commw. LEXIS 665.

Tariffs must be drafted in clear, unambiguous language to facilitate comprehension by ratepayers and uniform application by the utility. *Pennsylvania Public Utility Commission v. National Fuel Gas Distribution Corporation*, Docket No. R-891197 (Order of March 13, 1989) 1989 Pa. PUC LEXIS 7.

Public utilities are required to file and follow tariffs. 66 Pa. C.S. §§ 1302, 1303. These can include schedules of rates, and all rules, regulations, practices or contracts involving rates and such tariffs have the force of law and are binding on both the utility and its customer. [*Pennsylvania Electric Co. v. Pa. Pub. Utility Com*., 663 A.2d 281, 1995 Pa. Commw. LEXIS 354](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=15&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b663%20A.2d%20281%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=452fd8e06a195addabbeefc3242ab8a8) (Filed August 1, 1995); [*Brockway Glass Co. v. Pa. Public Utility Com*., 63 Pa. Commonwealth Ct. 238, 437 A.2d 1067 (1981).](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=16&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b63%20Pa.%20Commw.%20238%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=8c9fb50ae995fb2775f5166f9a90b13e) See also [Popowsky v. Pa. Public Utility Com., 647 A.2d 302, 1994 Pa. Commw. LEXIS 477 (1994);](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=17&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b647%20A.2d%20302%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=b0758e68899accf61ef8df7c61c56d73)  [*Bell Telephone Co. of Pa. v. Pa. Public Utility Com.,* 53 Pa. Commonwealth Ct. 241, 417 A.2d 827 (1980);](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=18&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b53%20Pa.%20Commw.%20241%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=81bfa5a88e2b155ed859b76d2866fd19) [*Delph v. Pa. Public Utility Com*., 46 Pa. Commonwealth Ct. 552, 406 A.2d 1209 (1979);](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=19&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b46%20Pa.%20Commw.%20552%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=d6801e5dd0fd1a1d9194015924e72cc4) [*Stiteler v. Bell Telephone Co*., 32 Pa. Commonwealth Ct. 319, 379 A.2d, 339 (1977);](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=20&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b32%20Pa.%20Commw.%20319%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=69b0c0e472db977fdce20ce75ce2ba95) [*Scranton Electric Co. v. School District of the Borough of Avoca*, 155 Pa. Superior Ct. 270, 37 A.2d 725 (1944).](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=21&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b155%20Pa.%20Super.%20270%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=7bf67d1c740b15e05786d46f8b38a52c)

In evaluating tariffs filed with it, the PUC may determine their reasonableness, fairness, and consistency with established policy. *Reynolds Disposal Co. v. Pa. PUC,* 468 A.2d 1179, (Pa. Cmwlth. Ct.1983). Established policy is to include sufficient detail that both the prospective customer and the company know what to expect and what is expected from each when entering into a contract for service.

In the remand of the *Laser* case (*Laser I)*, the Commission directed the parties to address whether the proposed tariff was reasonable. Peregrine states:

Peregrine does not agree that this material has to be examined in an application proceeding. In *Joint Application of UGI Utilities, Inc. and PPL Gas Utilities Corporation,* 2008WL8013813, Dkt. No. A‑2008-2034045, et al. (Recommended Decision issued August 7, 2008), Presiding ALJ Wayne Weismandel held that evidence concerning UGI's and PPL's current tariffs was not relevant in an application proceeding since they are not application issues.

Peregrine MB at 45.

The case cited above sought authority for the assets and certificated responsibilities of PPL Gas to be transferred to UGI Utilities, Inc. It was a merger case where both entities were operating public utilities. Both companies' tariffs had already been reviewed and approved by the Commission. That case has no application here, and its mention is disingenuous. Here, an evaluation of the Peregrine proposed tariff is a necessary part of the overall evaluation of the Application, as required by the Commission in the *Laser* remand, and the review finds Peregrine's proposed tariff lacking.

In the *Laser* remand, the Commission directed the parties to address whether contracts between the company and its customers should be public in order to police and prevent discrimination. *Laser I.* The answer for the Peregrine case is yes.

It is true that the Commission has approved the idea of negotiated rates between gathering companies and producers:

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.

*Laser Order I at 32-33.*

Negotiated rates are acceptable in public utility service in the proper circumstances. For example, contracts are expected in gas transportation.

Peregrine also argues that the contracts are merely intended to satisfy the requirements of Section 602(6) of the Commission's gas transportation regulations, 52 Pa. Code § 60.2(6). PKGP St. 1 at 13. MarkWest disagrees with the premise that the Commission's existing regulations allowing negotiated agreements for customers seeking natural gas *transportation* service from an NGDC support the conclusion that natural gas *gathering* agreements used by non-NGDCs are compatible with public utility service. Before these regulations are considered dispositive, there must be some evidence that a natural gas gathering agreement is comparable to a natural gas distribution company's form of transportation agreement. Peregrine has provided no such evidence. To the contrary, MarkWest witness Sander explained that a transportation agreement is a much simpler arrangement with far fewer critical provisions to negotiate than a natural gas gathering agreement. While the transportation agreement largely depends on two or three primary factors, *i.e.,* the amount of gas being transported, the length of the contract, and whether the supply was firm or interruptible service, these issues are only two or three of many considerations when rates and contract terms are negotiated with gathering operators. *See* MarkWest St. 1 at 35.

As discussed above, gathering service is separate and apart from transmission line service, and Section 1308(d) does not exclude gathering service. In addition, rates cannot be discriminatory, and bare-bones tariffs, which leave out nearly all of the substantive terms of service between a utility and a customer, do not inform both the company and the prospective customer of the expectations of the other. In short, tariffs with insufficient detail do not fulfill the purpose of a tariff.

"Discrimination in service." It provides that: "No public utility shall, as to service, make or grant any unreasonable preference or advantage" and further prohibits a public utility from establishing or maintaining "any unreasonable difference as to service, either as between localities or as between classes of service." [66 Pa. C.S. § 1502](https://www.lexis.com/research/buttonTFLink?_m=4b9dc5f1bb65c80e8f39ff6e9e93c868&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b912%20A.2d%20386%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=137&_butInline=1&_butinfo=66%20PA.C.S.%201502&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAl&_md5=b16a8e3ca36a66bc6e25cc343e9b38da). (Emphasis added). *PPL Electric Utilities Corporation v. Pennsylvania Public Utility Commission*, 912 A.2d 386 (Pa. Cmwlth. Ct. 2006).

Importantly, the issue here is not simply negotiated rates. Peregrine has admitted that *all terms of service are open for negotiation.* *See* Caiman MB at 7-8. This is inconsistent with the requirement that basic terms of service be available in a utility's tariff, and does not permit the evaluation of the service in order to determine whether it is discriminatory.

The proposed tariff is inadequate for the provision of public utility service. While rates[[20]](#footnote-20) may be negotiated, the terms of service must be spelled out in sufficient detail that the public can access the tariff and determine whether to engage the services of the utility. *See*  *PPL Electric Utilities Corporation v. Pa. Publ. Util. Comm'n,* 912 A.2d 386 (Pa. Cmwlth. Ct. 2006), 2006 Pa. Commw. LEXIS 665, for a discussion regarding the importance of the content of tariffs.

For a tariff to be effective for a gathering company, the basic terms of service must appear in that tariff so that any customer, prospective or existing, can refer to the tariff for a recitation of the rules by which the utility treats customers, as well as to find the duties of the customer. Caiman explains as follows:

. . . a Contract would not be exclusionary when: (a) express terms are not drafted so as to inherently allow only a privileged class within the class of producers to qualify for service, or (b) when there is an absence of the ability of the user of the Contract to use the Contract to withhold agreement with respect to terms reserved to be 'negotiable.' The existence of the former (or (a) should be self-explanatory or self-evident. The latter (or (b)) could be satisfied, for example, if "all" of the essentially non-negotiable terms and conditions of service were clearly set forth in a public tariff, and a *pro forma* contract, with service ready and available upon signature."

However, here we have the problem of (b), or the 'use' of the Contract to exclude customers. Here many of the significant, material terms of the Contract retain their exclusionary power by their use. Therefore, with this analysis in mind, statements throughout the Peregrine Application or testimony promising to "serve any and all potential customers" cannot arise to satisfy the *Laser* criterion by the same name, as lurking in the requesting customer's future is the hurdle of getting Peregrine to agree to negotiate terms of service in the Contract acceptable to the customer. This particular *Laser* criterion requires Peregrine to "serve any and all potential customers" and should not be converted to "serve any and all potential customers with whom Peregrine can successfully negotiate a Contract." The latter may be a service, but it is not service from a public utility.

Peregrine cannot: (1) reserve the right to negotiate a number of terms and conditions of its Contract with a prospective customer; that is, in the true meaning of negotiation, reserve its right to not agree with a prospective customer on a key term or condition, and, thus, not agree to serve that customer; and (2) at the same time, represent that it will serve any and all requesting customers by not using the Contracts, and Contract negotiations, to exclude a prospective, requesting customer. This is simply illogical. In the context of practical reality, Peregrine is stating two irreconcilable concepts when it states above (1) and (2) at the same time as it does in this proceeding.

Caiman MB at 10-11 (footnotes omitted).

Peregrine itself recognizes that the contracts must be individualized, unlike typical public utility service agreements:

Peregrine anticipates that its customer base will consist of customers with experience executing sophisticated agreements with leaseholders, drilling companies, suppliers and contractors. Each of the customers usually has different operating, commercial and litigation experience and different risk tolerances. These types of customers prefer to negotiate contracts based on their prior experiences and risk tolerance. In Peregrine's experience, a simplified contract that is intended to be broadly acceptable for all

parties is not likely to satisfy the operating experience and risk tolerance of the expected diverse customer base.

PKGP St. 1 Ex. D at 5; quoted in LMM MB at 13.

LMM agrees that the contracts negotiated with producers are complex.

"Every contract presents dozens of critical deal points, which extend well beyond price, to the fundamental structure of the gathering agreement. Therefore, each contract is unique to the producer." LMM MB at 13. These commercial terms include gas composition, treatment for impurities, processing and fractionation of natural gas liquids, compression, and terms of payment. MarkWest St. 1 at 20. This stands in contrast with regulated utilities, which primarily use tariffs or meet customers' service needs and use relatively standardized contracts in limited situations."

LMM MB at 13-14.

Gathering is exclusionary by its very nature, as each point in a contract must be agreed upon before service will be provided. LMM MB at 14. A public utility customer knows that service will be extended if the terms of the tariff are met. A gathering company customer does not know what the terms of extension are until the negotiations begin. This lack of transparency is inconsistent with public utility service. In its present form, "the Tariff is devoid of meaningful standards or information that would allow the Commission to resolve the inevitable disputes that will arise between producers and Peregrine due to the numerous provisions of a natural gas gathering that are unaddressed in (or missing from) Peregrine's tariff. Further, the pro forma gathering agreement provides no remedy by which producers may seek relief from provisions if the producer believes the gatherer has unreasonably discriminated." MarkWest MB at 18.

In other words, Peregrine's insistence that the tariff will trump a gathering agreement is meaningless unless the tariff contains enforceable terms. Peregrine avoided the issue as follows:

Q: Would you agree that it makes some common sense to say that in your tariff you should have a provision on every subject matter that is addressed in your gathering agreement?

A: Are you asking from a practical perspective, is it preferable?

Q: I'm asking what I'm asking.

A: I'm sorry, I don’t understand the question. I'm really sorry.

Q: Why not have a tariff provision for subject matter that's also addressed in your gathering agreement?

A: The tariff, as I understand – well, the tariff, in accordance with the laws or the code of the Utility Commission, as I understand it, requires certain things. One of those things is, in many cases, the rates, although there are some examples of tariffs that don't include rates, and it's also common practice to include whether or not a gathering agreement is to be included as part of the agreement between the customer and the gatherer. There's a couple of examples where that's already done, so I think the precedent exists to have a separate and distinct gathering agreement that supplements the tariff. We've observed and we follow the same practice.

Tr. 323-324 (Confidential record, no confidential information included here.)

Peregrine's answer was unclear; what is clear is Peregrine's intent to include as little as possible in its tariff, which minimizes the opportunity to "trump" the gathering agreements.

While Peregrine denies that the tariff rules and pro forma gathering agreement will allow it to pick and choose its customers by contract or otherwise discriminate against potential customers, Peregrine Stmt. 1-R at 4; Peregrine RB at 9, the facts are that service depends on the execution of a contract, and Peregrine controls whether or not the contractual terms are acceptable. Peregrine's protests that the terms of the pro forma agreement are consistent with industry practice is uncontested – and does not support a finding that they are, therefore, acceptable for public utility service. It is simply another reason to support a finding that gathering service is not public utility service.

I note that Peregrine's own witness testified that its pro forma gathering agreement is identified as confidential because:

This agreement was developed with input from what I would consider to be experts in the area, and it would have involved language based on our operating experience and our history and our transactions with other producers, and for that reason it's similar to an investment; there's operating experience, operating history, legal investments in developing the language as it stands.

Tr. 302, testimony of Mr. Fuller (Confidential record, quoted language contains no confidential information)

Note, too, that Peregrine does not require a prospective customer producer to sign a confidentiality agreement before giving the standard contract to that prospective customer, and therefore, there is nothing to prevent that producer from giving it to another gathering company. Tr. 303 (Confidential record, quoted language contains no confidential information).[[21]](#footnote-21)

Peregrine's own argument admits that a certain level of uniformity in terms is consistent with industry practice:

Mr. Fuller does agree that the threshold economic and technical parameters of an agreement to provide gathering services can be unique and must be negotiated. However, the remaining commercial terms are usually similar or identical in other gathering agreements negotiated for the specific production area. These commercial terms usually reflect standard industry business practices and in Mr. Fuller's extensive experience, constitute the vast majority of the executed gather agreement. The uniformity of the gas means that the producers require similar services from gatherers which can be provided by gas gathering agreements containing standard terms and conditions. The service area requested in Peregrine's application produces natural gas with similar qualities within distinct geographical areas. The uniformity of the gas produced within the proposed service area allows Peregrine to use uniform tariff rules and contracts with standard commercial terms and conditions in its agreements with producers. (PKGP Stmt. No. 1-R at p. 3: 3-22).

Peregrine RB at 13-14.

Accepting this argument as true, there is no reason to omit these terms from the tariff, and there is no reason to treat them as confidential and proprietary. Should the Commission approve this Application, Peregrine should be required to include these terms in its tariff.

Another issue to be addressed by the *Laser* remand, *Laser Order I*, was whether conditions should be placed on the certificate of public convenience, should a CPC be granted. The answer in Peregrine is: no certificate of public convenience should be issued; however, if one is to be issued, Peregrine should be required to include some minimum terms in its tariff, and the contracts should be tariff-based and filed as public documents.

In recognition of the special needs of gathering companies, Caiman Energy has provided a list of minimum terms which need to be included in a tariff. They are adopted here:

* Compression and dehydration services. While the Application tariff requires a contract for this, no rates are provided to appear as default.
* Line connections and extensions. The tariff states that "line connections and extensions will be made solely at the discretion of the Company and solely at the expense of the Customer, unless otherwise agreed," and provides no tariff rules. Proposed Tariff, Rules 5 and 17. This issue was important enough to justify a Commission rulemaking which set basic requirements for line extensions for water utilities, 52 Pa. Code § 65.21, and is contrary to traditional extensions, which are funded by the utility. 66 Pa. C.S. § 1501. Note, however, that "special utility service" requests may be funded by the requesting entity. *Shenango Twp. Bd. Of Supervisors v. Pa. Publ. Util. Comm'n,* 686 A.2d 910 (Pa. Cmwlth. 1996).
* Gas quality. Gas delivered into the Company's pipeline is required to conform to the gas quality specifications of the Company – which are in the contract and therefore, not known by a prospective customer perusing the tariff. As gas quality criteria and requirements are extremely important, *material* contract terms, and they will appear in the contract – not the tariff. There is no way to evaluate whether these terms are reasonable unless they appear in a public tariff.
* Capital recovery agreement. Application tariff section 20 – testimony section 19 – allows that Peregrine and its customer may enter into an agreement for the recovery of capital costs addressing the complexities of pipeline and appurtenant facility construction and no terms are included to allow a determination of whether it can be used to exclude customers.
* Capacity reservation agreement. Firm transportation service on any pipeline, including a gas gathering pipeline, is a premium service, and usually requires a premium price. It is unclear whether the rate stated is maximum, whether any customer may acquire firm transportation, whether a two-part rate is available, etc. This information is expected to be included in a tariff.
* Throughput Commitment agreement. The tariff does not inform the public about the workings of this agreement.
* Measurement. Gas measurement agreements are important terms of a customer arrangement. This tariff does not contain details regarding acceptable types of meters or measurement methodologies, how far back in time meter adjustments may go, routine meter inspection or testing procedures, the possible use of chromatographic devices to measure heating value content of the gas in addition to measurement of volumes.
* Rates. There is no reference to processing frees, imbalance cash out charges, imbalance fees or charges, or how firm and interruptible service rates may differ. Transportation of natural gas involves the need to compensate the pipeline for gas used as fuel to run compressor stations, and gas that becomes lost and accounted for during normal pipeline operations. Charges are not included in the proposed tariff .

Caiman MB at 12-18.

As Caiman points out:

Given that negotiation is not synonymous with reaching agreement, Peregrine is asking this Commission to allow it to be granted public utility status and the right of eminent domain while the practical operation of its proposed tariff and proposed service(s) to customers will enable Peregrine to use negotiation over key terms in its Contract (and in its other proposed agreements referenced in the various versions of its tariff) to exclude, or pick and choose, its customers. This type of approach does not satisfy the Commission test in *Laser* for public utility status, and it should not for valid public policy reasons; that is, bestowing Peregrine with significant public utility powers, but allowing it to negotiate and pick and choose its customers is not the typical public utility model.[[22]](#footnote-22)

In *Laser,* the Commission required that contracts could not be used to exclude, or pick and choose, customers, but referred to some negotiation being permissible "because our Regulations allow negotiated contracts for natural gas transportation pipelines."[[23]](#footnote-23) In this proceeding, one must decide whether Peregrine has proposed to reserve the right to negotiate so many of the significant, material terms of the service(s) it purports to offer to 'any and all' that it has retained the ability to use its Contract to exclude, or pick and choose, its customers. Caiman submits that Peregrine has done so, and, thus, fails the *Laser* test. If it is determined that Peregrine has not done so, it is difficult to imagine a proposal by a gathering pipeline company to be a public utility that would ever be more extreme in the extent to which it has reserved the right to negotiate significant, material contract terms, and, at the same time, placed so little in its public tariff to protect the public's ability to obtain service(s) and on reasonable default terms.

Caiman MB at 18.

Public utility rates are averaged over a customer base in order to even out the cost of serving customers. Peregrine's contract system will result in each customer paying for its own cost of service plus a profit margin for the Company. While this might be good business, it is not consistent with the public policy goal of balancing the interests of a utility and those of the public.

When asked how the Commission would compare rates to determine whether rates were discriminatory within the meaning of 66 Pa. CS. § 1304, Peregrine's response was that rates can be shown to be just and reasonable by evaluating the rates on a cost of service basis and comparing the rates with rates charged by unaffiliated pipelines for similar service. Tr. 306. The Commission would rely on unregulated producers to provide information regarding unregulated gatherers – which would only be provided in the context of a dispute before the Commission. Tr. 307.

In other words, there is no reliable, enforceable mechanism to establish comparative rates for purposes of determining whether proposed or existing rates charged by Peregrine are fair or discriminatory.

**f. Service Extensions**

Peregrine's tariff states that line connections and extensions will be made consistent with these tariff rules and at the discretion of the Company and at the expense of the Customer, unless otherwise agreed. Tariff Rule 5. In addition, Tariff Rule 17 permits Peregrine to condition service extension or expansions on the payment of a contribution in aid of construction, the amount of which will be determined by the Company.

Rules regarding service extensions appear in utility tariffs. The Public Utility Code anticipates that a public utility will extend the facilities necessary to provide service at its own expense. 66 Pa. C.S. § 1501.

Customers can be required to contribute to the cost of a utility's extension where necessary to protect that utility's existing customers from excessive rates or to preserve the financial viability of the utility. *Popowsky v. Pa. Publ. Util. Comm'n,* 589 Pa. 605, 912 A.2d 38, 2006 Pa. LEXIS 2261 (2006). Generally, however:

A public utility cannot collect the cream in its territory and reject the skimmed milk. . . . If a portion of the territory served is not profitable, but the entire service produces a fair return on the investment, the utility may still be required to serve the unprofitable portion, if the rendering of such service does not result in an unreasonable burden on its other service.

Ordinarily, it is not the business of the citizen or consumer to construct any part of a utility's system. There are, doubtless, instances where, under special circumstances, warranted by the evidence, the Commission may, in the exercise of its administrative discretion, withhold exercise of its power unless patrons offer to participate in the cost of construction. . . . But no inflexible rule can be laid down; participation in construction costs cannot be exacted indiscriminately; and it cannot be required upon a mere showing that an extension will not immediately produce an adequate profit. Ridley 94 A.2d at 171 (citations omitted).

*Popowsky v. Pa. Publ. Util. Comm'n,* 589 Pa. 605, 912 A.2d 38, 2006 Pa. LEXIS 2261 (2006).

In a traditional extension, where a new customer requests service, the utility will expand its distribution system in a manner which will provide service to that customer and *any other along the extension who may seek service as well*. The company has a commodity which it distributes to the consumer by extending the necessary facilities to that consumer. The cost of the extension depends on the formula which appears in the utility's tariff, with such factors as the length of the new extension and the number of new customers who will take service from the extension taken into account. Any potential (and existing) customer can look at the company's tariff and see what factors will be used to determine the final cost. The company must adhere to the tariff formula and may not inflate that price.

Once service is extended to that customer, that the service will continue to be available to that property no matter who owns it, and that service will be continuous. The distribution system will remain largely intact indefinitely following its construction.

In the case of a gathering company, there needs to be construction of a pipeline from each producing well to the commodity's destination(s), be it a processing plant or an interstate transmission line. The producers are the entities installing the well, not necessarily and not usually the owner of the underlying real estate. The pipelines will cross the intervening properties, and those property owners do not benefit from its presence and have no opportunity to extract the gas from the line for their personal use. There will be few, if any, additional customers added on because the customers – the "public" – are producers (well operators), and there are far fewer wells producing natural gas than there are consumers of other utility commodities, i.e., electricity, gas, landline telephone, and water. The service being provided is transportation capacity, not a commodity to end-users. In addition, the well will only produce for a finite period of time, and then the facilities should be removed and the area restored (another issue to be addressed in the tariff of certificated public utilities or the contracts between landowners and gathering companies).

Service extension rules appear in the tariffs of regulated utilities. Any prospective customer can turn to the company's tariff to find the rules for extension of service. The customer can judge the cost of extension as well as the extent of the responsibilities that the customer incurs when seeking service from the utility. The utility will apply a formula to the fact situation and determine what it can charge for the extension. There should be no surprises.

It is entirely consistent with the provision of gathering services to recognize that the needs of the customer will be determined on an individual basis and will vary depending on the quality and quantity of gas to be transported, and numerous other factors, some of which are spelled out in the Tariff Section, herein. It is, however, entirely inconsistent with the provision of public utility service.

Public utility rates for extensions as set forth in tariffs are designed to facilitate the service of the highest number of customers who can reasonably be served. The cost of the extensions are designed to reflect the expected return from customer rates, with the cost of extension decreasing as the number of customers joined to the distribution line increases.

Peregrine expects the producer to pay for the extension, and then to pay again to have a commodity transported away from the customer premises. Again, while this may be good business, it does not strike the appropriate balance expected in public utility service.

Section 1502 has been interpreted to prohibit preferential treatment of affiliates. *PPL Electric* at 407-408. Note that the Applicant's limitation of "available capacity" indicates that preference would be for its affiliated customers, and this is not permitted under the Public Utility Code. "Our courts have recognized that a fundamental duty of the Commission, assigned by the Legislature, is the protection of the public and the ratepayers. Although the Code is undeniably concerned with fostering competition, its scope and reach does not extend to fostering competition between unregulated affiliates." *PPL Electric* at 408.

Additionally, among other powers, the Commission has authority to review and modify any contract entered into by a public utility. The Commission has the broad and flexible authority to find that a contract's terms are 'unjust, unreasonable, inequitable, or otherwise contrary or adverse to public interest. . ." 66 Pa. C.S. § 508. Further, prior written approval is needed for a valid and effective contract or arrangement between a public utility and an affiliated interest for the furnishing of management, supervisory, construction, engineering, accounting, legal, financial, or similar services, or for the purchase, sale, lease, or exchange of any property, rights, or thing or for the furnishing of any other service, property, right or thin. 66 Pa. C.S. § 2102(a). The Commission has continuing supervision and jurisdiction over such contracts. 66 Pa. C.S. § 2103.

*PPL Electric* at 409.

Therefore, the contracts entered into between the Applicant and its affiliates must be closely scrutinized. There appears to be no reason for confidentiality, especially as most of the terms should be included in the tariff anyway.

Before Peregrine is permitted to offer public utility service, its tariff should be rewritten with the requirement that it include sufficient detail to inform prospective customers of the expectations of both customer and company, and the contracts entered between the utility and customer be public documents, subject to prior approval of the Commission.

Conditions specific to Peregrine should include the submission of a tariff with the specific factors included in the "Tariff" section. In addition:

Peregrine should not be permitted to use eminent domain for the purpose of allowing it to serve an affiliated producer. A certificate without this condition would be bad public policy. If a producer is having difficulty constructing pipelines to connect its wells up to larger pipelines and get its gas to market because of landowners who will not grant easements for pipeline, a producer would be motivated to consider creating an affiliated public utility gathering company, have that affiliated gathering company file for public utility status and obtain eminent domain authority. It would be bad public policy, and perhaps an unintended consequence from the *Laser*  decisions, for the Commission to have essentially created an opportunity to allow producers to use eminent domain to build their pipelines. Consequently, eminent domain should not be able to be used by a public utility gathering company, like Peregrine, to obtain any right-of-way easement for any facility, including for a gathering line, to serve an affiliated producer.

Caiman MB at 24.

This recommended condition is essential to the approval of this Application, as it would place the proposed service into the proper perspective. However, it is a condition which cannot be placed on the certificate as the ability to exercise eminent domain does not arise from the Public Utility Code, which this Commission administers, but instead it arises from the Business Corporation Law of 1988, which the Commission does not administer. *See* Discussion regarding eminent domain, above. While the Commission may place reasonable conditions upon the certificate of public convenience, it may not use the conditions to extend its jurisdiction.

**5. Act 127 of 2011**

Since the Commission issued its Order in *Laser,* the General Assembly has passed The Gas and Hazardous Liquids Pipelines Act, Act 127 of 2012. This Act calls for the registration of pipeline operators and for the reporting of the location of the pipelines and approximate number of miles. The Commission is authorized to assess and to enforce federal safety standards to those pipelines and to impose civil penalties when justified. However, the Act stops short of creating public utility status for these entities:

(C) Authority. – Nothing in this Act grants the Commission additional authority to determine or regulate a pipeline operator as a public utility as defined in 66 Pa. C.S. § 102 (relating to definitions) or as a natural gas supplier or natural gas supply services as defined in 66 Pa. C.S.§ 2202 (relating to definitions).

66 Pa. C.S. § 504(C).

As the Commission stated that it had the necessary authority to find that a gathering pipeline company is a public utility without this legislation in *Laser*, this section has no impact on this proceeding. However, the remainder of the legislation is aimed at enabling the Commission to exercise jurisdiction over safety measures regarding the gas pipelines in Pennsylvania, which is an express concern of both the Commission and the citizens residing in areas where the pipelines are being installed.

Peregrine argues that its services are "necessary for the service, accommodation, convenience and safety of the public . . ." Peregrine Main Brief, p. 26. To the contrary, the public at large will not receive any greater safety protection or receive any greater protection in terms of locations of facilities if Peregrine is a public utility, as opposed to simply a private natural gas gathering pipeline operator in Pennsylvania. The Legislature has spoken on the issue of public safety and has taken steps to ensure that the public safety and convenience, in terms of the location of pipelines and compression and processing facilities, is protected with the enactment of the Gas and Hazardous Liquids Pipeline Act, 58 P.S. § 801.101, *et seq.*, and more recently Act 13 of 2012 (H.B. 1950), 2012 Pa. Legis. Serv. Act 2012-13 (H.B. 1950).

Superior Appalachian RB at 4.

The OCA, which did not take a position on Laser's application, has been consistent in its averment that whether or not gas gatherers are public utilities is a determination which must be made by the Commission and not by individual companies. "At the time the Laser case was considered, an important public benefit of the grant of public utility status was to bring the gathering lines under the Commission's jurisdiction for safety purposes." OCA MB at 4.

The fact that Laser had agreed to stringent conditions presented an appealing picture in a scenario in which there was little legal authority to enforce safety measures. The Gas and Hazardous Liquids Pipelines Act grants the Commission the necessary jurisdiction to require pipeline companies to register, and subsequently, to be subject to Commission investigations and Commission enforcement of federal pipeline safety law. There is no longer a need to extend the reach of the Commission through the grant of a certificate of public convenience in order to oversee safety issues.

Peregrine has stated (three different times at the Public Input Hearings in the service territory) that its proposed service will differ from non-certificated gathering in how it is inspected. E.g." (Public Input Hearings p. 79 lines 7-11) "[Mr. Delaney] As a result of being a public utility Peregrine's facilities will be inspected by the PUC'S pipeline safety unit which will be enforcing the federal pipeline safety requirements. Private gathering pipelines in Pennsylvania are not inspected by the PUC." This statement was true at the time it was made. However: if public input hearings on this matter were held again today, this statement would probably not be true. Act 127 of 2011, The Gas and Hazardous Materials Pipelines Act, brings regulation to non-certificated gathering lines.

Rosenberg MB at 16.

**6. Is the proposed service necessary and proper** **?**

Peregrine states:

A public need exists in the service area for Peregrine's services. The significant gas exploration and development in the Marcellus Shale and other formations in Pennsylvania and substantial additional well drilling planned for the near future necessitates the construction of gathering and transportation systems such as Peregrine's to collect and transport gas to pipelines for redelivery to markets in the Northeastern portion of the Unites States and elsewhere.

Peregrine MB at 22.

No party disputes the need for midstream services in the Marcellus Shale area. The distinction that is made is whether the midstream services should be certificated as public utility services. Peregrine states:

Section 1103(a) of the Public Utility Code, 66 Pa. C.S. § 1103(a), states that the Commission shall grant a certificate of public convenience only if it determines that the granting of the certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. The Commission has interpreted this section to require the Applicant to demonstrate a public need for the service, the inadequacy of existing service in

the proposed territory, and the Applicant's fitness to provide the service. *See Chester Water Authority v. PUC,* 581 Pa. 640, 868 A.2d 384 (2005), *Seaboard Tank Lines, supra.[[24]](#footnote-24)*

Peregrine MB at 27.

Peregrine asserts that the lack of certificated service equates with a dearth of available service in the area. However, there is no evidence to support this claim, as no party has presented evidence that any producer in the proposed area has been unable to obtain gathering services. In fact, Peregrine was consistently unable to provide a single difference to be corrected between service currently offered by private gathering companies and Peregrine's proposed certificated service. Peregrine repeatedly asserts that the other companies do not offer service to the public, and that the other companies will not offer service unless a mutually-acceptable gathering agreement was negotiated. See Peregrine MB at 37, 39. While this is true, it is no different than Peregrine's own offering, which is dependent upon negotiation of a contract and Peregrine's available facilities.

Protestant Rosenberg states that "negative public interest" due to operations must be acknowledged, including air pollution and noise from compressor stations, landowner stress from being required to negotiate against the power of the state, i.e., the threat or exercise of eminent domain, the risk of pipeline explosion, and land use restrictions. "A demonstration that Peregrine's proposed CPC is in the public interest must show that its positive benefit to the public outweighs these burdens on the public." Rosenberg MB at 2.

Protestant Butela cites the numerous health concerns she has with the placement of compressor/dehydration facilities. Butela MB at 7. Ms. Butela points out that the grant of a certificate of public convenience would expedite the development of the Marcellus Shale in a manner which would outstrip the protections available to the citizens. She cites Section 27. Natural Resources and the Public Estate:

The people have the right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people. *Pennsylvania Constitution.*

Butela MB at 5.

She points out that the grant is not "necessary or proper," as all of the other gathering companies are doing business in the stated service territory without such certification, that the need has been met, and that the present method of using contractual agreements is more than sufficient to accommodate the public. Butela MB at 6.

Ms. Butela makes a good point. Her point of view is supported by those who participated in the two public input hearings, where one of the main concerns was the health of the citizens who were within a certain distance from a plant which provided support for the industry. Ms. Butela believes that, without the real property owners' ability to determine where and if a gathering company can build and operate such a facility, there will be increased exposure to the toxins which may be generated by those facilities. The need to negotiate in order to purchase the land for the support facilities, instead of using eminent domain, will at least give the local populace an opportunity to engage in investigation and to determine if such a facility should be located in its midst. The health and environmental implications demand that the development be done in a deliberate manner, not the expedited manner which would undoubtedly accompany the grant of the power of eminent domain.

This is especially true with the passage of Act 13, which requires that "all local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources," which the Act defines. 53 Pa. C.S. § 1304. Those municipalities which have agreed to comply with Act 13, have agreed that their ordinances shall authorize natural gas compressor stations and natural gas processing plants as a permitted use in agricultural and industrial zoning districts and as a conditional use in all other zoning districts, if certain specifications are met. This effectively circumvented any zoning restrictions that the local municipalities might have imposed upon the placement of these facilities.

Protestant Rosenberg points out that there should be a distinction made between the need for service and the need for certificated service. At the evidentiary hearing, the Applicant's witness was unable to articulate the difference. Tr. 262.

In each and every case, despite direct questioning, there is no actual *evidence* here which would distinguish certificated gathering from non-certificated gathering. The type of evidence that could be brought forward would be:

Quantification of how many more wells would be drilled with the availability of certificated service vs. non-certificated service.

Quantification of the number of customers for gathering service that would be served that would not be served by the incumbent non-certificated service.

Identification of specific customers who are not able to be served by the incumbent non-certificated service. (See Point 3 above.)

Instead, when given numerous opportunities to present such evidence, the only result has been either Peregrine's opinion or evidence that applies equally to certificated and non-certificated gathering service and does not differentiate between the two. **The case for the need for certificated gathering service has simply not been made.**

Rosenberg MB at 5 (emphasis in original).

Mr. Rosenberg points out that a similar line of questioning for the I&E witness produced similar results:

. . . I&E's witness was completely unable to offer any quantification at all of the difference granting a CPC to Peregrine would make to the rate-paying public. Again: to support the contention that certificated gathering service is needed, I&E has offered only opinion.

Rosenberg MB at 6.

Mr. Rosenberg points out that Peregrine's only stated difference in becoming certificated would be the inspections by the Commission's pipeline safety unit. Tr. 79. With the passage of The Gas and Hazardous Liquids Pipelines Act, that distinction has disappeared. There is no stated benefit to the public in certificating a gathering company. Rosenberg MB at 15.

Superior Appalachian points out:

In fact, a careful examination of the evidence offered by Peregrine reveals that the only demonstrated need is for natural gas gathering services due to a large increase in natural gas production in the proposed service area, not necessarily for a public utility to provide those services. Peregrine admits those services are already being provided by "existing gathering facilities in the service area . . . owned and operated by private gathering companies which are only providing service to a defined, privileged and limited group of customers." Peregrine Main Brief, p 21.

Are there any potential producer customers who are not part of that claimed "defined, privileged and limited group" being provided services by existing gathering facilities, and who are **not** affiliates of Peregrine? The record is devoid of any evidence of such producers.

Superior Appalachian RB at 2.

In addition, Mr. Rosenberg addresses "proper":

One hesitates to go there: the word 'proper' is so fraught with moral connotation as to make deep political controversy almost inevitable. Nevertheless, I believe the Public Utility Commission should be mindful that there is a strong segment of public opinion which holds: Intervention in a healthy marketplace by the force of the state for market purposes without compelling evidence is improper. This simply raises the bar for the standard of evidence on the "necessary side" of "necessary or proper." And that evidence has not made its appearance in this case.

Rosenberg MB at 7.

If a jurisdictional natural gas distribution company told the Commission that it was finished extending service and did not want to offer its services to the public any longer, just to that group of customers already being served, and therefore it no longer needed its certification as a public utility, but wanted to run its company as it pleased, the Commission would, undoubtedly, reject that application as ridiculous. After all, the nature of the service being performed is such that it is, without question, public utility service. In embarking on the road which includes the right to take property by eminent domain in order to provide service to those customers needing it in their homes and businesses, a company incurs a responsibility to continue to offer that service according to the stringent rules, regulations and consumer protections administered by this Commission.

The desire of the company is not a factor to be used in making the determination of whether the service is public utility service; it is the nature of the service itself. And the service is either public utility service such that all providers fit the classification and must be certificated, or the service is not public utility service, in which case no provider needs to be certificated.

As early as 1917 the United States Supreme Court upheld the power of a state regulatory commission to order an extension of service by a public utility. *New York & Queens Gas Co. v. McCall*, 245 U.S. 345, 38 S.Ct. 122, 62 L.Ed. 337 (1917). Writing for the Court, Justice Clarke stated that:

"Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render. To correct his disposition to serve where it is profitable and to neglect where it is not, is one of the important purposes for which these administrative commissions, with large powers, were called into existence. . . . "

245 U.S. at 351, 38 S.Ct. at 124. See also *People of State of New York ex rel. Woodhaven Gas Light Co. v. Public Service Commission,* 269 U.S. 244, 46 S.Ct. 83, 70 L.Ed. 255 (1925); *United Fuel Gas Co. v. Railroad Commission,* 278 U.S. 300, 49 S.Ct. 150, 73 L.Ed. 390 (1929).

*Western PA Water Co. at 369.*

\* \* \*

This Court has held many times that a certificate of public convenience is neither a contract nor a property interest under which its holder acquires vested rights. See e.g. *Day v. Public Service Commission,* 312 Pa. 381, 167 A. 565 (1933); *Snyder v. Pa. Public Utility Commission*, 187 Pa.Super. 147, 144 A.2d 468 (1958); *Paradise v. Pa. Public Utility Commission,* 184 Pa.Super. 8, 132 A.2d 754 (1957). To hold otherwise would elevate to a protected right the "disposition [of public utilities] to serve where it is profitable and to neglect where it is not" which administrative agencies, like the PUC, with broad regulatory powers, were created to prevent. *New York & Queens Gas Co. v. McCall, supra 245 U.S. at 351, 38 S.Ct. 15 124.*

*Western PA Water Co. at 371.*

Whether the proposed service is "necessary or proper" is a way of asking whether the service is needed. Caiman points out that there are no natural gas producers in the case advocating for the necessity of the service proposed, and even the affiliates were not brought in. Caiman MB at 20. The need for gathering service was not questioned, but the need for certificated gathering service was not established:

Third, Peregrine witness Fuller concedes that it has done no study or analysis demonstrating that other gatherers, including private, non-public utility gatherers, in the geographic area in which Peregrine proposes to operate cannot meet the need for gas gathering services.[[25]](#footnote-25) Peregrine seems aware of the fact that other non-public utility gathering companies can and will serve these needs when it carefully states that in the proposed geographic area it intends to serve it is only able to point to "the lack of *certificated* gathering."[[26]](#footnote-26) Cutting through all of Peregrine's Application and testimony is simply the bare assertion that Peregrine will provide gathering services, it wants to be a public utility (with eminent domain power) so argues that it meets the *Laser* test by making assertions, and, thus, granting Peregrine a certificate is necessary. This is not evidence.[[27]](#footnote-27) Also, assuming for the sake of argument that the Commission has issued certificates for gathering services,[[28]](#footnote-28) this is not to be confused with the requirements set forth by the Commission in *Laser*, quoted above, indicating that issuance of a certificate is not automatic, and in Section 1103(a) of the Code demanding that issuance of the certificate by *necessary.*

Caiman MB at 21-22.

Not only is there no need shown for certification, there is ample evidence to prove that the field is thriving without certification:

In fact, the natural gas gathering business in Pennsylvania as elsewhere has existed for decades as a largely *unregulated* industry and competitive business where siting, rates for service and other issues are driven by market forces. MarkWest St. 1 at 7; LMM St. 1 at 6; LMM Main Br. At 12. "Producers and gatherers have an open and free market in which they have the ability to enter into agreements with agreeable parties. This promotes the free market, commercial flexibility and the ability of both parties to enter into agreements that suit their needs and business models." MarkWest St. 1 at 8; LMM Main Br. At 12.

LMM, as a private, non-public utility natural gas gatherer, is currently operating a competitive gathering business in Pennsylvania. LMM and its affiliates *today* own and operate natural gas gathering facilities in substantial portions of the geographic area encompassing Peregrine's proposed service territory. LMM St. 1 at 15. As Mr. Billings pointed out, "LMM Exhibit FB-1 illustrates the prevalence of Williams' facilities in the very service area Peregrine seeks to obtain in this proceeding." LMM St. 1 at 15; LMM Exhibit FB-1; LMM Main Br. 15 32-33.

LMM RB at 4.

In addition,

As Peregrine's witness, D. Loren Fuller, is fully aware, a significant number of gas wells have been drilled in Peregrine's proposed service territory in the last several years. That natural gas is being successfully brought to market by the incumbent non-certificated gathering companies is amply supported by the extraordinarily low current price for natural gas. There is simply nothing whatsoever broken about the current marketplace for natural gas. And of course, there has been no testimony whatsoever that would show that the absence of certificates of public convenience for gathering has led to any form of disruption at all in the market for natural gas. If anything, the current market for natural gas is flourishing so successfully without certificates of public convenience that the immense supply of natural gas has driven down the price to the point where unconventional gas wells have questionable profitability. Applications for certificates of public convenience for gathering service in Pennsylvania have been extremely rare: during the entire period of Marcellus Shale drilling, there have been only two others beside Peregrine's and both of those cases ended with the applicant withdrawing *for marketplace reasons.*

"If it ain't broke don't fix it" is not exactly the type of language one expects to find in the Public Utility Code, but it is a message which speaks rather loudly in the marketplace.

Rosenberg MB at 6.

LMM argues that the regulation of public utilities under the Code is inconsistent with the operations of natural gas gatherers. In an industry that depends on flexibility and the ability to tailor transactions to each customer's specific needs, the constraints of public utilities certifications is not workable. For example, the "just and reasonable" rate standard is difficult to discern and apply when all rates are negotiated. LMM MB at 29.

Peregrine never explains how the Commission could even begin to resolve a rate dispute between Peregrine and a proposed customer given the dearth of information available upon which the Commission could determine if any rate quoted by Peregrine is truly "just and reasonable" or if Peregrine's underlying costs on which its rate is presumably based are equally just and reasonable. This lack of information is even more glaring when neither Peregrine's proposed pro forma gathering agreement nor its proposed tariff contain *standards* to determine how certain critical cost items, like capacity expansion, should be addressed by the Commission if a dispute between Peregrine and a prospective customer/producer were to develop.

LMM MB at 30.

MarkWest agrees and argues that possible regulation of Peregrine as a natural gas gatherer threatens the development of natural gas extraction in Pennsylvania:

The regulation of public utilities under the Public Utility Code is inconsistent with the operations of natural gas gatherers. Indeed, as MarkWest witness John Mollenkopf explained, the natural gas gathering business originally developed and largely operates today as an independent and unregulated business characterized by high risk and high reward. MarkWest St. 2 at 4-5. The high degree of risk and competition in the natural gas gathering business requires gatherers to have great flexibility in contracting with their producer customers, a concept that "is completely at odds with the notion of a public utility." MarkWest St. 2 at 7.

In addition, cost of service regulation traditionally employed for public utilities is not workable in today's natural gas gathering business and, indeed, will be harmful to unregulated competitive natural gas gatherers. MarkWest St. 2 at 9. The "just and reasonable" rate requirement imposed on regulated utilities under Section 1301 of the Public Utility Code, 66 Pa. C.S. § 1301, is particularly problematic where rates for *all* of Peregrine's customers will be negotiated. There is no pretense by Peregrine that any of its customers will ever be served under a published tariff rate without the need for negotiation of one or more contracts.

MarkWest MB at 25.

**7. Service territories**

One of the questions asked in the *Laser* remand was whether there should be exclusive service territories for gathering company utilities. The answer is that, if there are public utility gathering companies, they should have exclusive territories.

A *gas transportation* company takes the commodity from Point A to Point B, where it is then dispersed to the waiting distribution company. The transportation company traverses communities and municipal lines for many miles, creating a single corridor before reaching the distribution point. This company, almost always a public utility under federal law, can use eminent domain to create that single corridor. While no exclusive territory is awarded, each project is approved as necessary if a zoning exemption is needed for it.

Gas, electric and water *distribution* companies take a commodity from a central location and disperse it to the individual customers. The present day system of exclusive territories developed because of the unwieldy situation which developed when multiple utilities served the same communities, creating a confusing and dangerous mishmash of service lines which intersected and interfered with each other, hurting the reliability and operation of each company. In exchange for the ability to provide service, each utility is granted an exclusive territory and must provide service to all who seek it within that territory, consistent with the rules which appear in the utility's tariff, as approved by the Commission.

Gas gathering is different from more traditional public utilities. The gathering company will take the raw gas from the well and transport it to either a facility for treatment or directly to a transmission line. Multiple gathering companies working in the same territory will be sending the gas to the same destination, be it a transmission line or treatment facility. This means that the properties closest to the transmission line or treatment facility can conceivably be overburdened by the eminent-domain-enforced "need" of multiple, competing gathering companies to deliver gas to that destination. To avoid this concentration of competing company gathering lines, the individual landowners should be permitted to determine where and when which companies cross their land. Eminent domain removes that ability, and the land becomes fair game for providing the shortest distance and thereby, the cheapest alternative, to accessing the destination point. Since a finding that a company is a public utility bestows the right to use eminent domain, the only reasonable way to manage the rush to the destination point is to grant exclusive territories.

Even in the utility industries where competition is thriving - gas, electric and telephone – there are rarely multiple distribution companies serving the same territory because of the basic need for only one physical distribution facility per customer or area. Where there are competing physical facilities, they usually predate the creation of the Public Service Commission. A public utility is granted an exclusive territory, the guarantee that any customer within it must seek service from it, and the ability to earn a given rate of return on tariffed and predictable rates.

Peregrine seeks the freedom to place its facilities at will, using eminent domain, without the balancing requirement that it serve all within the certificated territory who seek service.[[29]](#footnote-29) This is not consistent with the purpose and operations of public utilities.

I note that no party supports the grant of exclusive territories even if a certificate of public convenience is granted to Peregrine. In the present case, a grant of an exclusive territory for Peregrine will have a negative effect on at least two companies:

Peregrine's proposed service territory "directly overlays a dedication area of over 1,200 square miles under contract to MarkWest." MarkWest St. 2 at 14. MarkWest is contractually obligated to provide natural gas gathering service today in the same area, upon the customer's request. MarkWest St. 2 at 15. MarkWest has invested approximately $3 billion in developing its natural gas system in support of the Marcellus Shale and any action by the Commission in granting Peregrine's request for a CPC and authorizing some certificated territory could put that system "at risk" MarkWest St. 2 at 12.[[30]](#footnote-30)

MarkWest MB at 28.

In addition, "LMM Exhibit FB-1 illustrates the prevalence of Williams' facilities in the very service area Peregrine seeks to obtain in this proceeding." LMM Stmt. 1 at 15.

Any action by the Commission in granting Peregrine's request for CPC and authorizing some certificated territory could put that system at risk. LMM St. 1 at 12.

The granting of certificated service territory to Peregrine, irrespective of whether it is characterized as "exclusive," is likely to cause adverse impacts on LMM and other private unregulated gatherers presently providing service in the area. Mr. Billings noted that awarding such territory could (i) create a disincentive for private gatherers to locate facilities in that area in the future; (ii) reduce competition in midstream gas services; and (iii) prevent gathers [sic] like LMM and its affiliates that have gathering facilities in the same area from serving their existing natural gas gathering customers. LMM St. No. 1 at 14.

\* \* \*

Granting a certificated service territory to a gathering entity could eliminate the market forces that create competition, foster efficiency and result in cost-effective service for producers.

LMM MB at 33.

*See also,* MarkWest Stmt. 2 at 12 ("If no other gatherers could build additional capacity in the certificated territory, there would be no incentive for the public utility gatherer to maximize efficiency, or to be competitive with other operators seeking to gain entry or service producers in the same area. As a result, producers will pay higher rates than they otherwise would in an efficient, competitive environment, notwithstanding regulators' best intentions to keep rates "just and reasonable" for producers.").

In addition, MarkWest witness Mollenkopf noted that awarding exclusive territory could:

1. eliminate competition in midstream gas services;

2. protect inefficiency;

3. change the gathering industry's competitive dynamics that have prevailed for at least two decades; and

4. stifle development of the Marcellus Shale gathering pipelines.

MarkWest Stmt. 2 at 11.

MarkWest charges that a company without competition has no incentive to provide superior service to producers, which is not in the public interest. "The logical and not unexpected response by private unregulated natural gas gatherers to a decision by the Commission to issue a CPC to Peregrine for a specific certificated area would be to avoid doing business in that state or region, and instead invest in time and resources where there is less chance of being caught in the web of "public utility" regulation. MarkWest MB at 28-29.

MarkWest also points out that Peregrine's proposed territory:

. . . directly overlays a dedication area of over 1,200 square miles under contract to MarkWest. MarkWest St. 2 at 14. MarkWest is contractually obligated to provide natural gas gathering service today in the same area, upon the customer's request. MarkWest St. 2 at 15. MarkWest has invested approximately $3 billion in developing its natural gas system in support of the Marcellus Shale and any action by the Commission in granting Peregrine's request for a CPC and authorizing some certificated territory could put that system "at risk." MarkWest St. 2 at 12.

MarkWest MB at 28.

LMM sums up the issue of territories:

The Commission should not be regulating the siting of natural gas gathering operations via service territories, even if they are non-exclusive. As I have indicated previously, the siting of natural gas gathering infrastructure should be left to the competitive markets. The normal operations of competitive markets will best ensure that natural gas gathering facilities will be sited in the most efficient and cost-effective locations. If the Commission were to grant Peregrine a certificated service territory, it is likely to create a disincentive for private gatherers to locate new facilities in that area in the future, which in turn will result in reduced competition. In addition, the very granting of certificated territory to Peregrine could prevent Williams and others with gathering facilities in the same area from serving their *existing* natural gas gathering customers. These concerns are real and palpable because Williams *today* owns and operates natural gas gathering facilities in substantial portions of the geographic area encompassing Peregrine's proposed service territory. . . . [see LMM Exhibit FB-1 for map of Williams facilities in Peregrine's proposed territory]. There is hardly a public need for gathering facilities in large portions of this proposed territory based on Williams existing and fully operational facilities shown on LMM Exhibit FB-1. The

competitive market has worked well in bringing natural gas gathering operations to this area and we see no reason to believe that it will not continue to do so in the future.

LMM Stmt. 1 at 14-15.[[31]](#footnote-31)

The parties are correct that Peregrine has failed to provide convincing evidence that the present system of private, unregulated gathering companies is in need of regulation. The other gathering companies, however, have provided convincing testimony that the system in place now is thriving, and that regulation would be harmful to it in terms of both efficiency and cost.

To put it in simply:

1. The service to be offered by Peregrine is no different than that already offered by existing, operating gathering companies.

2. Therefore, if it is public utility service, then each existing gathering company is also providing public utility service and must be certificated as well.

3. If these companies are certificated and can place their facilities using eminent domain, then they must be given exclusive territories to prevent overlapping facilities and overburdening of real property and communities near destination facilities.

4. Existing companies already operate near each other and requiring a separation would be a difficult legal miasma.

5. No party wants exclusive service territories, and the nature of the business does not support exclusive territories.

Nothing about this scenario is necessary, proper, or in the public interest. Peregrine's Application for a certificate of public convenience should be denied.

VI. CONCLUSION AND SUMMARY

There have been substantial changes to the law since this Commission evaluated the *Laser* case: Laser has withdrawn its application, stating that it would provide the same service but would not seek to provide it "to the public"; the Legislature has passed Act 13, which creates strict limitations on zoning restrictions permitted by any municipality which wants to charge fees to gas producers; the Legislature has passed Act 127, which gives the Commission jurisdiction over pipeline safety; it has become obvious that the only difference between certificated gathering service and uncertificated gathering service is the certificate itself and its accompanying rights to exercise eminent domain and to be excluded from local zoning restrictions.

As several parties pointed out, the Applicant was unable to articulate any factual distinction between gas gathering as a private company and gas gathering by a public utility. Uncertificated gathering companies are thriving in Pennsylvania, and Applicant has not claimed nor provided any evidence to support a finding of need for certificated service. In fact, the field is thriving without certification – and without the intrusion on real property rights caused by the use of eminent domain.

The public interest is served by a market which operates effectively, as the midstream market presently operates in the proposed territory. There is inherent unfairness in introducing eminent domain to a healthy competitive market, as those property owners who had declined to lease or sell easements across their land at higher prices would now be forced to permit such a use at the "fair market value" without the ability to dictate the location itself. Tr. 125-127; 138-146.

The public interest is not served by gathering companies which each has its own pipelines but not exclusive territories. As there are competing companies in business in the same territory now, there is no easy way to extricate them fairly.

Should the Commission determine that the gathering service proposed by Peregrine rises to the level of public utility service and that it is necessary and proper for the service, accommodation, convenience, or safety of the public, then the Commission should require that this and every applicant for a certificate of public convenience for gas gathering file a far more detailed tariff than that proposed here, and be responsible for an exclusive service territory.

This Recommended Decision recommends disapproval of this Application because it fails to meet the standard for certification of a public utility under the Public Utility Code for the following reasons explained in detail in the discussion above: (1) the service it will offer and the facilities it plans to build will, first and foremost, be used to provide service to affiliated producers; (2) the Application fails to meet the standard set in the *Laser* case; (3) the proposed tariff is inadequate to inform prospective customers of terms of service; (4) the type of service to be offered cannot meet the stated intent to serve the public indiscriminately; (5) the market is providing robust competition that eliminates the claim that this service is necessary or proper within the meaning of the Public Utility Code; and (6) the Pennsylvania General Assembly has passed legislation, signed by the Governor, which provides Commission oversight for pipeline safety issues while eliminating the need for the exemption from the restrictions of local zoning laws.

VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this proceeding.

2. The proponent of a rule or order in any Commission proceeding has the burden of proof, 66 Pa. C.S. § 332, and therefore, the Applicant has the burden of proving its entitlement to certification and must do so by a preponderance of the evidence, or evidence which is more convincing than the evidence presented by the other parties. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.3d 854 (1950); *Samuel J. Lansberry, Inc. v. Pa. Publ. Util. Comm’n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

3. Any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mill v. Comm., Pa. Publ. Util. Comm’n*, 447 A.2d 1100 (Pa. Cmwlth. Ct.1982); *Edan Transportation Corp. v. Pa. Publ. Util. Comm’n,* 623 A.2d 6 (Pa. Cmwlth. Ct.1993), 2 Pa. C.S. § 704. 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. V. Pa. Publ. Util. Comm’n,* 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Com. Bd. Of Review*, 166 A.2d 96 (Pa. Super. Ct.1960); *Murphy v. Comm., Dept. of Public Welfare, White Haven Center,* 480 A.2d 382 (Pa. Cmwlth. Ct.1984).

4. Before rendering public utility service, an entity is required to obtain a certificate of public convenience. 66 Pa. C.S. § 1101.

5. A certificate of public convenience will be issued “only if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. . . .” 66 Pa. C.S. § 1103(a).

6. An applicant must meet the definition for “public utility” under the Public Utility Code, 66 Pa. C.S. § 102.

7. Applicant bears the burden of proving that its actions fall within the definition of the term “public utility” as it appears in the Public Utility Code, and, if so, that it is technically and financially fit to be certificated.

8. The seminal case for evaluating whether an entity is a public utility within the meaning of the Public Utility Code is *Drexelbrook Associates v. Pa. Publ. Util. Comm’n*, 418 Pa. 430, 212 A.2d 237 (1965).

9. The public or private character of the enterprise does not depend upon the number of persons by whom it is used, but upon whether or not it is open to the use and service of all members of the public who may require it. *Drexelbrook* at 435, citing *Borough of Ambridge v. P.S.C.,* 108 Pa. Super. Ct. 298, 304, 165 At. 47, 49 (1933).

10. “[A] public use . . . is not confined to privileged individuals, but is open to the indefinite public” and “it is this indefinite or unrestricted quality that gives it its public character.” *Drexelbrook* at 436, citing *Camp Wohelo, Inc. v. Novitiate of St. Isaac Jogues,* 36 Pa. P.U.C. 377 (1958).

11. The Commonwealth Court reads *Drexelbrook* as the Supreme Court’s determination of whether utility service is being offered “for the public” as “whether or not such person hold 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. Publ. Util. Comm’n*, 596 A.2d 1221, 1223 (Pa. Cmwlth. Ct. 1990), citing *Drexelbrook* at 418 Pa. 435-436, 212 A.2d at 239.

12. The private or public character of a business does not depend upon the number of persons who actually use the service; rather, the proper characterization rests upon whether or not the service is available to all members of the public who may require the service. *C.E. Dunmire Gas Co., Inc. v. Pennsylvania Public Utility Commission,* 50 Pa. Commonwealth Ct. 600, 413 A.2d 473 (1980).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. *Masgai V. Pennsylvania Public Service Commission,* 124 Pa.Superior Ct. 370, 188 A. 599 (1936); *Borough of Ambridge, supra.; Waltman* at 50.

13. The Supreme Court of Pennsylvania clarified that a single customer is not “the public,” in its decision in *Bethlehem Steel Corporation v. Pa. Publ. Util. Comm’n*, 552 Pa. 134, 713 A.2d 1110 (1998), unless the reason for the single customer was the entity’s inability to secure other customers despite actively seeking additional customers to no avail. *See also Pilot Travel Centers LLC v. Pa. Publ. Util. Comm’n*, 933 A.2d 123 (Pa. Cmwlth. Ct. 2007).

14. Commission guidelines for determining public utility status mirrors the standard in *Drexelbrook.* 52 Pa. Code § 69.1401.

15. The Applicant does not satisfy the definition of public utility within the meaning of the Public Utility Code. 66 Pa. C.S. § 102.

16. The service proposed by Applicant is not “to or for the public” within the meaning of the Public Utility Code. 66 Pa. C.S. § 102.

17. Applicant's gathering system will be designed to serve affiliated producers of natural gas by transporting the gas to a designated transmission line, and is, therefore, constructed only to serve specific individuals.

18. Applicant has not satisfied the test in *Laser I* to be a public utility.

19. The grant of this Application is not necessary for the service, accommodation, convenience or safety of the public. 66 Pa. C.S. § 1103(a).

20. The Gas and Hazardous Liquids Pipeline Act of 2011, 2011 Pa. Laws No. 127, gives the Commission the general administrative authority to supervise and regulate pipeline operators within the Commonwealth consistent with Federal pipeline safety laws.

21. Due to the nature of public utilities, the Pennsylvania Supreme Court has long held that municipalities have no power to zone with respect toutility facilities. [*Duquesne Light Co. v. Upper St. Clair Twp.*, 377 Pa. 323, 105 A.2d 287 (1954);](https://www.lexis.com/research/buttonTFLink?_m=870e889eab3ba02a24dbd116250525a7&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2010%20Pa.%20PUC%20LEXIS%201605%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=54&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b377%20Pa.%20323%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=25&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=6cd634e46cf7c3a734d49a18189c4eea)  [*Duquesne Light Co. v. Monroeville Borough*, 449 Pa. 573, 580, 298 A.2d 252, 256 (1972)](https://www.lexis.com/research/buttonTFLink?_m=870e889eab3ba02a24dbd116250525a7&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2010%20Pa.%20PUC%20LEXIS%201605%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=55&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b449%20Pa.%20573%2cat%20580%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=25&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=4ae407c938a9cbf9e788475f920eda15) (the PUC has exclusive regulatory jurisdiction over the implementation of public utility facilities). See, also, [*County of Chester v. Philadelphia Electric Co.*, 420 Pa. 422, 425-426, 218 A.2d 331, 333 (1966)](https://www.lexis.com/research/buttonTFLink?_m=870e889eab3ba02a24dbd116250525a7&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2010%20Pa.%20PUC%20LEXIS%201605%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=56&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b420%20Pa.%20422%2cat%20425%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=25&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=c7dd979b4f0e6325497200c4e4aad6a2) (regulation by a multitude of jurisdictions would result in "twisted and knotted" public utilities with consequent harm to the general welfare of the public); [*Commonwealth v. Delaware & Hudson Railway Co.*, 19 Pa.Cmwlth. 59, 61, 339 A.2d 155, 157 (Pa. Cmwlth. 1975)](https://www.lexis.com/research/buttonTFLink?_m=870e889eab3ba02a24dbd116250525a7&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2010%20Pa.%20PUC%20LEXIS%201605%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=57&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b19%20Pa.%20Commw.%2059%2cat%2061%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=25&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=4db6cba31a6b535ff0fb76e297ed4e30) **("**public utilities are to be regulated exclusively by an agency of the Commonwealth with state-wide jurisdiction rather than a myriad of local governments with different regulations").

22. Under eminent domain, a public utility may begin the process of  condemnation only after the Pennsylvania Public Utility Commission . . . has found and determined . . . that the service to be furnished by the corporation through the exercise of those powers is necessary or proper for the service, accommodation, convenience or safety of the public. The power of the public utility corporation to condemn the subject property or the procedure followed by it shall not be an issue in the commission proceedings held under this subsection . . . . [15 Pa. C.S. § 1511(c)](https://www.lexis.com/research/buttonTFLink?_m=d300b2c1a2f6e7df20f96a6de01a1c98&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b991%20A.2d%201021%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=32&_butInline=1&_butinfo=15%20PA.C.S.%201511&_fmtstr=FULL&docnum=27&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=88de1e1b2be40ed0c169adb458ecfeca). Under this provision, the only role of the PUC is to consider if the project is necessary or proper for the benefit of the public, and it is expressly barred from considering the power of the utility to condemn.

23. The Pennsylvania Supreme Court held, in interpreting an earlier but substantially similar version of the statute: "Once there has been a determination by the PUC that the proposed service is necessary and proper, the issues of scope and validity and damages must be determined by a Court of Common Pleas exercising equity jurisdiction." [*Fairview Water Co. v. Pa. Pub. Util. Comm'n*., 509 Pa. 384, 393, 502 A.2d 162, 167 (1985)](https://www.lexis.com/research/buttonTFLink?_m=d300b2c1a2f6e7df20f96a6de01a1c98&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b991%20A.2d%201021%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=35&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b509%20Pa.%20384%2c%20393%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=27&_startdoc=21&wchp=dGLzVzB-zSkAb&_md5=411ad71a7a1c2732c6572a5c755eea68).

24. The Commission is not able to grant a certificate of public convenience but withhold the power to exercise eminent domain.

25. Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. . . . 66 Pa. C.S. § 1501.

26. Customers can be required to contribute to the cost of a utility's extension where necessary to protect that utility's existing customers from excessive rates or to preserve the financial viability of the utility. *Popowsky v. Pa. Publ. Util. Comm'n,* 589 Pa. 605, 912 A.2d 38, 2006 Pa. LEXIS 2261 (2006).

27. Under such regulations as the commission may prescribe, every public utility shall file with the commission, within such time and in such form as the commission may designate, tariffs showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission. The tariffs of any public utility also subject to the jurisdiction of a Federal regulatory body shall correspond so far as practicable, to the form of those prescribed by such Federal regulatory body. Every public utility shall keep copies of such tariffs open to public inspection under such rules and regulations as the commission may prescribe. One copy of any rate filing shall be made available, at a convenient location for a reasonable length of time within each of the utilities' service areas, for inspection and study by customers, upon request to the utility.

66 Pa. C.S. § 1302.

28. A tariff is a set of operating rules imposed by the state that a public utility must follow if it wishes to provide services to customers. It is a public document which sets forth the schedule of rates and services and rules, regulations and practices regarding those services. It is well settled that public utility tariffs must be applied consistently with their language, 66 Pa.C.S. § 1303. Public utility tariffs have the force and effect of law, and are binding non the customer as well as the utility. *Pa. Electric Co. v. Pa. Publ. Util. Comm'n,* 663 A.2d 281, 284 (Pa.Cmwlth.Ct.1995).

29. Tariffs must be drafted in clear, unambiguous language to facilitate comprehension by ratepayers and uniform application by the utility. 1989 Pa. PUC LEXIS 7, *Pennsylvania Public Utility Commission v. National Fuel Gas Distribution Corporation*, Docket No. R-891197 (Order of March 13, 1989).

30. Public utilities are required to file tariffs, [66 Pa. C.S. § 1302](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=13&_butInline=1&_butinfo=66%20PACODE%201302&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=b8d39f1cd8ae5126fdd9e918c61d180c), and they are required to follow those tariffs. [66 Pa. C.S. § 1303](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=14&_butInline=1&_butinfo=66%20PACODE%201303&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=e4eaddc55e603132da4c5ce535b30dc6).

31. Tariffs can include schedules of rates, and all rules, regulations, practices or contracts involving rates and such tariffs have the force of law and are binding on both the utility and its customer. [*Pennsylvania Electric Co. v. Pa. Pub. Utility Com*., 663 A.2d 281, 1995 Pa. Commw. LEXIS 354](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=15&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b663%20A.2d%20281%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=452fd8e06a195addabbeefc3242ab8a8) (Filed August 1, 1995); [*Brockway Glass Co. v. Pa. Public Utility Com.*, 63 Pa. Commonwealth Ct. 238, 437 A.2d 1067 (1981).](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=16&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b63%20Pa.%20Commw.%20238%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=8c9fb50ae995fb2775f5166f9a90b13e) See also [*Popowsky v. Pa. Public Utility Com.*, 647 A.2d 302, 1994 Pa. Commw. LEXIS 477 (1994);](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=17&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b647%20A.2d%20302%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=b0758e68899accf61ef8df7c61c56d73)  [*Bell Telephone Co. of Pa. v. Pa. Public Utility Com.,* 53 Pa. Commonwealth Ct. 241, 417 A.2d 827 (1980);](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=18&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b53%20Pa.%20Commw.%20241%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=81bfa5a88e2b155ed859b76d2866fd19) [*Delph v. Pa. Public Utility Com.*, 46 Pa. Commonwealth Ct. 552, 406 A.2d 1209 (1979);](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=19&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b46%20Pa.%20Commw.%20552%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=d6801e5dd0fd1a1d9194015924e72cc4) [*Stiteler v. Bell Telephone Co*., 32 Pa. Commonwealth Ct. 319, 379 A.2d, 339 (1977);](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=20&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b32%20Pa.%20Commw.%20319%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=69b0c0e472db977fdce20ce75ce2ba95) [*Scranton Electric Co. v. School District of the Borough of Avoca*, 155 Pa. Superior Ct. 270, 37 A.2d 725 (1944).](https://www.lexis.com/research/buttonTFLink?_m=497f40c5bad4d6c4dd9403bc65d59dcb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1996%20Pa.%20PUC%20LEXIS%2056%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=21&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b155%20Pa.%20Super.%20270%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=77&_startdoc=71&wchp=dGLbVzt-zSkAl&_md5=7bf67d1c740b15e05786d46f8b38a52c)

32. In evaluating tariffs filed with it, the PUC may determine their reasonableness, fairness, and consistency with established policy. *Reynolds Disposal Co. v. Pa. PUC,* 468 A.2d 1179, (Pa. Cmwlth. Ct.1983).

33. No public utility shall, as to service, make or grant any unreasonable preference or advantage; nor may a public utility establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service. [66 Pa. C.S. § 1502](https://www.lexis.com/research/buttonTFLink?_m=4b9dc5f1bb65c80e8f39ff6e9e93c868&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b912%20A.2d%20386%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=137&_butInline=1&_butinfo=66%20PA.C.S.%201502&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAl&_md5=b16a8e3ca36a66bc6e25cc343e9b38da). *PPL Electric Utilities Corporation v. Pennsylvania Public Utility Commission*, 912 A.2d 386 (Pa. Cmwlth. Ct. 2006).

34. Service where all terms of service are open for negotiation is inconsistent with the requirement that basic terms of service be available in a utility's tariff, and does not permit the evaluation of the service in order to determine whether it is discriminatory.

35. "Rate" is defined as every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental. 66 Pa. C.S. § 102.

36. "Tariff” is defined as all schedules of rates, all rules, regulations, practices, or contracts involving any rate or rates, including contracts for interchange of service, and, in the case of a common carrier, schedules showing the method of distribution of the facilities of such common carrier. 66 Pa. C.S. § 102.

37. Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission. Only public utility service being furnished or rendered by a municipal corporation, or by the operating agencies of any municipal corporation, beyond its corporate limits, shall be subject to regulation and control by the commission as to rates, with the same forces, and in like manner, as if such service were rendered by a public utility. 66 Pa. C.S. § 1301.

38. The Commission may impose such conditions as it may deem to be just and reasonable in a proceeding involving an application for a certificate of public convenience. 66 Pa. C.S. § 203.

VIII. ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the Application of Peregrine Keystone Gas Pipeline, LLC for Approval on a Non-exclusive Basis to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering, Compression, Dehydration, and Transportation or Conveying Service by Pipeline to the Public in All Municipalities Located in Greene and Fayette Counties and in East Bethlehem Township, in Washington County, Pennsylvania, at Docket No. A-2010-2200201, is denied.

2. That the Secretary mark this docket closed.

Dated: May 3, 2012 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Susan D. Colwell

Administrative Law Judge

1. *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, A-2010-2153371, Order entered June 14, 2011 (*Laser Order I);* Order entered July 15, 2011 (*Laser Order II);* Order entered August 24, 2011 (*Laser Order III);* andOrder entered December 5, 2011 (*Laser Order IV).*

   [↑](#footnote-ref-1)
2. The sole shareholder here of Peregrine is Mr. Arrington. Tr. 131. [↑](#footnote-ref-2)
3. On Transcript page 236, lines 7 to end, and page 237, lines 1-12, testimony given by Ms. Dunning is attributed to the presiding officer. [↑](#footnote-ref-3)
4. Additionally, the recently passed Act 13 of 2012, the Unconventional Gas Well Impact Fee Act (Act 13), amends Title 58 of the Pennsylvania Consolidated Statutes: gathering lines are defined as "a pipeline used to transport natural gas from a production facility to a transmission line.” 58 Pa. C.S. § 3218.5. [↑](#footnote-ref-4)
5. *Application of Allegheny Land and Exploration, Inc. for approval of the right to offer, render, furnish or supply gas transporting or conveying service by pipeline to the public in Glade and Meade Townships, Warren County, Pennsylvania*, Docket No. A-125136 (Order entered March 7, 2005)(“*Allegheny Land*”). [↑](#footnote-ref-5)
6. Tariff of Equitable Gas Company, LLC (Supplement No. 65 to Pa. P.U.C. NO. 22, Fourth Revised Page No. 98; Peregrine MB at 12, FN 3. [↑](#footnote-ref-6)
7. *Pa. Publ. Util. Comm'n v. Peoples Natural Gas Company LLC, Docket Nos. R-2011-2228694, et al.* [↑](#footnote-ref-7)
8. Caiman MB FN 5: *August Laser Order* at 19. [↑](#footnote-ref-8)
9. Caiman MB FN 6: *August Laser Order* at 18. [↑](#footnote-ref-9)
10. A Stipulation entered into between Applicant and Columbia Gas agrees that an Order approving the Application would include language indicating that Peregrine does not seek authority to provide distribution or end-use service, and if it should decide to provide it in the future, it would need to return to the Commission with another application. The parties are free to enter any stipulation they choose; however, as neither the parties nor the ALJ is empowered to direct the Commission to include any particular language, and as it is obvious that the present case will not result in the authority to provide distribution or end-use service, inclusion of the stipulated language is not recommended here. [↑](#footnote-ref-10)
11. Mr. Rosenberg points out that this case and *Laser* were widely publicized and no potential customer came forward to indicate that it could not obtain gathering service. "A potential customer that was not able to receive service would have every incentive to come forward and support Peregrine's application. Conversely, unless Peregrine wanted the option of eminent domain just for its Arrington segments, it would have every incentive to postpone the expense of litigation for a CPC until having a reasonable calculation that a CPC would be necessary for known identified agreements. The fact that no other customers than Arrington have been announced strongly suggests that Peregrine wants the option of eminent domain for its announced pipeline -- regardless of whether other customers are forthcoming or not." Rosenberg MB at 2-3. [↑](#footnote-ref-11)
12. **§ 508. Power of the commission to vary, reform and review contracts**

    The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms or conditions of any contract heretofore or hereafter entered into between any public utility and any persons, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth. . . .

    66 Pa. C.S. § 508. [↑](#footnote-ref-12)
13. PIOGA FN 10: PKGP Statement No. 1-R at 20, lines 12-14, and 22, line 19-23, line 1. [↑](#footnote-ref-13)
14. PIOGA FN 11: Pennsylvania Public Utility Commission et al. v. Peoples Natural Gas Company LLC, Docket Nos. R-2011-2228694, et al., Recommended decision at 22. [↑](#footnote-ref-14)
15. PIOGA FN 12: Appendix A at 7. [↑](#footnote-ref-15)
16. The Commission stated in *Laser:*

    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.

    *Laser Order I* at 32. [↑](#footnote-ref-16)
17. Mr. Billings notes further that Williams operates more than 15,000 miles of interstate natural gas pipeline, with a gas pipeline design capacity of more than 11 billion cubic feet per day. It transports 12 percent of the natural gas consumed in the U.S. and enough to heat 30 million homes on a winter day. Williams has a seasonal storage capacity of more than 230 billion cubic feet. Williams owns two pipelines, Transcontinental Gas Pipe Line Company, LLC (Transco) and Northwest Pipeline GP, and partially owns a third, Gulfstream Natural Gas System, LLC. The Transco pipeline is a 10,500 mile natural gas transportation system from south Texas through Pennsylvania to New York City, and it alone accounts for 8% of the natural gas consumed in the US. LMM Stmt. 1 at 10. [↑](#footnote-ref-17)
18. 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-18)
19. The significance of the cost of revisions varies according to the industry involved. [↑](#footnote-ref-19)
20. “Rate.” Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental.

    “Tariff.” All schedules of rates, all rules, regulations, practices, or contracts involving any rate or rates, including contracts for interchange of service, and, in the case of a common carrier, schedules showing the method of distribution of the facilities of such common carrier.

    66 Pa. C.S. § 102.

    **§ 1301. Rates to be just and reasonable.**

    Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission. Only public utility service being furnished or rendered by a municipal corporation, or by the operating agencies of any municipal corporation, beyond its corporate limits, shall be subject to regulation and control by the commission as to rates, with the same forces, and in like manner, as if such service were rendered by a public utility.

    66 Pa. C.S. § 1301. [↑](#footnote-ref-20)
21. While there appears to be no factual reason to accord the pro forma agreement confidential status, no party objected to its designation as confidential, thus there was no reason for me to strike it. [↑](#footnote-ref-21)
22. Caiman MB FN 20: Sander Direct at 32, lines 21-22; and at 33, lines 1-6 [↑](#footnote-ref-22)
23. Caiman MB FN 21: *August Laser Order* at 6. [↑](#footnote-ref-23)
24. *Seaboard Tank Lines, Inc. v. Pa. Publ. Util. Comm'n,* 502 A.2d 762 (Pa. Cmwlth. Ct. 1985). [↑](#footnote-ref-24)
25. Caiman MB FN 26: "Q. The question is whether or not you have conducted any studies or analyses demonstrating that private gatherers in the proposed footprint of Peregrine's proposed territory cannot meet the need for gas gathering services.

    A. We've conducted no such studies." Transcript at 344, lines 21-25. [↑](#footnote-ref-25)
26. Caiman MB FN 27: Fuller Direct at 14, line 8 (emphasis added). *See also* Application Section 13, at 6; and Section 20 at 9. In fact, "Peregrine Keystone anticipates that other companies . . . will be competing to provide service to natural gas service providers to this area." Fuller Direct at 17, lines 8-12. *See* Direct Testimony of Frank Billings, LMM Statement No. 1, dated November 7, 2011 ("Billings Direct") at 15, lines 1-13. [↑](#footnote-ref-26)
27. Caiman MB FN 28: "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*, 389 Pa. 109, 413 A.2d 1037 (Pa. 1980)." *June Laser Order* at 11. [↑](#footnote-ref-27)
28. Caiman MB FN 29: *See* Fuller Direct, Exhibit D, Section E, Peregrine's Response, at 12. [↑](#footnote-ref-28)
29. While it says it will provide service to all, that statement is always qualified with wording which permits the Company to pick and choose each and every time a producer seeks its service – regardless of whether the producer is located near existing facilities or far from them. [↑](#footnote-ref-29)
30. Peregrine questioned MarkWest witness Sander's ability to speak authoritatively, but MarkWest explains:

    It is important to recognize that Peregrine designated its pro forma gathering agreement as "proprietary," triggering the restrictions of its protective order as to which witnesses may view information marked proprietary" and excluding those employees of a competitor who is involved in the pricing, development and/or marketing of competitive products. MarkWest RB at 8. I found that Ms. Sander's extensive experience in the industry made her a very credible witness. MarkWest argues that this was part of Peregrine's plan, because if Ms. Sander could be discredited, Peregrine's claims regarding gathering contracts would be unchallenged. MarkWest RB at 8. The other option would have been to challenge the designation of the gathering contracts as proprietary, which no party did. [↑](#footnote-ref-30)
31. Having said that, Mr. Billings states that he is not opposed to "light-handed" regulation which might entail the use of eminent domain as a last resort "to overcome local obstacles when acquiring rights-of-way.". LMM Stmt. 1 at 16. [↑](#footnote-ref-31)