PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

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

Public Meeting: May 19, 2011
2153371-OSA
Docket No. A-2010-2153371

DISSENTING STATEMENT OF COMMISSIONER JAMES H. CAWLEY

Summary

Whether to grant or deny a certificate of public convenience, conferring public utility status, is within the sound discretion of the Commission, with the public interest being paramount, not that of the corporate applicant, and "public utility" status only a secondary consideration. The Public Utility Code must be strictly construed when pipelines are involved, because a certificate also confers the power of eminent domain, which upsets the negotiating balance between landowners and pipeline operators over rights-of-way or easements, with grave implications for individual Pennsylvanians and their communities given the enormity of shale gas extraction underway in the state. The upset of this balance is not in the public interest and is sufficient reason to deny Laser's application.

Thus, it is unnecessary to decide whether Laser meets the test for a "public utility," but it fails that standard as well. Rather than holding itself out expressly or impliedly as engaged in the business of supplying its service to the public, as a class, or to any limited portion of it (natural gas producers), Laser instead holds itself out as serving or ready to serve only particular producers, those willing to enter into a gathering agreement with Laser for negotiated rates and terms of service. Laser will control those whom it serves (a "defined, privileged and limited" group of customers), "without similarity of service, without uniformity of rates, and necessarily with a different contract for service in each case and with each customer," principally because gathering service is competitive in nature on the both the federal and state level, requiring flexibility and the need to tailor service to the individual needs of each customer. Natural gas producers are sophisticated customers that do not need the usual protections provided to retail customers of monopoly utilities.

Therefore, even though Laser may hold itself out as willing to enter into such contracts, it is not a public utility *because it is not providing service indiscriminately to the indefinite public.* "The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character." If property has truly been devoted to the public's use, there exists both a duty on the part of the public utility to provide service and a right in the customer to demand service.

Thus, Laser can easily engage in pricing discrimination among its similarly situated customers by setting differentiated contract prices and corresponding profit levels for individual contracts under its proposed negotiated pricing with an intentionally high maximum price being the only limit. Since Laser's customers will not have access to any detailed and transparent tariff rate element information, such rate discrimination will not be easily policed by this Commission while Laser enjoys the benefits of its eminent domain powers as an alleged public utility.

Safety will not suffer if gathering pipelines are not PUC regulated because the Legislature is about to grant the Commission the authority to conduct gas pipeline safety inspections and investigations of non-public utility gathering lines, respond to complaints, assess fines or penalties, and address service quality issues consistent with federal pipeline safety laws and regulations.

I respectfully dissent from the majority's view that Laser's proposed pipeline project is a "public utility," and that a remand is necessary to clarify certain questions raised by the application.

The fundamental difference between the majority's view and mine is that the majority believes that, if an entity demonstrates that it technically qualifies as a public utility, a certificate of public convenience must be granted, while my view is that, even if an entity so qualifies (I do not believe that Laser does), a certificate need not be granted if the overall public interest demands that it not be granted. In other words, the public interest prevails over any private interest, and the Commission possesses the discretion to determine if the public interest prevails. This is not an elevation of "policy" over plain statutory language, but the discretionary interpretation of two statutory provisions—Section 1103(a) and Section 102 "public utility" (1)(v)—with the former, in my view and in the view of longstanding appellate case law, being paramount. In passing upon an application for a certificate of public convenience, the Commission must consider the interest of the public, as distinguished from the interest of the corporation or individual making the application.[1]

Thus, the *overarching* issue in this proceeding is whether approval of the application is "necessary or proper for the service, accommodation, convenience, or safety of the public" under Public Utility Code Section 1103(a).[2] The *secondary* issue, which is irrelevant and not reached if the applicant fails the public interest standard of Section 1103(a), is whether the proposed natural gas gathering pipeline service is a "public utility" under Public Utility Code Section 102 "public utility" (1)(v),[3] defining a "public utility" as "[a]ny person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for: ... 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."

In my view, the application is a nonstarter because it fails the initial public interest test. It is therefore unnecessary to consider whether Laser is a "public utility," although I deal with that and other issues in response to my colleagues' written statements which will be reflected in the Commission's subsequently-drafted Opinion and Order.

Laser's Proposed Service

Laser is "a natural-gas midstream company" with its "primary purpose ... to construct, build, own, and operate natural-gas gathering and transportation facilities and to provide gathering and transportation services to producers of gas in Pennsylvania and New York."[4] The system "will be a "backbone style" gathering system that will span 33 miles (24 miles in Pennsylvania and 9 miles in New York) with up to six lateral lines ranging in length of approximately 1 to 6 miles each" in eight townships in Susquehanna County, Pennsylvania, and extending into Broome County, New York, to a tie-in with the Millennium interstate pipeline.[5]

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[1] *Perry County Telephone & Telegraph Co. v. Pa. Pub. Serv. Comm'n*, 108 A. 659, 661(Pa. 1919).
[2] 66 Pa.C.S. § 1103(a) (relating to procedure to obtain certificates of public convenience; general rule).
[3] 66 Pa.C.S. § 102 "public utility" (1)(v) (relating to definitions).
[4] LNGC Stmt. 1 at 4.
[5] *Id.* at 6.

A compressor facility will be constructed near the Millennium tie-in in Broome County, New York. No plans exist for a gas treatment or processing facility on the system, although the compressor facility "will include a pig receiver, various gas/liquid separators, scrubbers, liquid tanks, and dehydration equipment."[6]

Laser amended its application to specify that (1) the service it proposes will not be exclusive and that the Commission may issue certificates of public convenience to other qualified applicants to provide gathering and transportation service to the same townships, and that (2) it would provide service only to producers who have entered into a contractual agreement with Laser for gathering and transportation services.[7]

Laser's proposed tariff provides that "[l]ine connections and extensions shall be made solely at the discretion of the Company and solely at the expense of the Customer, unless otherwise agreed."[8]

As to rates, Laser's proposed tariff provides that "[t]he delivery charge [per Mcf (or mmbtu)] will be negotiated by the Company and the Customer and expressed in the Gathering Agreement. The maximum charge per Mcf (or mmbtu) for gathering service will be $.75."[9]

If its application for a certificate of public convenience is approved, Laser proposes that it be afforded "light-handed" regulation, i.e., "the Commission should not: regulate entry unduly (authority should be effective upon filing and proof of fitness), siting, rates, service or terms and conditions of service; require affiliated interest filings, securities certificates, annual reports and similar requirements under the Public Utility Code and regulations intended for retail, end-user traditional utility services."[10]

Whether to Grant or Deny a Certificate of Public Convenience Is Within the Commission's Sound Discretion

As the Applicant recognizes, "[a]n administrative agency's expert interpretation of a statute for which it has enforcement responsibilities is entitled to great deference and will not be reversed unless clearly erroneous."[11] The power of the Commission to grant certificates of public convenience and to establish territories in which a public utility may serve is exclusive, subject, of course, to judicial review.[12] "The question [in this class of case] is not whether the granting of the application will be for the convenience and accommodation of some of the public, but whether it will be for the convenience, accommodation and advantage of the public generally and considered as a whole."[13]

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[6] *Id.* at 7.
[7] *Id.* at 6.
[8] Proposed Tariff ¶ A. 5.
[9] *Id.*, ¶ B. 1.
[10] Laser M.B. at 34 (citing LNGC Stmt. 1A at 16:21-18 – 18:21; Joint Petition at ¶ 36). Traditional economic regulation includes regulation of the prices that may be charged for a service and the terms and conditions under which the service may be provided, including such utility regulatory concepts as certification, abandonment, and tariff-based regulated terms and conditions of service.
[11] Laser M.B. at 35 (citing *Popowsky v. Pa. Pub. Util. Comm'n*, 706 A.2d 1197, 1203 (Pa. 1997)).
[12] *Lukens Steel Co. v. Pa. Pub. Util. Comm'n*, 499 A.2d 1134, 1137 (Pa. Cmwlth. 1985).
[13] *Id.* (citations omitted; brackets original).

The precise meaning of the phrase "necessary or proper for the service, accommodation, convenience, or safety of the public" cannot be determined because of the wide diversity of facts presented by different cases. The Federal Power Commission (FPC), predecessor to the Federal Energy Regulatory Commission (FERC), described the inquiry this way:

> In a word, public convenience and necessity is a 'complex' encompassing numerous elements which in diversity and importance vary with the circumstances of particular cases; and in determining whether a certificate should issue, we must weigh the relative importance of the several factors involved, as well as balance the favorable against the unfavorable, if any. Furthermore, in evaluating the circumstances of a particular case it may well be that, in the judgment of the agency to which decision is entrusted, an aspect of a proposal not wholly desirable standing alone should be accepted where offsetting favorable features exist which would in sum total yield a greater public good, so long as all minimal requirements are satisfied.[14]

"As regards ... the public interest ... the commission's discretion must be accepted unless totally without support in the record, based on an error of law or unconstitutional.....Neither this Court nor [other Pennsylvania appellate courts] was intended by the Legislature to weigh the various factors entering in the granting of a certificate of public convenience and necessity by the Commission."[15]

Most importantly, the "public interest" standard of Section 1103 is broader and more fundamental than the Section 102 legal analysis of public utility status, and it should therefore be afforded a more deferential standard of review. Consequently, even though a particular entity may arguably be a "public utility," the Commission may, for good and sufficient reasons rooted in the overall public interest, decide that a certificate of public convenience not be issued to such an entity. As a noted authority observed:

> Certificates of public convenience and necessity differ from most forms of government licensing of business activity. Under the typical licensing statute any number of applicants may receive authorizations if each of them satisfies applicable licensing criteria: if each possesses, for example, the necessary skill, financial responsibility, or honorable background. The test is essentially qualitative. In the case of the certificate of public convenience and necessity, there is a quantitative dimension as well. Even if the applicant fulfills all other pertinent requirements, the application may be denied if the regulatory agency concludes that the addition of the proposed services to those already available in the market would not be in the public interest. Thus, the essence of the certificate of public convenience and necessity is the exclusion of otherwise qualified

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[14] *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 264, 270 (1958) (citing *National Coal Ass'n v. FPC*, 191 F.2d 462, 467 (D.C. Cir. 1951); *Scripps Howard Radio v. FCC*, 189 F.2d. 677 (D.C. Cir. 1951), *cert. den.*, 342 U.S. 830 (1951)) (emphasis omitted).

[15] *Bucks Cty. Bd. of Comm'rs v. Pa. Pub. Util. Comm'n.*, 313 A.2d 185, 189 (Pa. Cmwlth. 1973) (quoting *Philadelphia Suburban Water Co. v. Pa. Pub. Util. Comm'n*, 229 A.2d 748, 752, 754 (1967)) (internal quotation marks omitted).

applicants from a market because, in the judgment of the regulatory commission, the addition of new or expanded services would have no beneficial consequences or, in a more extreme case, would actually have harmful consequences.[16]

"Public Utility" As Defined In Section 102 "Public Utility" (1)(v) Must Be Strictly Construed

It is a well settled rule of statutory construction in Pennsylvania that a statute conferring the right of eminent domain on a private corporation must be strictly construed.[17] Section 1928 (b) of Pennsylvania's codified rules of statutory construction provides that "(b) All provisions of a statute of the classes hereafter enumerated shall be strictly construed: ...(4) Provisions conferring the power of eminent domain."[18]

Under the Business Corporation Law (BCL), a certificate of public convenience is required to condemn "property outside the limits of any street, highway, water or other public way or place for the purpose of erecting poles or running wires or other aerial electric, intrastate aerial telephone or intrastate aerial telegraph facilities,"[19] and, under the Public Utility Code, the Commission is vested with exclusive power to appropriate property to ensure the safety of rail-highway crossings.[20] Section 1511(a) of the BCL confers the power of eminent domain on a "public utility corporation," including those whose principal purpose is "[t]he transportation of artificial or natural gas ... for the public."[21] Such corporations may, if they "condemn for occupation ... an interest (other than a fee) for right-of-way purposes or an easement" may elect to proceed under a more expeditious alternative than the procedures of the Eminent Domain Code.[22] If this alternative is chosen by the public utility, preliminary objections are not available to the landowner to challenge the validity or scope of the condemnation. Possession by the utility is obtained, after notice, upon approval by the appropriate court of the public utility's bond, with surety, and the only issue before the court at that hearing is the form and adequacy of the bond. The landowner's constitutional rights are thought to be protected by virtue of his or her ability to file an action in equity in the Court of Common Pleas to challenge the validity or scope of the condemnation. If the public utility instead elects to condemn an easement or right of way under the Eminent Domain Code, preliminary objections are the exclusive method for the landowner to challenge the condemnation.

Consequently, the grant of a certificate of public convenience confers "public utility" status which in turn confers, albeit indirectly, the right of eminent domain.

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[16] William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Colum. L. Rev. 426, 427 (1979).
[17] *See, e.g., Toler v. Pa. Pub. Util. Comm'n*, 138 A.2d 221 (Pa. Super. 1958).
[18] 1 Pa.C.S. § 1928(b)(4).
[19] 15 Pa.C.S. § 1511(c) (relating to additional powers of certain public utility corporations; Public Utility Commission approval). Any issues regarding a public utility's legal authority or power to condemn land may not be raised before the Commission. *See Fairview Water Co. v. Pa. P.U.C.*, 502 A.2d 162 (Pa. 1985) (holding that any issue regarding the scope, validity, or damages of a taking by a public utility may not be raised before the Commission and, instead, such issues must be addressed before the appropriate judicial forum).
[20] 66 Pa.C.S. § 2702(b) (relating to construction, relocation, suspension and abolition of crossings; acquisition of property and regulation of crossing).
[21] 15 Pa.C.S. § 1511(a)(2) (relating to additional powers of certain public utility corporations; general rule).
[22] *See* 15 Pa.C.S. § 1511(g)(2) (relating to additional powers of certain public utility corporations; procedure).

Although there are many instances when the Public Utility Code must be liberally construed in order to effectuate its purposes, it need not be so construed, and instead strictly construed, when private property is subject to appropriation by a private pipeline.

Laser's Proposed Service Fails the Public Interest Standard of Section 1103(a)

As noted, the overarching issue in this proceeding is whether approval of the application is "necessary or proper for the service, accommodation, convenience, or safety of the public" under Public Utility Code Section 1103(a). Laser's proposed service, and in fact all such natural gas gatherers, fails this public interest standard.

If granted its extraordinary wish of eminent domain power, even on a non-exclusive basis (meaning other gathering lines could become public utilities and acquire the same condemnation power and exercise it in Susquehanna County and elsewhere in the Commonwealth), landowners in Susquehanna County—and elsewhere in Pennsylvania—will not be safe from a multitude of pipelines crisscrossing their land. Such pipelines will have the upper hand in easement and right of way negotiations, and few if any landowners will have—or long have—the financial or emotional stamina to resist.

No matter which of the alternative condemnation procedures is used, the public utility almost invariably enjoys a significant advantage because of its superior financial resources. It is beyond the ken, and usually the pocketbook, of the average landowner to find and retain legal counsel knowledgeable in eminent domain law and procedures and a land value expert, to say nothing of the time and worry involved in protracted legal proceedings.[23]

Granting Laser or any other natural gas gatherer the power of eminent domain has grave implications given the enormity of shale gas extraction underway in the state. Appropriating private property by eminent domain

> is fraught with great economic, social, and legal implications for the individual and the community. Appropriation cases often represent more than a battle over a plot of cold sod in a farmland pasture or the plat of municipal land on which a building sits. For the individual property owner, the appropriation is not simply the seizure of a house. It is the taking of a home—the place where ancestors toiled, where families were raised, where memories were made. ... The rights related to property, i.e., to acquire, use, enjoy, and dispose of property, are among the most revered in our law and traditions. Indeed, property rights are integral aspects of our theory of democracy and notions of liberty.[24]

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[23] *See* public input testimony of Richard M. Jordan on July 7, 2010, in Montrose (referring to eminent domain legal procedures, "I submit to you that very few of us relatively small landowners are going to have the wherewithal to carry that fight the distance. ... It's absolutely unfair to the landowners if the pipeline companies have that power."). N.T. 266.

[24] *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 354-55, 361-62, 853 N.E. 2d 1115, 1122, 1128 (2006) (citations omitted).

It is no comfort that Laser has made assurances that it will use eminent domain only as a last resort. It is highly likely that abuses will occur and that the Commission will never hear of them. As we have learned to our grief in other contexts, pious promises and Codes of Conduct to ensure compliance come to naught when large sums of money are involved and ordinary citizens lack the resources to complain. Even large corporations, although aggrieved, are hesitant to incur the expense of formally complaining. Should a formal complaint be filed, the pipeline operator's first defense will be that this Commission lacks jurisdiction over contractual disputes, which is true, or lacks authority over pipeline siting, which is also true. The landowner therefore will be forced into litigation in the Court of Common Pleas.

Granting exclusive certificated territories is not an adequate remedy. It would deprive landowners of competitive prices and services, and it could lead to monopolistic abuses. It is much better to leave easement and right of way negotiations to equally empowered bargainers—the landowner and the private pipeline company. The landowner can simply say no to a company that is not, after all, providing a vital public service.

Laser Proposes To Construct a Gathering Line, Not a Transportation Line

By its name and by its own characterization of its business purpose,[25] and certainly under federal standards (the Federal Power Commission and its successor, the Federal Energy Regulatory Commission, having wrestled with the distinction for decades under the Natural Gas Act[26]), the proposed facilities constitute a gathering line as opposed to a transportation line.[27]

The U.S. Supreme Court has "consistently held that 'production' and 'gathering' are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution."[28] The FPC's long-held definition of gathering was "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line."[29] The D.C. Circuit Court of Appeals has defined gathering as "the process of taking natural gas from the wells and moving it to a collection point for further movement through a pipeline's principal transmission system."[30]

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[25] *See, e.g.*, Laser M.B. at 16 ("gathering and transporting"), 17 ("transportation or conveyance"), 19 (New York part of the line "will be provided by a NY gatherer utility pipeline"), 19 ("its sole business will be the gathering and delivery of gas" [to the Millennium Pipeline in Broome County, New York]), 19 ("gathering and transportation" and "Applicant will offer to gather and transport gas"), 20 ("its gathering and transportation service"), 31 ("the necessary gathering or midstream service and facilities that are the subject of the Application"), 34 (urging regulation that will encourage "gatherers" to do business in Pennsylvania), 35 (the "gathering and transportation service proposed by the Applicant").

[26] Pub. L. No. 688, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. §§ 717-717w). In 1978, the Federal Power Commission (FPC) became the Federal Energy Regulatory Commission (FERC), a five-member independent regulatory agency within the Department of Energy. *See* 42 U.S.C. §§ 7171-7177.

[27] The Commission's gas service regulations define a "gathering line" as "[a] pipeline that transports gas from a current production facility to a transmission line or main." The same regulations define a "transmission line" as "[a] 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 [Specified Minimum Yield Strength]; (iii) Transports gas within a storage field." 52 Pa. Code §59.1 (relating to definitions).

[28] *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90 (1963).

[29] *Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957).

[30] *Conoco, Inc. v. FERC*, 90 F.3d 536, 539 n.2 (D.C. Cir. 1996) (citing *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404 n.1 (10th Cir. 1990)).

In 1983, in *Farmland Industries, Inc.*,[31] FERC developed the "primary function test," "a set of factors that tend to indicate whether a facility is devoted to the collection of gas from wells—gathering—or to the further ("downstream") long-distance movement of gas after it has been collected—interstate transportation."[32] Six factors are considered: (1) the length and diameter of the relevant lines; (2) the extension of the facility beyond the central point in the field; (3) the lines' geographic configuration; (4) the location of compressors and processing plants; (5) the location of wells along all or part of the facility; and (6) the operating pressure of the lines.[33] The configuration and location of wells is a critical factor. Unbranched, point-to-point lines generally have been viewed as consistent with a transportation function, while the presence of wells along the line has been viewed as evidence that the line performs a gathering function.[34]

FERC has recognized three basic configurations as performing a gathering function: (1) the web-like or spoke-and-hub system, commonly found in field gathering systems; (2) the backbone system, which consists of a pipeline that connects to numerous feeder lines along its entire length; and (3) short, small diameter pipelines that connect a few wells directly to the transmission system.[35]

Similar to Laser's proposed project, North American Resources Company (NARCO) proposed constructing a 12.75-inch diameter, 18.75-mile pipeline that would connect an existing gathering system with a different interstate pipeline with greater takeaway capacity. NARCO acknowledged that the pipeline would not be connected to any wells during the initial phase. However, NARCO stated that the pipeline would traverse an extensive production area, and, as new wells were developed, NARCO expected to connect those wells to its line. In reliance on NARCO's representations, FERC held that the line performed a gathering function, stating that, once the new wells were connected to the facility, it would have a backbone configuration.[36]

On December 23, 2009, Laser's predecessor in interest, Laser Marcellus Gathering Company, LLC (Laser Marcellus), filed a petition for a declaratory order with FERC requesting that agency to determine that pipeline facilities it intended to construct (those described herein) would perform a gathering function exempt from FERC's jurisdiction under Section 1(b) of the Natural Gas Act. Using the factors of the primary function test, FERC granted the petition, finding the facilities to be gathering.[37] In doing so, FERC noted that, "[t]he history of

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[31] 23 F.E.R.C. ¶ 61,063 at 61 (1983). The test was later modified in *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268 at 61,987-88 (1990).
[32] *Conoco, Inc.*, 90 F.3d at 543.
[33] *Id.* at 543 n.16.
[34] *Amerada Hess Corp.*, 67 F.E.R.C. ¶ 61,254 at 61,847 (1994).
[35] *Arkla Gathering Servs. Co.*, 67 F.E.R.C. ¶ 61,257 at 61,868 (1994).
[36] *North American Resources Co.*, 75 F.E.R.C. ¶ 61,286 at 61,921 (1996). Laser asserts that it has already entered into gathering agreements with three unaffiliated producers (Laser M.B. at 19 citing LNGC Stmt. 1 at 5:16-18; N.T. at 400:6-8), and that it intends "to grow with the development of the Marcellus Shale as it grows" (*id.* at 18 citing LNGC Stmt. 2R at 8; N.T. 400, 402, 415). Laser's either 12-inch or 16-inch line will span 30 miles with up to 6 lateral lines ranging from 1 to 6 miles each. Application at 4. This "gathering system will be constructed to accept natural gas from wells in Pennsylvania and New York that have been, and will be, drilled by unaffiliated natural gas producers with which Laser has entered into gathering and transportation agreements." Application at 3; LNGC Stmt. 1 at 5.
[37] Laser Marcellus Gathering Company, LLC, 130 FERC ¶ 61,162 (March 5, 2010).

Commission and court interpretation of Section 1(b), ... makes clear that there is a distinction between gathering and transportation, such that the two functions are mutually exclusive."[38]

Natural Gas Gathering Is a Competitive Business Requiring Individualized Agreements With Each Producer Served

A 1935 Federal Trade Commission study concluded that the natural gas pipeline industry was a natural monopoly.[39] Natural monopoly theory posits that economies of scale within certain industries enable a single firm to provide service at lower average cost than several competing firms.[40] "Noting that the [natural gas] industry contained some of the textbook features of a monopoly/monopsony (for instance, abnormally high prices, considerable accumulation of wealth at the expense of producers and consumers, and insufficient availability of the pipeline service), the FTC recommended that the industry be regulated."[41] Where a natural monopoly exists, failure to regulate the monopolist firm may lead to pricing structures highly detrimental to consumers of the monopolist's services.[42] Regulation becomes necessary to achieve a balance between the monopolist service provider and consumers that roughly mimics competitive market conditions.[43]

A desire to protect consumers from excessive gas rates inspired passage of the Natural Gas Act.[44] However, unlike the interstate *transportation* of natural gas, robust competition characterized (and still characterizes) the *production and gathering* industries.[45] With no prospect of natural monopoly, Congress lacked justification to place production and gathering within Natural Gas Act jurisdiction.[46] Therefore, Section 1(b) of the NGA specifically exempts the production and gathering of natural gas from federal regulation.[47] Moreover, subsequent to the passage of the Natural Gas Policy Act of 1978, FERC adopted a formal policy to promote competition, including policies promoting open access to pipeline transportation facilities and the unbundling of gas services.

> Unbundling profoundly affected FERC's prior classification of gas facilities as jurisdictional or nonjurisdictional, particularly in regard to gathering facilities. Before unbundling, FERC classified many pipeline-owned gathering facilities as jurisdictional because the facilities were bundled with the pipelines' sales and transportation services. Few reasons

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[38] *Id.*, slip op. at 6 (quoting *Columbia Gas Transmission Corp.*, 85 FERC ¶ 61,191, at 61,769 (1998), *order on reh'g*, 86 FERC ¶ 61,137 (1999), and *Panhandle Eastern Pipe Line Co.*, 68 FERC ¶ 61,209, at 62,101 (1994)).

[39] *See* Joseph Fagan, *From Regulation to Deregulation: The Diminishing Role of the Small Consumer Within the Natural Gas Industry*, 29 TULSA L.J. 707, 712 (1994).

[40] *See* Stephen Breyer, REGULATION AND ITS REFORM 15 (1982).

[41] Fagan, *supra* note 39, at 712 n.14 (citing Report of the FTC to the U.S. Senate, S. DOC. NO. 92, 70th Cong., 1st Sess. 588-91 (1928)). A monopsony is a condition of the market in which there is but one buyer for a particular commodity.

[42] *See* James C. Bonbright *et al.*, PRINCIPLES OF PUBLIC UTILITY RATES 33-41 (2d ed. 1988).

[43] *Id.*

[44] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) ("The primary aim of [the Natural Gas Act] was to protect consumers against exploitation at the hands of natural gas companies.").

[45] Charles F. Phillips, Jr., THE REGULATION OF PUBLIC UTILITIES 633 (2d ed. 1988).

[46] *See* Fagan, *supra* note 39, at 711-13 (explaining the integral role of a natural monopoly in the NGA's grant of jurisdiction over the transportation and sale of natural gas to the FPC).

[47] 15 U.S.C. § 717(b).

> existed for pipelines to challenge these classifications since bundling blocked independent gatherers from directly offering their services to end users. Unbundling, however, allowed customers to satisfy their gathering needs either by hiring a pipeline for gathering or an independent service provider. This disadvantaged pipelines since their gathering services, previously classified as jurisdictional, remained regulated. To prevent unregulated gatherers from undercutting them on price, pipelines began to pursue strategies for deregulating their own gathering facilities.[48]

As acknowledged by Laser (an independent gather), natural gas gathering is a competitive business.[49] Laser must compete with the unregulated gathering "spin down" affiliates of FERC-regulated interstate pipelines and with other independent gathers. Because Laser does not seek an exclusive franchise, it "anticipates that other companies providing gathering and transportation service will be competing to provide service to Marcellus Shale producers located in those townships [it seeks to serve]. As in other states, such competition will benefit the customers and attract other service providers to this area."[50]

Such competition will require Laser to limit its offerings to those willing to sign acceptable contracts for its services. Laser confirmed this on April 2, 2010, by amending its Application by letter to the presiding Administrative Law Judge: "Laser also agrees that it will provide service only to producers who have entered into a contractual agreement with Laser for gathering and transportation services."[51] Laser claims that such contracts "are not intended to be exclusionary,"[52] but, "[b]ecause these types of transactions require significant technical requirements and delivery points and other terms and conditions of service, [a contract] is largely established to delineate the conditions and terms and technical requirements of the relationship."[53] Laser avers that "the use of a contract is not a limitation but rather a vehicle—not unlike that used for public utility natural gas transportation service or for the many natural gas offerings by LDCs [local distribution companies] where the terms and conditions of service are best determined by a mutually acceptable and negotiated contract by sophisticated utility customers and the utility."[54]

MarkWest Liberty Midstream & Resources, LLC's witness, Lindsay N. Sander, testified, however, that, "Gathering operators, often referred to as midstream, that transport natural gas from or near the well-head to a transmission pipeline, do not hold themselves out to serve the public....They perform services pursuant to private contracts, and are not common carriers. [They] typically do not offer or provide service to anyone or everyone that seeks it. Nor do they

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[48] David V. Bryce, *Pipeline Gathering in an Unbundled World: How FERC's Response to "Spin Down" Threatens Competition in the Natural Gas Industry*, 89 Minn. L. Rev. 537, 551-52 (2004) (footnotes omitted). *See also ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1076-77 (D.C. Cir. 2002) (discussing the effect of unbundling on the jurisdictional classification of gathering systems), and *Conoco, Inc. v. FERC*, *supra* note 30, 90 F.3d at 541 (illustrating that pipelines wish to deregulate their gathering facilities to fairly compete with independent gatherers).

[49] Laser M.B. at 13 ("when the industry involved is competitive in nature—as is gathering"; 20 ("gathering is competitive"); 33 ("this competitive industry"); 35 ("The gathering and transportation service proposed by the Applicant is purely competitive by nature.").

[50] Laser M.B. at 33 n.39.

[51] The amendment was intended to satisfy the protest of ETC Northeast Pipeline LLC (ETC NE), and the understanding was confirmed by a separate letter, filed simultaneously, to that effect from ETC NE's counsel.

[52] *Id.* at 20 (citing N.T. 401:3-4).

[53] *Id.* (citing N.T. 401:5-9).

[54] *Id.* at 18.

have to. Instead, gathering operators only provide service to those shippers or producers that have negotiated fees and/or terms and entered into a contractual agreement for the services."[55] She further distinguished competitive gathering service from regulated public utility service as follows:

> The business of gathering gas is complex and driven by competition. A gatherer's operations will differ greatly, depending on the individual business structure of an entity and the contracts that the entity enters into with its customers. Operators need the flexibility to enter into unique contracts that meet the needs of their clients. This model does not fit typical utility regulation. ... A regulated utility may only offer specific services at a predetermined rate. Producers with the decision of whether to move their gas stream with a utility or a non-utility will likely choose the non-utility, with which the producer can negotiate better terms and fees. ... Therefore, the gathering business must continue to preserve market competition, by allowing producers and gatherers the flexibility to negotiate the terms of service necessary to transport and process the gas.[56]

Similar testimony was given by Laurel Mountain Midstream, LLC's Rory Miller in opposition to the Application because the result would be "inconsistent with the nature of natural gas gathering services, which are offered to a limited and unique group of sophisticated customers":[57]

> [N]atural gas gathering customers are sophisticated companies involved in the production business, not retail consumers in need of protections. In contrast with public utilities that provide service at tariff rates, the natural gas gathering business depends on flexibility, and that ability to tailor transactions to each customer's specific needs. This includes being able to construct facilities quickly (implicating both siting certificate regulations and right of way issues). For these reasons, natural gas gathering, and midstream operations in general, do not fit the traditional public utility model. Because the business is competitive and the customers are highly sophisticated, market forces control the participants' behavior.[58]

The Proposed Service Is Not "For the Public"
But Private Service to a Defined, Privileged and Limited Group

The standards for "public utility" service were formulated under the common law of England and then in this country to differentiate between public and private transportation.[59] Thus, the Superior Court in *Merchants Parcel Delivery, Inc. v. Pa. Public Utility Commission* stated:

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[55] MarkWest Stmt. 1 at 10.
[56] *Id.* at 15-16.
[57] LMM Stmt. 1 at 11-12.
[58] *Id.* at 11.
[59] *See Dairymen's Co-Operative Sales Ass'n v. Public Service Comm'n*, 174 A.826, 829 (Pa. Super. 1934), *aff'd*, 174 A. 826 (Pa. 1935) (collecting cases).

> The common law definitions of common carriers are all to the same effect, and are uniform throughout the country. Despite variations in language, the definitions found in the cases stress the all-important factor that a common carrier is one that holds itself out and undertakes to carry the goods of all persons indifferently, or of all who choose to employ it, and one that invites the custom of the public indiscriminately.
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> * * *
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> Differentiating between common and private (contract) carriers, this court held that *the test is 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.*[60]

The emphasized language was suggested to the Superior Court by counsel for this Commission's predecessor, the Public Service Commission, in its brief (at 13-14) in *Borough of Ambridge v. Public Service Commission.*[61] The Superior Court adopted the indicated language and the oft-quoted sentence following it: "The public or private character of the enterprise does not depend, however, 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,* to the extent of its capacity; and the fact that only a limited number of persons may have occasion to use it does not make of it a private undertaking *if the public generally has a right to such use.*"[62]

Consequently, private (or contract) carriers were not public utilities, and the 1913 Public Service Company Law[63] defined (and subjected to regulation) only common carriers.[64] The 1937 Public Utility Law,[65] however, included a definition of "contract carrier by motor vehicle" and required such carriers to gain PUC certification.[66] Contract carriers could, after 1937, still contract with individual customers, but the PUC assured itself that the contractual relationship was limited to defined customers and that the carrier was not in fact offering its service indiscriminately to the public in competition with common carriers.

No such public/private distinction was legislated regarding so-called "fixed utilities" (electric, gas, telecommunications, water), except to include in the 1937 Public Utility Law definition of "public utility" (continued verbatim in the 1978 Public Utility Code[67]) the shorthand phrases "to or for the public", "for the public", and "to the public". There being no Public Utility Code definition of a "private utility" (equivalent to a contract carrier), the common law formula continues to be used to determine fixed "public utility" status under these phrases, read in conjunction with the first sentence of Section 1101 of the Public Utility Code regarding

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[60] 28 A.2d 340, 344 (Pa. Super. 1942) (emphasis added; citations omitted).
[61] 165 A. 47 (Pa. Super. 1933), *allocatur denied,* 108 Pa. Super. xxiii (1933).
[62] *Id.* at 49 (emphasis added).
[63] Act of July 26, 1913, P.L. 1374.
[64] Art. 1, § 1.
[65] Act of March 31, 1937, P.L. 160.
[66] 66 P.S. § 1102 (repealed).
[67] Act of July 1, 1978, P.L. 598. No. 116.

the need for a "proposed public utility" to apply for PUC approval.[68] Only an entity that will provide "public" utility service is required to apply for a certificate of public convenience. Entities that will provide "private" utility service need not so apply. The distinction has evolved by a long series of appellate court decisions explicating the shorthand phrases in the Public Utility Code definition of "public utility," often drawing on the distinctions drawn in the common carrier/contract carrier cases.

Again, the ultimate inquiry is "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."[69] An entity is adjudged to be "affected with a public interest" only after it is determined that the service "is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character."[70]

Consequently, "it is the practice of such indifferent service that confers common carrier status. That is to say, a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve."[71] In contrast to a common carrier, a private (contract) carrier has no duty to serve the public with indifference and may accept or reject customers even if it has available capacity to carry the goods. A private carrier also differs from a common carrier in that it provides service subject to contracts with one or a limited number of persons of its choosing.[72] The Interstate Commerce Commission (ICC) defined a contract carrier as "an independent contractor whose undertaking is defined and limited by an individual contract which calls for a service specialized to meet the peculiar needs of a particular shipper or a limited number of shippers and operates to make the carrier virtually a part of each shipper's organization."[73]

> Common carriers, as a general rule, do not require the signing of a specific contract, or, at least, the shipper is not usually aware of signing such a contract. But there is a contractual relationship between a shipper and a common carrier that is just as binding from a legal standpoint as that signed by a contract carrier and a shipper. Therefore, the difference is not that contract carriers operate under contracts and common carriers have no

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[68] The Federal Aviation Act of 1994, 49 U.S.C. §§ 41713(b) & 11501(h), preempted the authority of the states to regulate the rates, routes, and service of motor carriers, except that matters involving safety and insurance were not affected, nor was the regulation of passenger carriers and household goods carriers. *See Regulation of Motor Common Carriers of Property*, Pa. PUC Dkt . No. P-00940884 (order entered Dec. 20, 1994).

[69] *Borough of Ambridge*, 165 A. at 49. *See also Drexelbrook Associates v. Pa. Pub. Util. Comm'n*, 212 A.2d 237, 239 (Pa. 1965) ("[t]he public or private character of the enterprise [depends] ... upon whether or not it is open to the use and service *of all members of the public* who may require it") (quoting *Borough of Ambridge*, 165 A. at 49) (emphasis in original); *Waltman v. Pa. Pub. Util. Comm'n*, 596 A.2d 1221, 1224 (Pa. Cmwlth. 1991), *aff'd per curiam*, 621 A.2d 994 (Pa. 1991).

[70] *Overlook Development Co. v. Public Service Comm'n*, 101 Pa. Super. 217, 225 (1930), *aff'd per curiam*, 158 A. 869 (Pa. 1932) (citing *White v. Smith*, 42 A. 125, 126 (Pa. 1899)); *see also Borough of Ambridge*, 165 A. at 49.

[71] *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (1976) (citations omitted). *See also Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630 (1976) (affirming FCC denial of common carrier status where operator would likely not serve public indifferently but instead would negotiate with and select future clients on a highly individualized basis because of differing methods of operation and time demands).

[72] *United States v. Contract Steel Carriers, Inc.*, 350 U.S. 409, 410 n.1 (1956).

[73] *Transportation Activities of Midwest Transfer Co.*, 49 M.C.C. 383, 390 (1949).

contracts with shipper. *The distinction must be in the nature of the contracts and the willingness of a carrier to provide the service for all who might request the service or to limit his service to certain shippers and refuse certain other shippers who might wish the same service.* If a carrier:

> With or without words, claims to and exercises the right to fix a specific rate in each individual case basing charges [not on a regular schedule (whether formally filed as tariffs or otherwise), but] on contemporary judgment of the moment ... this is effectual announcement that the carrier will discriminate, will undertake transportation differently, not indifferently.

Legally, it appears that the distinction to be drawn between common and contract carriers is whether the carrier exercises any degree of discretion in accepting business, provided, however, that the business is of the nature that the carrier professes to provide. This does not mean that a contract carrier is not free to solicit business within the scope of his permit, for he does have that right. *The distinction is solely a matter of whether the carrier has the legal right to refuse certain shippers or to discriminate among shippers in price or service.*[74]

Legally, and in many respects factually, Laser's proposed service is indistinguishable from that in *Brink's Express Co. v. Public Service Commission*, where Brink's Express provided "service to those who do not care to take the risk of carrying valuables from one place to another over the public highways."[75] Further:

> *All work done is on a basis of a written contract*, usually for a year or more, *which sets forth the work to be done, and the amount to be paid therefor* in monthly installments. *No two contracts are alike and it is not possible to make them uniform.* The charge for the work is not dependent upon the distance travelled, the time consumed, nor alone upon the value of the articles carried. It is affected by the time when the work is to be done, by the character of the district in which it is to be done, and by the value of the article; *that it is impossible to make a uniform tariff of rates.*
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> *The appellant admitted that it was actively engaged in soliciting customers and that it advertised, at times, in an effort to secure new business. It has refused contracts where they were not remunerative*, and where they involved the carrying of information which should be sent through the mails. *The company is prepared to handle all the new customers and the new business it can get, provided it can agree on proper terms....[I]t has a*

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[74] Thomas C. Campbell, *The Contract Carrier, A History of the Concept*, 29 I.C.C. Practitioners' J. 952, 963-64 (1962) (quoting *The Home Ins. Co. v. Riddell*, 252 F.2d 1, 4 (5th Cir. 1958), and citing *United States v. Contract Steel Carriers, Inc.*, 350 U.S. 409 (1956)) (emphasis added).

[75] 178 A. 346, 348 (Pa. Super. 1935).

separate contract with each customer, and the rate varies according to the service rendered.

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Without similarity of service, without uniformity of rates, and necessarily a different contract for service in each case and with each customer, we do not think that the services rendered by appellant come under the supervision of the Public Service Commission. ... In so far as the public is concerned, the Commission regulation is designed to secure reasonable rates and adequate service. Where from the nature of the service this becomes impracticable, an attempt at regulation would be an idle gesture.[76]

Brink's Express was implicitly overruled two years later by passage of the Public Utility Law in 1937, which specifically extended the Commission's jurisdiction to contract carriers, and then the Federal Aviation Act of 1994 almost completely preempted the states' regulation of all motor carriers. The point, however, is that, at a time when the Pennsylvania Superior Court was unmasking every artifice created by private carriers using contracts with every available individual customer to avoid the Commission's common carrier jurisdiction,[77] it found the use of individual contracts and other characteristics of the service provided in *Brink's Express* to require a finding of contract (private) carriage.

So too here, Laser will only do business with producers who enter into an individually negotiated agreement "for negotiated rates and terms of service."[78] Therefore, again as in *Brink's Express*, "[n]o two contracts are alike and it is not possible to make them uniform," and "it is impossible to make a uniform tariff of rates." Laser *says* it will solicit other customers,[79] and will refuse to serve producers who will not agree to Laser's terms. And Laser "is prepared to handle all the new customers and the new business it can get, provided it can agree on proper

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[76] *Id.* at 348, 349 (emphasis added).

[77] *See, e.g., James v. Pub. Serv. Comm'n*, 177 A. 343 (Pa. Super. 1935), decided by the Court just six weeks before *Brink's Express*, where the carrier sought "to avoid his duties as a common carrier by reason of his assertion that he only accepted such business as he was fitted to handle and he wished to take, and then only after making a special oral or written contract for the service ... No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. The public does not mean every body all the time. The status of one as a common carrier is not changed by an occasional refusal to perform services for which he is equipped or by the fact that he does not advertise, and the fact that one makes written contracts with his patrons is not controlling in determining that question. ... The testimony shows not only that the defendant devoted his transportation facilities to the indiscriminate use of the public, but that there was a studied effort to avoid the responsibilities of a common carrier by the mere assertion of the claim that he was a private carrier and would serve whom he pleased. If such schemes were effective, any carrier ... might by this subterfuge evade regulation. The 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." *Id.* at 345-346 (citations and internal quotation marks omitted) (quoting *Dairymen's Co-Op. Ass'n v. Pub. Serv. Comm'n*, 174 A. 826, 829 (1934), *aff'd*, 177 A. 770 (Pa. 1935), decided the previous October).

[78] N.T. at 401:3-9.

[79] Laser's assertions of its present and future intent to hold out its services to a variety of potential customers are suspect. As the Pennsylvania Independent Oil and Gas Association pointed out, Laser made these assertions for the first time in *rebuttal* testimony, and later at the hearing (on friendly cross-examination, i.e., by counsel for a settling party). PIOGA M.B. at 11-12 & Reply Exc. at 10. As described below, more than one applicant for a certificate of public convenience has made a bald assertion of its intent to hold its services out to the general public, only for the Commission to learn, years later, that the applicant still serves only the single customer originally identified.

terms. ... [I]t has a separate contract with each customer, and the rate varies according to the service rendered."

Carrying valuables and gathering gas of course differ, but the essential mode of operation in the two instances is the same—"Without similarity of service, without uniformity of rates, and necessarily a different contract for service in each case and with each customer." Like Brink's Express, Laser will not use individual contracts to avoid regulation, but because the very nature of its business requires unique contracts. Therefore, even though Laser may hold itself out to the world as willing to enter into such contracts (that allow Laser to *control* whom it serves), it is not a public utility *because it is not providing service indiscriminately to the indefinite public.* "The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character."[80] If property has truly been devoted to the public's use, there exists both a duty on the part of the public utility to provide service and a right in the customer to demand service.[81]

Laser, in fact, is not holding itself out, expressly or impliedly, as engaged in the business of supplying its product or service to the public, as a class, or to any limited portion of it, but instead holding itself out as serving or ready to serve only particular individuals.

The contracts that Laser requires of its customers are not mere non-exclusionary "vehicles" as Laser claims,[82] but, rather, as Laser acknowledges, "instruments[s] to provide for negotiated rates and terms of service."[83] Although it is doubtless true that "these types of transactions require significant technical requirements and delivery points and other terms and conditions of service, [and contracts are] largely established to delineate the conditions and terms and technical requirements of the relationship,"[84] there remains the need, inherent in gas gathering, for "the flexibility to enter into unique contracts that meet the needs of their clients [which] does not fit typical utility regulation."[85] "In contrast with public utilities that provide service at tariff rates, the natural gas gathering business depends on flexibility, and that ability to tailor transactions to each customer's specific needs."[86] Gatherers, therefore, "typically do not offer or provide service to anyone or everyone that seeks it," but instead "provide service to those shippers or producers that have negotiated fees and/or terms and entered into a contractual agreement for the services."[87] That precisely is what Laser intends to do, which is not "public utility" service, because Laser thereby has "the legal right to refuse certain shippers or to discriminate among shippers in price or service."[88]

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[80] *White v. Smith*, 42 A. 125, 126 (Pa. 1899).

[81] *See, e.g., Waltman v. Pa. Pub. Util. Comm'n*, 596 A.2d 1221, 1224 (Pa. Cmwlth. 1991), *aff'd per curiam*, 621 A.2d 994 (1991) (service is not "a private undertaking if the general public has a right to subscribe to such a service"); *Aronimink Transp. Co. v. Pub. Serv. Comm'n*, 170 A. 375, 377 (Pa. Super. 1934) ("The distinction between a public or common carrier of passengers and a special or private carrier of the same is that it is the duty of the former to receive all who apply for passage, so long as there is room and no legal excuse for refusing, while such duty does not rest upon the latter.").

[82] Laser M.B. at 18, 20.

[83] *Id.* at 20.

[84] *Id.*

[85] MarkWest Stmt. 1 at 16.

[86] LMM Stmt. 1 at 11.

[87] MarkWest Stmt. 1 at 10.

[88] Campbell, *supra* note 74, 29 I.C.C. Practitioners' J. at 964.

As *Drexelbrook Associates v. Pa. Public Utility Commission* (the seminal case on what constitutes public utility service) stated, "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."[89] Instead of all producers wishing to advantage themselves of Laser's services, Laser's contractually-selected producer customers will be just as the tenants in *Aronimink*[90] and the tenants in *Drexelbrook*:

> [T]hose to be serviced consist only of a special class of persons—those to be selected as tenants—and not a class open to the indefinite public. Such persons clearly constitute a defined, privileged and limited group and the proposed service to them would be private in nature.[91]

Thus, based on *Drexelbrook Associates*, the test for whether an enterprise is private in nature (i.e., not public utility service) is whether anyone outside of the special class, which the service provider has the ability to control and restrict, is privileged to demand service. If no one outside of the special class is privileged to demand service, then the service is private. If anyone outside of the special class is privileged to demand service, then the service is open to the use and service of all members of the public who may require it (i.e., public utility service). [92]

Here, no one outside the special class of producer-customers who have negotiated rates and terms of service with Laser—without similarity of service, without uniformity of rates, and necessarily a different contract for service tailored to each customer (thereby affording Laser maximum flexibility, especially if it were to enjoy "light-handed" rather than traditional economic regulation)—is privileged to demand service.

Commission Decisions Certificating Other Pipelines Are Factually or Legally Distinguishable

Laser argues that it deserves to be certificated because the Commission has previously certificated natural gas pipelines, principally relying on *Application of Allegheny Land and Exploration, Inc.*[93] and *Application of Ardent Resources, Inc.*[94]

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[89] *Drexelbrook Associates v. Pa. Pub. Util. Comm'n*, 212 A.2d 237, 239 (Pa. 1965) (quoting *Borough of Ambridge*, 165 A. at 49 (emphasis in original) (holding that the provision of gas, electric, and water service by a landlord to the residents of a 1,223 unit apartment complex, as well as associated facilities including nine stores, was private in nature and did not constitute public utility service)).

[90] *Aronimink Transp. Co. v. Pub. Serv. Comm'n*, 170 A. 375 (Pa. Super. 1934) (holding that bus transportation provided by the owner of an apartment complex only to its tenants was private in nature).

[91] *Drexelbrook Associates*, 212 A.2d at 240.

[92] *See Re Megargel's Golf, Inc.*, 59 Pa. P.U.C. 517, 521 (1985) (the term "defined, privileged and limited" group does not imply service restricted to the residents of a particular development or customers situated within a confined geographic region, but rather connotes a situation where the purveyor of service has control over the persons selected to be provided service); *Re USX Corp. - U.S. Steel Group*, 79 Pa. P.U.C. 118 (1993) (USX Corporation's businesses locating at its Fairless Works site, to be provided over its 22 miles of steam and gas lines, 20 miles of water distribution mains, 20 miles of sanitary and industrial waste sewer lines, an electrical generation and distribution system capable of producing and distributing 60 megawatts of electricity, and its vast telecommunications system, was not public utility service).

[93] Dkt. No. A-125136 (Opinion and Order entered March 7, 2005).

[94] Dkt. No. A-140005 (Opinion and Order entered April 16, 2007).

Allegheny Land is distinguishable from Laser's proposed service. Allegheny Land was an affiliate of PAPCO, Inc., a gas and oil production company in Warren, Pennsylvania, with all its operations within Warren County. To support its own production, PAPCO built a gas stripping/fractionating plant in Warren County. The purpose of Allegheny Land's proposed 4.2-mile pipeline (really PAPCO's), consisting of two 3-inch polyethylene lines,[95] was to transport gas from other producers, presumably to enhance the stripping/fractionating plant's revenues. Customers (producers) would be required to enter into a contract with PAPCO for the sale of gas for a minimum of three years, apparently with no negotiated terms besides those specified in the tariff,[96] which specified a *uniform* transportation rate of $0.35/Mcf and a shrinkage rate for line loss, fuel and compression cost of 10%/Mcf.[97] The tariff provided that the title to the gas delivered into the pipeline belonged to the customer or nominee (as noted, for sale to PAPCO); no storage, banking, compression, processing, or sales services were offered by the pipeline; and the service was described in Rule 10 as a "transporting or conveying service."[98] The tariff also provided that line connections and extensions would be "made solely at the discretion of the Company and solely at the expense of the Customer, unless otherwise agreed."[99]

Thus, instead of being without similarity of service, without uniformity of rates, and necessarily a different contract for service tailored to each customer, Allegheny Land proposed similarity of service, uniformity of rates, and the same contract for all customers. The authority granted was for transportation service, not gathering service to a defined, privileged and limited group, although the discretion reserved to the pipeline operator whether or not to make line connections and extensions appears to give complete control over the selection of customers, as in *Brink's Express*, *Aronimink*, and *Drexelbrook Associates*. If so, the application should have been denied as not proposing "public utility" service.

Ardent Resources is also distinguishable. Ardent also proposed transportation service only for its own natural gas wells (owned by three Pennsylvania limited partnerships) over a 1,500 foot pipeline at a *uniform* rate of $0.25/Mcf with the promise that it would not actively solicit additional producers. The application should have been denied outright as self-service but was granted instead because Arden said that it would "consider" requests for service by other natural gas producers on a case-by-case basis, although none was ever added. Subsequently, the pipeline was sold to a non-public utility which jointly petitioned for rescission of the certificate of public convenience, which was granted.[100] The decision offers no support for Laser's arguments. Laser does not propose self-service, and certainly not at a uniform rate. Even though it alleges that it will do more than merely consider serving additional customers, its intended offers will not be indiscriminate offers to indefinite customers.

Laser also asserts that the Commission should certificate its services because it granted a certificate to Pentex Pipeline Company and "currently regulates the gathering and transmission of petroleum products through intrastate pipelines in Pennsylvania ... [which] services are

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[95] *Application* at 4, ¶ 9.
[96] *See* Revised Initial Tariff filed April 19, 2005, "A. Transportation Conveying Services Rules."
[97] *Id.* at "B. Rates."
[98] *Id.* at Rules 9, 10, and 11.
[99] *Id.* Rule 5.
[100] Dkt. No. A-140005 (Opinion and Order entered April 17, 2009); *see also* Opinion and Order entered August 11, 2009 (granting reconsideration and clarification).

almost identical to the gathering and transmission of natural gas that the Applicant is proposing here."[101]

At present, the Commission regulates the following eight entities as pipeline public utilities:

Laurel Pipe Line Company, L.P. (Dkt. No. 140000)

Sunoco Pipeline, L.P. (Dkt. No. 140001)

ConocoPhillips Pipe Line Co. (Dkt. No. 140003)

Buckeye Pipe Line Company, L.P. (Dkt. No. 140110)

Sun Company, Inc. (Dkt. No. 140375)

PPL Interstate Energy Company (Dkt. No. 140200)

Pentex Pipeline Company (Dkt. No. 140325)

Allegheny Land & Exploration, Inc. (Dkt. No. 125136)

The first five of these pipelines are regulated by FERC either as the interstate transportation of natural gas under the Natural Gas Act or as the interstate transportation of oil under the Interstate Commerce Act (ICA).[102] The U.S. Department of Transportation has safety jurisdiction over them. The Commission, usually after minimal investigation and with rare protests, decides rate increase requests from only the oil pipelines.[103]

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[101] Laser M.B. at 24.

[102] 49 U.S.C. Apps. §§ 1 *et seq.* (1988). In 1977, regulation of oil pipelines was transferred from the ICC to FERC. In 1978, the ICA was revised and recodified (Revised Act) and the preexisting version of part I applicable to railroads was repealed. However, the portion of part I of the ICA applicable to oil pipelines, as it existed on October 1, 1977, was not repealed and this is the law that FERC must apply in its regulation of oil pipelines. This law cannot be found by referring to Title 49 in the *U.S. Code*. The last publication of the October 1, 1977, version of part I of the ICA was in the 1988 publication of the *U.S. Code*. A .pdf version of Title 49 from the 1988 *U.S. Code* can be found on FERC's website, available at http://www.ferc.gov/legal/fed-sta.asp?new=sc4.

[103] *See Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana*, 332 U.S. 507 (1947) ("states could regulate sales direct to consumers, even though made by an interstate pipeline carrier"); *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S 329 (1951) ("But the sale and distribution of gas to local consumers made by one engaged in interstate commerce is 'essentially local' in aspect and is subject to state regulation without infringement of the Commerce Clause of the Federal Constitution."). This dual jurisdiction with FERC can lead to somewhat bizarre rate orders. For example, for decades the Commission has granted Sun Pipe Line Company periodic rate increases, each time with almost verbatim orders. *See, e.g.*, 52 Pa. P.U.C. 672; 57 Pa. P.U.C.533; 59 Pa. P.U.C. 513. In each, the company states that it has had since the 1930's and has now only one intrastate customer, Sun Petroleum Products Company, Inc., that both companies are owned 100% by Sun Company, Inc., and that the pipeline company "has no expectation of serving other customers in the foreseeable future," *although it holds itself out as a Pennsylvania common carrier should an intrastate shipper other than its sole present customer appear.* In short, the pipeline has only one customer and really is not seriously holding itself out to serve any other customers, so it is not a public utility. But the Commission dutifully grants the rate increase (which was probably negotiated ahead of time by the two affiliated companies), observing that the pipeline is only a public utility because of its "holding out." Each order then cites federal decisions purporting to allow forbearance from exerting jurisdiction (which is proper only when a declaratory order is sought), and obscurely opines that, "Our regulatory power is legitimated only by limiting its function to attain proper purposes and to avoid evils within the legislative province," whatever that means.

On November 16, 1988, the Commission issued Pentex a Certificate of Public Convenience to enable it to fulfill an agreement with Taylor Packing, Inc. in Bradford County to construct a pipeline and *transport* natural gas from the interstate facilities of Tennessee Gas Pipeline Company (Tennessee) to the Taylor Packing plant. The Commission granted the certificate and accepted Pentex's ambiguous assertion in its application (¶ 12) that, "[s]ubject to the capacity of the pipeline, Applicant *is prepared* to transport natural gas in the pipeline for all other persons requesting such service." (Emphasis added.) In the Commission's order, this ambivalent statement became "Applicant *will* also transport natural gas up to the capacity of the pipeline for any other person or business requesting the service."[104]

Pentex's current (sole) customer, Taylor Packing /Taylor Byproducts Co. (Cargill Meat Solutions Corporation acquired Taylor Packing in 2002) has a negotiated transportation rate in effect of $0.25 per Mcf for all gas transported under the current contract. Otherwise, a firm transportation customer, other than Taylor Packing, will be charged the tariff rate of $0.70 per Mcf for the first 9,000 Mcf and $0.25 per Mcf for any Mcf transported above the 9,000, for the first twelve months of service. For the second twelve months of service, the rates drop to $0.60 for up to 9,000 Mcf and $0.25 for any amount transported above the 9,000 Mcf. Pentax reserves its right to enter into a contract for firm transportation service at rates other than the fixed rates above.

On March 8, 2011, Pentex filed an application to amend its certificate so as to add natural gas *gathering* services to the services performed for its existing transportation customer. The application, which is pending, also seeks authority to provide gathering services for local producers in six townships in Bradford County. If granted, "the natural gas transported for producers will be used to serve Cargill [Taylor Packing] or injected into the interstate pipeline system through Pentex's existing interconnection point."[105] Poignantly, the application notes that, "[c]urrently, Cargill [Taylor Packing] remains Pentex's sole customer."[106]

Pentex is no support for Laser's position because Pentex has only ever provided transportation service to one customer. It acquired its certificate on the mere assertion that it was "prepared" to serve others, although its tariff makes provision for other customers. But, because it reserves the right to negotiate the rates for which it will serve, it, like Laser, is not really holding itself out to others indiscriminately. Laser's "holding out" assertions may be equally amorphous, but, as noted, they are immaterial if, in fact, such openness to the public is not complete because qualified by a reservation to select by contract only those worthy.

In Pentex's pending case, much like Laser's proposal, the proposed delivery charge will be negotiated by the company and the customer and expressed in the Gathering Agreement. The charge may include a fee per Mcf, a facilities service charge or other rate structures mutually agreed to by Pentex and the customer. The Gathering Agreement also may set forth minimum contract terms and/or minimum volume requirements as negotiated between the company and the customer.

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[104] Order at 1 (emphasis added).
[105] Application to Amend Certificate of Public Convenience of Pentex Pipeline Company, Dkt. No. A-2010-2230314, at 1-2.
[106] *Id.* at 3.

Finally, the creation and certification of PPL Interstate Energy Company, which now transports both #2 and #6 heating oil and natural gas, may be found in *Bucks County Board of Commissioners v. Pa. Public Utility Commission.*[107] As described therein, "IEC proposes an intrastate pipeline facility 80 miles long between Marcus Hook in Lower Chichester Township, Delaware County, on the south, and Martins Creek on the north, with an extension of nine miles to serve Metropolitan Edison at Portland, north of Martins Creek, a lateral 6.8 miles long to serve New Jersey Power and Light on the east bank of the Delaware River south of Martins Creek, and a takeoff point to serve Philadelphia Electric Company at the latter's Cromby terminal near the Chester-Montgomery County boundary line."[108]

That case is curious because it appears to have confused the oil "shippers" with the three public utility "customers." The appellants contended that IEC, created by PPL to serve itself and two other public utilities, was not a public utility "because it is a creation of one or a few privately owned public utilities designed to serve only them."[109] The court, however, held that the pipeline was a public utility because IEC promised that it would transport oil "for all shippers."[110] It appears to have been a classic "defined, privileged and limited" group of customers under *Drexelbrook Associates.* [111]

The delivery service provided by this transportation "public utility" is dissimilar to Laser's gathering proposal and irrelevant to the present proceeding, especially now that PPL has since ceased serving any entity but itself.

Regulated Transportation and Gathering Offerings Are Inapt Precedents

Laser alleges that its "negotiated contract tariff provisions are not unusual in the natural gas industry and are common for regulated natural gas transportation service and service by LDCs to large customers who have competitive alternatives," citing tariffs of Dominion Peoples and Equitable Gas.[112] This is a classic "bootstrap" argument.

The short answer to this allegation is that a non-public utility entity cannot become one by citation to tariffs of public utilities who have that status because they truly provide service without discrimination to the indefinite public. Laser is not a public utility because of its intended mode of operation. Furthermore, for Laser to analogize to transportation service is particularly inapt as MarkWest observed:

Laser's comparison of its proposed range of gathering rates to rates for natural gas transportation service, Laser Exceptions at 6 n.18, 26 n.64, *does not change the fact that Laser reserves the right to select its customers by private contractual arrangement.* Indeed,

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[107] 313 A.2d 185 (Pa. Cmwlth. 1973); *see also UGI Utilities v. Pa. Pub. Util. Comm'n*, 684 A.2d 225 (Pa. Cmwlth. 1996) (relating UGI's unsuccessful challenge to the pipeline's application for a Certificate of Public Convenience to convert the pipeline to dual oil and gas service).

[108] *Id.* at 188.

[109] *Id.* at 191.

[110] *Id.*

[111] The same affiliate device was successfully used by three oil refiners in *Independence Twp. Sch. Dist. Appeal*, 194 A.2d 437 (Pa. 1963) to gain public utility status (and therefore the power of eminent domain). It also is alive and well in the interstate pipeline world. *See* Bryce, *supra* note 48.

[112] Laser M.B. at 20; *see also id.* at 23 n.33 (citing Equitable Gas) & 36 n.43 (citing Equitable Gas and Dominion Peoples (now Peoples Natural Gas)).

comparison of Laser's tariff to the natural gas local distribution company ("LDC") transportation tariff that Laser cites in Paragraph 36 of the Settlement [citing Columbia Gas of Pennsylvania, Inc. negotiated contract rates for customers under Tariff No. 144 to Tariff Gas-Pa.P.U.C. No. 9 Fifth revised Pages 115 and 116] illustrates the extent to which Laser's tariff is lacking in essential terms of service which will need to be negotiated individually. While the Laser tariff has only a negotiated gathering rate as its default pricing and service mode, the LDC tariff's negotiated rate service presumes the customer has an otherwise applicable traditional tariff and rate schedule, to which the customer will default under certain circumstances. Also, the LDC tariff provides for a negotiated rate option only in certain unique and special circumstances, such as the availability of an alternative fuel source which would effectively replace the LDC's service. ... Further, there is no real description in Laser's tariff of what Laser will actually be gathering and transporting. This is because the actual product itself, as well as the actual service and the pricing, are all subject to the unique circumstances of each producer and the individual negotiations between the producer and gatherer. In short, the Laser tariff comes nowhere close to setting forth the essential terms of service, in contrast with the LDC transportation service.

In addition, the Commission's gas transportation regulations require the natural gas utility's tariff to state a minimum volume of transported natural gas that entitles a customer to transportation service, see 52 Pa. Code § 60.3(a), a detail missing from Laser's tariff. Also, since transportation service is provided by a jurisdictional LDC, there is no need for the Commission's regulations to require transportation tariffs to include specific terms regarding gas composition, since the gas is all consumer quality and not raw gas. This is a critical term that gatherers and producers must negotiate. Moreover, the Commission's regulations mandate that transportation service shall be provided without discrimination as to type and location of customer. 52 Pa. Code § 60.3(a). As MarkWest has explained in detail, discrimination among customers is a necessary part of the natural gas gathering business.[113]

Dominion Peoples' tariff is like that of Columbia Gas's tariff, described in the quoted passage. Its service is available to provide for the delivery of transportation volumes to residential, commercial (other than those that use natural gas as a motor vehicle fuel) and natural gas distribution company ratepayers regulated by the Commission. Priority-one customers (as described in Rule 17), must purchase standby service in accordance with the terms and conditions of GS-SB. (See First Revised Page No. 41 – effective April 11, 2003). This service is not consistent with the service proposed by Laser because it is available to all residential and commercial customers for use other than as a motor vehicle fuel. This tariff provides transportation service of ratepayer (customer)-owned gas to that ratepayer (customer) via company infrastructure. Any ratepayer (customer) with competitive alternatives must execute a Transportation Agreement with the company wherein an initial term of one year is required and the maximum daily volume that may be transported and other negotiated conditions will be addressed.

Equitable Gas is already a public utility, and this Commission, perhaps unwisely, allowed it to offer a gathering service. Its Rate AGS (Appalachian Gathering Service) is available to any party desiring to transport gas through the gathering system as well as to deliver gas directly into the Company's distribution system. All rates (gathering and retainage) for this service are determined by negotiation. T.W. Phillips has a similar service called Field Transportation

[113] MarkWest Reply Exc. at 11-12 (citing MarkWest Stmt 1 at 15-16) (emphasis added).

Service with a maximum volumetric delivery rate with all rates negotiable below that intentionally high rate.

Equitable's and T.W. Phillips' gathering services are oddities among all other Pennsylvania regulated natural gas company offerings, aberrations that the Commission is not mandated to repeat. Laser does not become a public utility by mimicking an aberrant service provided by a true public utility.

Telecommunications Regulation Also Provides Inapt Precedents

It has been suggested that two Commonwealth Court decisions involving telecommunications service require a finding that Laser's service constitutes public utility service: *Waltman v. Pa. Public Utility Commission*[114] and *Rural Telephone Co. Coalition v. Pa. Public Utility Commission*.[115] These are inapt precedents.

The applicability of *Waltman*, i.e., the certification of a long-distance provider that rendered WATS long-distance services to few large end-users, is questionable in the instant proceeding. First, technological and market developments in the telecommunications industry structure and the provision of telecommunications and communications services since 1991 are not directly comparable to the traditional pipeline gas gathering operations of Laser. Although various *wireline* providers of *intrastate* telecommunications services are classified and certified as "public utilities" by this Commission, many rely on the *pre-existing* network facilities of other telecommunications carriers when they render their wholesale and/or retail services *without* necessarily making extensive (and expensive) use of their eminent domain rights, especially in urban areas, e.g., use of pre-existing poles, conduits, and rights of way. For example, facilities-based competitive local exchange carriers (CLECs) will rely on interconnection arrangements with and "last mile" unbundled network element (UNE) loops of certain incumbent local exchange carrier (ILEC) telephone companies in order to reach their respective end-user consumers. Similarly, resellers of long-distance services – including WATS – will simply lease capacity on the networks of other facility-based wireline carriers.

The Pennsylvania General Assembly has recognized these market dynamics and has declared the long-distance services provided by interexchange carriers (IXCs) to be competitive and not subject to this Commission's price regulation.[116] Under Pennsylvania and federal law, the Commission has very limited regulatory involvement (e.g., numbering and interconnection) with *wireless* telecommunications carriers.[117]

Regarding *Rural Telephone Co. Coalition*, there is no doubt that telecommunications utilities that provide wholesale access services to a number of end-users and/or other telecommunications carriers or communications enterprises can be and have been classified as public utilities such as Core Communications, Inc. (Core). However, the similarities between

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[114] 596 A.2d 1221 (Pa. Cmwlth. 1991).
[115] 941 A.2d 751 (Pa. Cmwlth. 2008).
[116] 66 Pa.C.S. § 3018(a)&(b); *see also Final Rulemaking for Revision of Chapter 63 of Title 52 of the Pennsylvania Code Pertaining to Regulation of Interexchange Telecommunications Carriers and Service*, Docket No. L-00050170, Final Rulemaking Order entered August 13, 2007.
[117] 66 Pa.C.S. § 102 (wireless carriers are not classified as "public utilities").

Laser's pipeline gas gathering operations and Core's competitive provision of access services to a broad segment of the public end there.

First, because of the interconnected nature of telecommunications networks and their technology, Core – a facilities-based CLEC – does not need to exercise its eminent domain rights in order to build individual and expensive transmission access paths in order to collect, route, and deliver various types of telecommunications traffic.

Second, a cursory examination of Core's intrastate tariff will readily reveal that Core does not *exclusively* rely on individual case basis (ICB) contract pricing in order to offer its access services. Instead, in accordance with applicable Commission directives, Core utilizes an extensive list of switched access service rates that is *customized* on a per ILEC service area basis where Core operates.[118] Core also offers its services on an ICB contract basis.[119] However, any customer who wishes to engage Core's ICB contract pricing *already* has the benefit of Core's publicly available and transparent tariff rate elements and can negotiate accordingly. The same customer can also avail himself of similar individual tariff rate element information for other telecommunications utilities that offer similar services as Core within the Commonwealth and adopt the appropriate negotiating posture.

The same transparency will not be available in the case of Laser's operations where services will be rendered *exclusively* by contract and will be subject only to an upper pricing limit. Under this scenario, Laser can easily engage in pricing discrimination among its intended but similarly situated customers despite its alleged public utility classification by setting differentiated contract prices and corresponding profit levels for individual contracts under this upper pricing limit. Since Laser's customers will not have access to any detailed and transparent tariff rate element information, such potential rate discrimination will not be easily policed by this Commission while Laser will be able to enjoy the benefits of its eminent domain powers as an alleged public utility. Naturally, it is doubtful that a level playing field and competitive equity will be maintained under this pricing scheme among Laser's similarly situated end-user customers.

Safety Will Not Suffer
If Gathering Lines Are Not PUC Regulated

Laser may continue with its business plans without a certificate of public convenience, just as other uncertificated natural gas gatherers presently do. The Commission does not presently have the authority to inspect non-public utility lines like those proposed by Laser, but the Legislature is about to enact such authority. House Bill 344, Printer's No. 299, which passed the House of Representatives by a vote of 195-0 on April 4, 2011, and Senate Bill 325, Printer's No. 981, which passed the Senate of Pennsylvania by a vote of 49-1 on April 6, 2011, will, upon reconciliation and approval of the Governor, grant the Commission the authority to conduct gas pipeline safety inspections and investigations of non-public utility gathering lines, respond to complaints, assess fines or penalties, and address service quality issues consistent with federal pipeline safety laws and regulations.

[118] *See* Core Communications, Inc. PA P.U.C. Tariff No. 4, Sec. 5.4, Rev. Sheet Nos. 51-52.36.
[119] *See* Core Communications, Inc. PA P.U.C. Tariff No. 4, Sec. 6.1 and. 6.2, Orig. Sheet No. 53.

Conclusion

For the foregoing public interest and legal reasons, Laser Northeast Gathering Company's Application for a certificate of public convenience is not necessary or proper for the service, accommodation, convenience, or safety of the public, principally because giving natural gas gathering pipelines the power of eminent domain upsets the beneficial existing negotiating balance between landowners and pipeline operators. Nor is such extraordinary power needed by gathering pipelines, as demonstrated by the present thriving competitive gathering industry. The application should, therefore, be denied. Secondarily, Laser does not meet the test for public utility status.

The advent of the Marcellus Shale play, and the manner in which it is occurring in the absence of heavy-handed economic regulation, makes the Commission's interpretation of the status of gathering important to the robust competitive provision of that service. Natural gas gathering is unquestionably a highly competitive industry. This flexible type of service is certainly not a natural monopoly, as is distribution service or the point-to-point service provided by gas transportation or intrastate hazardous liquid pipelines. Competitive forces are a better regulator of such a marketplace. Economic regulation is unnecessary when the customers are sophisticated international energy producers. The Commission needs, however, the authority to ensure pipeline safety, which the Legislature is poised to confer.

Unlike the federal Natural Gas Act, which gives FERC jurisdiction over the interstate transportation of natural gas, but not over the gathering of natural gas, the Public Utility Code only speaks of "transporting or conveying" natural gas, which terms could include both transportation and gathering, *but only if done in the manner of a public utility*. It is for this Commission to determine whether an entity—whether gathering or transporting—meets the tests for public utility status, chiefly that the entity is holding itself out to provide service *without discrimination to the indefinite public* for compensation, and not picking and choosing its customers.

Laser's intended method of providing service is without question a selective process of picking and choosing customers on Laser's terms. By its negotiated contract process, it will discriminate in the acquisition of its customers, who will not have the right to demand service from Laser. Its intended methods are so blatantly selective, and so consistent with the business methods of all the other several gathering companies doing business in Pennsylvania and throughout the nation—all except Laser wantonly competitive and happily free of state and federal economic regulation—that one wonders why Laser seeks economic regulation as a public utility.

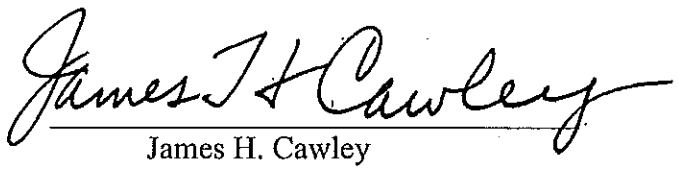
The answer is that it wants to be a public utility but it doesn't want to be a public utility. By its request for "light-handed" regulation, it seeks to acquire the extraordinary benefit of public utility status—the power of eminent domain—but none of the burdens of being a public utility. It wants no part of this Commission setting its rates, overseeing its terms and conditions of service, adjudicating customer complaints about its service or land acquisition methods, approving its financial transactions or dealings with affiliated companies, auditing its books and inspecting its property records, or giving or withholding permission for it to abandon service or sell or merge its operations.

Finally, public utility status should not be granted in order to provide pipeline operators with a means to counter the concerted "blocking" efforts of landowners who exact higher compensation from private pipeline companies. If that is the purpose of Laser's application, then it should persuade the Legislature to change the law to say that, because of the resourcefulness and obstinacy of landowners who wish to keep their property unblemished or wish to obtain their fair share of the economic benefits of shale gas extraction, one may be a public utility even though the service is only available to those acceptable to the pipeline company.

Until that legislative change occurs, this Commission is bound to say no to Laser's attempt to have it both ways.

The Commission's determination today that the applicant is a "public utility" significantly expands the scope of the use of the eminent domain power by "public utilities." The unprecedented natural gas discoveries in the Marcellus and Utica Shales make it likely that the Commission will receive similar applications for gathering lines throughout the Commonwealth. The property rights of a significant portion of the citizens of the Commonwealth have been substantially affected by today's decision. Rather than the broad interpretation of the law rendered today, legislative guidance on the public utility status of natural gas gathering lines would have been far preferable.

My compliments and thanks go to the citizens who made the effort to testify in the public input hearings, the parties who so ably tried and briefed this very important case, to our advisory staff for enlightening the issues and drafting our decision, and especially to Administrative Law Judge Susan D. Colwell for her usual professional supervision of the case and Recommended Decision.



James H. Cawley
Commissioner

May 19, 2011