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| **PENNSYLVANIA**  **PUBLIC UTILITY COMMISSION**  **Harrisburg, PA 17105-3265** | |
|  | Public Meeting held September 13, 2012 |
| Commissioners Present:  Robert F. Powelson, Chairman  John F. Coleman, Jr., Vice Chairman  Wayne E. Gardner  James H. Cawley, Concurring in Result Only  Pamela A. Witmer, Concurring in Result Only | |
| 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 | Docket No. A-2010-2200201 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition to Withdraw Application (Petition), filed by Peregrine Keystone Gas Pipeline, LLC (Peregrine) on June 8, 2012, relative to the above-captioned proceeding.[[1]](#footnote-1) MarkWest Liberty Midstream & Resources, LLC (MarkWest) and Laurel Mountain Midstream, LLC (LMM) filed a Joint Answer in Support of Petition to Withdraw Application (Joint Answer) on June 28, 2012. The Pennsylvania Independent Oil and Gas Association (PIOGA) filed a Petition for Leave to File Answer to Petition of Peregrine Keystone Gas Pipeline, LLC to Withdraw Application (Petition for Leave to File Answer) and an Answer in Support of Petition of Peregrine Keystone Gas Pipeline, LLC to Withdraw Application (Answer) on June 28, 2012. For the reasons set forth herein, we shall grant PIOGA’s Petition for Leave to File Answer and grant Peregrine’s Petition.

**Background**

The instant case is one of three recent cases in which we have addressed applications filed by natural gas gathering companies. The first of these cases is *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*, at Docket No. A-2010-2153371. In that proceeding, Laser Northeast Gathering Company, LLC (Laser) filed an Application for a certificate of public convenience for authority to begin to offer gathering and transporting or conveying service by pipeline to the public in the Townships of Apolacon, Choconut, Forest Lake, Great Bend, Jessup, Liberty, Middletown, and New Milford in Susquehanna County, Pennsylvania. Numerous parties filed protests and petitions to intervene. On December 1, 2010, Administrative Law Judge (ALJ) Susan D. Colwell’s Recommended Decision was issued, in which she rejected a non-unanimous settlement among a number of parties and recommended that the Commission deny Laser’s Application on the basis that the service Laser proposed to offer did not meet the definition of “public utility” service under Section 102 of the Public Utility Code (Code), 66 Pa. C.S. § 102.

In an Order entered on June 14, 2011 (*June 2011 Order*), we disagreed with the ALJ’s recommendation and determined that Laser had met the threshold issue that its proposed service constituted “public utility” service under Section 102 of the Code. We remanded the case for further proceedings to determine if Laser was proposing to offer jurisdictional service for the public and whether its Application for a certificate of public convenience should be granted. Certain parties sought reconsideration of the *June 2011 Order.* In an Order entered on August 25, 2011 (*August 2011 Order*), we denied the parties’ requests for reconsideration and clarified our *June 2011 Order*. Subsequently, three midstream gathering companies and PIOGA filed Petitions for Review of the *June 2011 Order* and the *August 2011 Order* with the Commonwealth Court. In its appeal, PIOGA contended that the Commission improperly characterized midstream gathering services as “public utility” offerings when midstream gathering service does not meet the definition of “public utility” service under Section 102 of the Code.

On September 8, 2011, Laser filed a Petition to Withdraw its Application. In its Petition to Withdraw, Laser stated that its proposed business plan had changed in the following manner: (1) it was no longer willing to serve any and all potential customers; (2) it would use contracts to select and serve a defined and limited group of customers; and (3) it would not expand its facilities to meet the demand of the public. In an Order entered on December 5, 2011 (*December 2011 Order*), we granted Laser’s Petition to Withdraw because the information that Laser provided supported the premise that Laser would no longer be offering “public utility” service under Section 102 of the Code, and granting the Petition reduced the time and expense involved in continuing to litigate the case. *December 2011 Order* at 15-16. The three midstream gathering companies subsequently withdrew their Petitions for Review.

On August 20, 2012, the Commission and PIOGA filed a Joint Stipulation and Request to Discontinue the Petition for Review of PIOGA in *Pennsylvania Independent Oil and Gas Association v. Pa. PUC,* Docket No. 1790 C.D. 2011. The stipulation recognized that public utility status was a “fact-based” inquiry and that the Commission had made no determination in its earlier orders that the service provided by midstream gathering companies, *per se*, qualifies as public utility service. The Commonwealth Court granted the Joint Stipulation and discontinued the appeal on September 7, 2012.

The second case in which we have recently addressed an application filed by a natural gas gathering company is *Application of Pentex Pipeline Company for Approval to Amend its Existing Certificate of Public Convenience to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering or Conveying Services by Pipeline to its Existing Customer and to the Public in the Borough of Wyalusing and in the Townships of Wyalusing, Herrick, Terry, Tuscarora, Stevens and Wilmot in Bradford County, Pennsylvania*, at Docket No. A-2011-2230314. In that case, Pentex Pipeline Company (Pentex) filed a Petition for Leave to Withdraw its Application on December 5, 2011, prior to any evidentiary proceedings. In its Petition, Pentex stated that, based on the Commission’s clarification in the *August 2011 Order* in the *Laser* proceeding, and Pentex’s desire to expeditiously offer gathering arrangements, it had revised its business plan and strategy. Pentex averred the following: “Pentex: (1) is no longer willing to serve any and all potential customers; (2) will use contracts to select and serve a defined and limited group of customers; and (3) is no longer committed to expanding its facilities to meet the demand of the public as would a public utility.” Pentex’s Petition at 2.

In an Initial Decision, issued February 9, 2012, ALJ Dennis J. Buckley granted the Petition, finding that it would have been premature to compel Pentex to pursue an Application for additional authority that Pentex no longer believed it needed based on its revised business plans and its interpretation of the Commission’s determinations in the *Laser* proceeding. The ALJ stated that to continue with the proceeding would be a waste of the time and resources of those involved in the proceeding. I.D. at 11. In an Order entered April 26, 2012, at 12, we agreed with the ALJ’s decision regarding Pentex’s Petition. We stated that the ALJ’s decision was consistent with our recent decision in the *Laser* proceeding to grant Laser’s Petition to Withdraw its Application.

The third case is the instant proceeding involving Peregrine’s Application and its Petition to Withdraw Application. A separate account of the history of the instant proceeding is delineated in the section immediately below.

**History of the Proceeding**

On September 17, 2010, Peregrine filed an 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 November 1, 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 (Caiman). The Motion was not opposed and was granted by Order dated December 16, 2010.

The Office of Consumer Advocate (OCA) filed a Notice of Intervention on November 1, 2010. The Commission’s Bureau of Investigation & Enforcement (I&E), filed a Notice of Appearance on November 2, 2010.

On November 1, 2010, Superior Appalachian Pipeline, LLC (Superior), Columbia Gas of Pennsylvania, Inc. (Columbia), and Caiman filed Petitions to Intervene. The Applicant filed answers to each Petition on November 15, 2010.

Protests were filed by MarkWest on November 1, 2010; LMM on November 1, 2010; Mary Grace Butela on November 1, 2010; James E. Rosenberg on November 1, 2010; and Veronica Coptis on November 4, 2010. On November 15, 2010, the Applicant filed answers to each protest. On December 1, 2010, Mr. Rosenberg filed a reply to the Applicant’s answer to his protest.

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

On December 16, 2010, the Office of Administrative Law Judge (OALJ) issued a notice of prehearing conference, scheduling the prehearing conference for January 24, 2011. By Prehearing Order dated December 16, 2010, ALJ Colwell denied the Preliminary Objections and directed the Parties to file prehearing memoranda.

On December 15, 2010, FirstEnergy Solutions Corp. (FES) filed a Petition to Intervene. On January 4, 2011, the Applicant filed an answer opposing the intervention.

On December 23, 2010, the Applicant filed a Motion for Continuance of Initial Prehearing Conference. The Applicant indicated that all parties on the service list had been contacted and that no party had voiced opposition. By Order issued January 7, 2011, ALJ Colwell granted the Motion for Continuance and FES’s Petition to Intervene.

By Notice issued July 5, 2011, and published in the *Pennsylvania Bulletin* on July 16, 2011, 41 *Pa. B*. 3946, the prehearing conference was scheduled for August 31, 2011.

On August 9, 2011, MarkWest, LMM, Caiman, FES, and Superior filed a Joint Motion to Suspend the Proceedings. Peregrine filed an Answer in Opposition to the Joint Motion on August 29, 2011.

The prehearing conference was held as scheduled on August 31, 2011, and the ALJ granted all interventions as unopposed. The ALJ additionally informed the Parties that the Directed Questions issued by the Commission in the *Laser* proceeding, were required to be addressed in this proceeding.[[2]](#footnote-2) The Parties submitted an agreed-upon schedule following the prehearing conference, which was adopted in the Fourth Prehearing Order, issued September 12, 2011, along with agreed-upon discovery modifications. The Order also denied the Joint Motion to Suspend Proceedings.

On September 15, 2011, the Applicant filed an Application for Protective Order. On September 21, 2011, MarkWest and LMM filed a joint answer in opposition to the proposed protective order. The Protective Order, the Fifth Prehearing Order, was issued on October 11, 2011.

On October 26, 2011, two public input hearings were held: at 1 p.m. in Uniontown and at 7 p.m. in Waynesburg. Thirty-seven witnesses testified at the public input hearings.

On November 17, 2011, Peregrine filed a motion to compel discovery responses by both MarkWest and LMM. MarkWest and LMM filed answers to the motion on November 21, 2011. On December 5, 2011, the ALJ issued the Sixth Prehearing Order which denied the motion.

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

The following Parties filed main briefs: the Applicant (public and proprietary), Mr. Rosenberg, Ms. Butela, Columbia, Superior, the OCA, I&E, MarkWest, Caiman (public and proprietary), LMM, and PIOGA (*amicus curiae*)*.* Reply briefs were filed by the Applicant, Ms. Butela, Mr. Rosenberg, LMM, MarkWest, Superior, and PIOGA (*amicus curiae*). The record closed on February 23, 2012.

ALJ Colwell’s Recommended Decision was issued by the Commission on May 23, 2012. ALJ Colwell recommended that Peregrine’s Application be denied on the basis that the Application failed to meet the standards for certification of a public utility under the Code. R.D. at 96, 98, 106.

As previously noted, Peregrine filed its Petition on June 8, 2012. In response to Peregrine filing its Petition, on June 12, 2012, I&E filed a letter indicating that it would not be filing Exceptions to the Recommended Decision.

MarkWest and LMM filed a Joint Answer on June 28, 2012. PIOGA filed a Petition for Leave to File Answer and an Answer on June 28, 2012.

**Discussion**

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

**PIOGA’s Petition for Leave to File Answer**

Prior to addressing the merits of Peregrine’s Petition and the responses thereto, we will address PIOGA’s Petition for Leave to File Answer. PIOGA filed its Petition for Leave to File Answer pursuant to Section 5.41 of the Commission’s Regulations, 52 Pa. Code § 5.41.[[3]](#footnote-3) PIOGA requests permission to file an answer in support of Peregrine’s Petition and has also attached its Answer to the Petition. PIOGA explains that it is a comprehensive trade association that represents oil and natural gas interests throughout Pennsylvania and that its members are involved in producing and transporting Pennsylvania natural gas from conventional and unconventional, i.e., shale, formations. PIOGA’s Petition for Leave to File Answer at 1. PIOGA states that it has been involved from the initial effort by a few midstream companies to obtain Commission certification as public utilities and was a party in the *Laser* proceeding. *Id*. at 1-2. PIOGA avers that permitting it to file an Answer in this proceeding will not prejudice any party because its Answer supports the withdrawal of Peregrine’s Application. PIOGA additionally avers that its Answer seeks to provide the Commission with additional considerations that may not be provided by other parties or interested persons and, thus, will give the Commission a fuller record upon which to base its decision regarding whether Peregrine’s withdrawal request should be granted. *Id*. at 3.

Based on PIOGA’s averments, we find that it is appropriate to consider PIOGA’s Answer under the specific facts and circumstances of this case. Since no Party has objected to PIOGA’s Petition for Leave to File Answer, we do not believe our consideration of PIOGA’s Answer will prejudice any of the Parties in this proceeding. We also believe that, as a representative of oil and natural gas interests in Pennsylvania, PIOGA may provide us with some valuable information to consider in reaching our determination regarding Peregrine’s Petition.

**Peregrine’s Petition to Withdraw Application**

In its Petition, Peregrine requests leave to withdraw its Application in this proceeding. Peregrine states that, although it disagrees with the Recommended Decision, it has decided that, due to changes in the Pennsylvania natural gas industry since it filed its Application in 2010, it will not file Exceptions to the Recommended Decision but has filed this Petition instead. In support of its Petition, Peregrine avers that “[t]he reduced natural gas activity in Pennsylvania has resulted in Peregrine revising the schedule and scope of its planned facilities in the proposed service area.” Petition at 2. Peregrine believes that continuing with this matter would be a waste of time and resources for those involved in this proceeding. *Id*.

In their Joint Answer, MarkWest and LMM state that they support Peregrine’s Petition and urge the Commission to approve the Petition. Joint Answer at 1. They state that Peregrine’s averments in its Petition are sufficient to support withdrawal of the Application under the standards set forth in the *Pentex* Order, entered April 26, 2012, and the *Laser* Order, entered December 5, 2011. *Id*. at 1-2. MarkWest and LMM aver that, as the ALJ in the *Pentex* proceeding observed, it would be premature to compel an applicant, such as Peregrine, to pursue an application for authority it no longer believes is necessary based on its revised business plans and its interpretation of the Commission’s determination in the *Laser* proceeding. *Id*. at 2.

Additionally, they aver that withdrawal of the Application will benefit the Pennsylvania Marcellus Shale midstream industry as it will reduce regulatory uncertainty for market participants and allow them to protect their existing operations and more effectively plan for their future operations. Furthermore, MarkWest and LMM state that withdrawal of the Application will conserve valuable administrative resources. *Id*.

In its Answer, PIOGA states that it supports Commission approval of Peregrine’s request to withdraw its Application. PIOGA’s Answer at 7. Additionally, PIOGA avers that the public interest also requires the Commission to state that its determinations in the *Laser* proceeding, particularly in the *June 2011 Order*, have no precedential value and are not to be cited or relied upon for any reason. *Id*. at 7, 9.

The withdrawal of pleadings, including applications, in a contested proceeding is governed by Section 5.94 of our Regulations, 52 Pa. Code § 5.94. Section 5.94(a) provides the following:

(a) Except as provided in subsection (b), a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon the other parties. The petition must set forth the reasons for the withdrawal. A party may object to the petition within 20 days of service. After considering the petition, an objection thereto and the public interest, the presiding officer or the Commission will determine whether the withdrawal will be permitted.

Based on our review of the applicable law, the information provided by Peregrine in its Petition, and the responses to the Petition, we find that it is in the public interest to grant Peregrine’s request to withdraw its Application.

We find that granting Peregrine’s Petition is consistent with our prior decisions in the *Pentex* and *Laser* proceedings*,* in which we granted petitions to withdraw applications filed by natural gas gathering companies. We do not believe it would serve the public interest to continue further with this proceeding, particularly when Peregrine no longer believes it is necessary to pursue an application for authority based on its revised schedule and scope of planned facilities in the proposed service territory. We agree with Peregrine, MarkWest, and LMM that permitting withdrawal of the Application will conserve the time and resources of those involved in this proceeding. Accordingly, we shall grant Peregrine’s Petition. As we have decided to grant Peregrine’s Petition, we find that it is appropriate to vacate the ALJ’s Recommended Decision which addressed the merits of Peregrine’s Application.

In response to PIOGA’s request that we state that our determinations in the *Laser* proceeding have no precedential value, we note that we have previously addressed the same request from PIOGA in our *December 2011 Order* in the *Laser* proceeding. In that proceeding, PIOGA filed Objections to Laser’s Petition to Withdraw. In its Objections, PIOGA requested that, if the Commission granted Laser’s Petition, the Commission should rescind or vacate the *June 2011 Order* and *August 2011 Order* and state that the Orders and the determinations therein had no precedential effect and were not to be cited or relied upon in Commission proceedings. We declined PIOGA’s request to rescind our Orders and stated the following:

Separately, we note that, while the determinations in the *June 2011 Order* and the *August 2011 Order* were specific to the interlocutory issues presented to us, other statements in the Orders were of generally applicable legal principles. These Orders did not adjudicate the merits of Laser’s application. The Commission also granted Exceptions for the purpose of acknowledging prior Commission and Commonwealth Court decisions that were relevant. For example, the Commission acknowledged that it had the authority, under Section 502 of the Code, 66 Pa. C.S. § 502, to enforce its orders approving settlement provisions agreed to by the parties as a condition for resolving a case, including cases involving certificates of public convenience. The Commission also restated the legal principles that service to a limited class of customers may constitute service “to or for the public” and that the determination of public utility status is a fact specific inquiry. The Commission has the full authority and the obligation to affirm its prior orders, correct the misapplication of Commonwealth Court precedent, and provide guidance to the public regarding issues within its jurisdiction for future adjudications. Rescinding the *June 2011* and the *August 2011 Orders* would, in fact, foster regulatory uncertainty about the validity of prior, long-standing Commission decisions.

*December 2011 Order* at 17-18 (citations omitted). We here reiterate our response to PIOGA’s request within the *December 2011 Order*.

Moreover, we recognize that, consistent with the Commission’s policy statement at *Guidelines for determining public utility status—statement of policy,*  52 Pa. Code § 69.1401, because the determination of “public utility” status is necessarily a fact-based determination, the Commission has made no general or final factual findings and established no precedent in its earlier orders that the service provided by midstream gathering companies, *per se*, qualifies as public utility service. We have also recognized that, in determining whether proposed service qualifies as “public utility” service, each case involves its own unique set of facts, and we will apply the facts of each specific case to the applicable law to determine the outcome in that specific case. *August 2011 Order* at 18.

**Conclusion**

Based upon PIOGA’s averments, we shall grant PIOGA’s Petition for Leave to File Answer under the circumstances in this case. Additionally, based upon our review of the record in this proceeding, Peregrine’s Petition, and the responses thereto, we find that granting Peregrine’s Petition is in the public interest. As we have decided to grant Peregrine’s Petition, we find that it is also appropriate to vacate the ALJ’s Recommended Decision which addressed the merits of Peregrine’s Application; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Leave to File Answer to Petition of Peregrine Keystone Gas Pipeline, LLC to Withdraw Application, filed by the Pennsylvania Independent Oil and Gas Association on June 28, 2012, is granted.

2. That the Petition to Withdraw Application, filed by Peregrine Keystone Gas Pipeline, LLC on June 8, 2012, is granted.

3. That the Recommended Decision of Administrative Law Judge Susan D. Colwell, issued May 23, 2012, at Docket No. A-2010-2200201, is vacated.

4. That this proceeding shall be marked closed.



**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: September 13, 2012

ORDER ENTERED: September 13, 2012

1. Pursuant to Section 5.94 of our Regulations, 52 Pa. Code § 5.94, either the presiding officer or the Commission will determine whether a withdrawal is permitted. [↑](#footnote-ref-1)
2. In the *Laser* proceeding, a Secretarial Letter was issued on August 25, 2011, in which Commissioner Cawley requested that Laser and the other parties address specific issues in the remand proceeding. [↑](#footnote-ref-2)
3. Section 5.41(a) provides that “Petitions for relief under the act or other statute that the Commission administers, must be in writing, state clearly and concisely the interest of the petitioner in the subject matter, the facts and law relied upon, and the relief sought.” 52 Pa. Code § 5.41(a). [↑](#footnote-ref-3)