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**Gathering and Transporting Marcellus and Utica Shale Natural Gas to the Market and the Regulation of Midstream Pipeline Companies - The Case for a Uniform Federal and State Definition of "Gathering" in the Context of Economic and Siting Regulation**

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# GATHERING AND TRANSPORTING MARCELLUS AND UTICA SHALE NATURAL GAS TO THE MARKET AND THE REGULATION OF MIDSTREAM PIPELINE COMPANIES – THE CASE FOR A UNIFORM FEDERAL AND STATE DEFINITION OF “GATHERING” IN THE CONTEXT OF ECONOMIC AND SITING REGULATION

*By Kurt L. Krieger<sup>1</sup>*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	50
II.	IMPORTANCE OF SINGULAR TEST FOR “GATHERING”...	51
III.	THE FERC “GATHERING” TEST .....	52
IV.	STATE LAW TESTS .....	55
	A. <i>West Virginia</i> .....	55
	1. West Virginia Public Service Commission (“WVPSC”) Jurisdiction .....	55
	<i>a. Exemption for Gathering Facilities</i> .....	55
	<i>b. Public Utility Analysis</i> .....	56
	<i>c. Regulation of Intrastate Pipelines</i> .....	57
	<i>d. Obligation to Serve Field Tap Customers</i> ...	58
	2. Adopting FERC “Gathering” Test in West Virginia .....	58
	B. <i>Pennsylvania</i> .....	59
	1. Pennsylvania Public Utility Commission (“PaPUC”) Jurisdiction .....	59
	2. Public Utility Analysis .....	59
	3. Adopting FERC “Gathering” Test in Pennsylvania .....	63
	C. <i>Ohio</i> .....	64
	1. OPSB Jurisdiction: “Major Utility Facility” Analysis .....	64
	2. PUCO Jurisdiction: Public Utility Analysis .....	65
	3. Adopting FERC “Gathering” Test in Ohio .....	67
	D. <i>Kentucky</i> .....	67
	1. Kentucky Public Service Commission (“KYPSC”) Jurisdiction.....	67
	<i>a. Exemption for Gathering Facilities</i> .....	68

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<i>b. Public Utility Analysis</i> .....	69
<i>c. Regulation of Intrastate Pipelines</i> .....	70
<i>d. Regulation of Common Carriers</i> .....	72
<i>e. Obligation to Serve Field Tap Customers</i> ...	73
2. Division of Oil and Gas Regulation .....	73
3. Adopting FERC “Gathering” Test in Kentucky .....	74
V. CONCLUSION .....	74

## I. INTRODUCTION

Much has been written about the major natural gas reserves in the Marcellus and even Utica Shale formations located in West Virginia, Pennsylvania, and Ohio.<sup>2</sup> But much of the focus has been on the law and regulation around producing the gas—drilling and getting it out of the ground. Related, but serving a very different function, is the role of pipeline companies in their various business models to transport that gas to market. This is a different and equally robust and growing segment of the natural gas industry where large amounts of shale exploration take place. In fact, without pipelines and regulatory certainty for those constructing pipelines, natural gas has no value as it cannot be transported to the market place in any practical manner without pipelines.

When planning to construct or acquire natural gas pipelines, a major question to consider is, “Will the pipelines be regulated?” For purposes of this Article, “regulated” refers to regulation of the siting and construction of pipeline facilities as well as economic regulation of the prices (or rates) charged and the terms and conditions (or tariffs) for services offered to customers (or shippers) transporting on those pipelines.<sup>3</sup> Depending upon the physical configuration of the pipelines, the manner in which they are used to transport natural gas, and the type of customer transporting the gas on the pipeline, the correct answer could be (1) no regulation, (2) regulation by a state or commonwealth public service or utility commission, or (3) possible regulation by the Federal Energy Regulatory Commission (“FERC”).<sup>4</sup> Moreo-

2. Currently, there are no natural gas shale plays being explored in Kentucky, but the Author has also researched the Commonwealth of Kentucky law and regulation of midstream or gathering pipelines or companies, and it is worthy of mentioning given the overall purpose of this Article.

3. Safety regulation by various state and federal regulators of natural gas gathering pipelines is beyond the scope of this Article. For example, after years of discussion and debate, the federal pipeline safety regulations incorporated the American Petroleum Institute’s Recommended Practice 80 (“RP-80”) by reference with its extensive definitions and analysis for distinguishing “production operation” from “gathering pipeline.” See 49 C.F.R. § 192.7(c)(2)(B)(5) (2011). In the pipeline safety context, many states have adopted the federal regulations and added additional requirements.

4. While beyond the scope of this Article, traditionally state or commonwealth-regulated pipelines also providing any service or transportation of natural gas in inter-

ver, with respect to state or commonwealth regulation, as one might imagine, the extent of that regulation varies by state or commonwealth.

## II. IMPORTANCE OF SINGULAR TEST FOR “GATHERING”

While many articles could be written on any number of definitions that could be made more uniform across federal and state jurisdictions with respect to pipeline regulation, this Article focuses only on that segment of the pipeline transportation industry commonly referred to as the “midstream” segment or also generally referred to as the “gathering” segment. The midstream-gathering segment is only one segment in the chain of transporting pipelines that transport gas from the producing well to consumers. Midstream-gathering typically refers to those pipelines that begin at connections to natural gas production operations, or to pipeline systems assembled to connect numerous wells together, and transport the gas to gas treatment, processing, or hydrocarbon liquid extraction and fractionation facilities. Then the pipelines may transport it to larger pipeline facilities (that transport the gas yet further) or to local distribution company systems (i.e., state-regulated public gas utilities or local distribution companies (“LDCs”)) for distribution to consumers for consumption.<sup>5</sup>

The increased production of shale gas in West Virginia, Pennsylvania, and Ohio has placed great demand on existing natural gas pipeline infrastructure of all shapes and sizes. This increased demand has resulted in a great deal of investment in the construction of new pipelines—specifically, midstream-gathering pipeline systems—as the first leg in the transportation of this new-found gas. Midstream-gathering systems are not new, but significant investment is now being made in these systems in the referenced states as a result of the recent extensive Marcellus and Utica Shale gas production development activity. This investment, in turn, is causing one to look more often than in past decades to federal and state regulations to determine which agencies, if any, will regulate these midstream-gathering pipelines.

The conventional wisdom is that midstream-gathering pipeline systems are unregulated, which, while often true, is not a conclusion that can be reached from a legal point of view without researching federal and state laws and regulations applicable to the transportation of nat-

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state commerce must obtain FERC authority for such interstate service. It is possible to provide or facilitate interstate service even when the pipeline system is located entirely within the boundaries of a single state or commonwealth. This aspect of pipeline regulation can often be overlooked by those traditionally focused only on gathering or intrastate pipeline regulation within a single state or commonwealth.

5. U.S. ENERGY INFORMATION ADMIN., NATURAL GAS TRANSMISSION PATH DIAGRAM, [http://www.eia.doe.gov/pub/oil\\_gas/natural\\_gas/analysis\\_publications/ngpipeline/transpath\\_fig.html](http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/transpath_fig.html) (last visited Aug. 15, 2012) (illustrating this chain of transportation).

ural gas in interstate or intrastate commerce. Such research reveals inconsistencies in the definitions these jurisdictions use to characterize midstream-gathering facilities and pipelines (which, thereby, classify the facilities and subject them to or exempt them from regulation). For the convenience of regulators and midstream companies, as well as the general welfare of the industry, the definitions used to classify midstream-gathering pipelines should become more synthesized—more uniform among the mentioned jurisdictions. Uniformity is currently not the case among applicable FERC, West Virginia, Pennsylvania, Ohio, and Kentucky statutes and regulations.

Unfortunately, given the nature of pipelines and their inevitable crossing of state lines, incongruous evaluations between states and commonwealths as to whether or not a midstream-gathering pipeline is subject to regulation can create havoc and a disincentive to investment in developing and maintaining adequate midstream-gathering pipeline systems. This Article reviews and analyzes whether each state and commonwealth should adopt and use the FERC test for determining whether natural gas pipeline facilities are to be classified as “gathering” in nature, and thus, depending upon each state’s law, not subject to siting or economic regulation by the state or commonwealth commissions that regulate public utilities. To be clear, it is not the Author’s purpose to expand the jurisdiction of the FERC. Instead, the purpose would be to tap into a well-developed body of FERC decisions defining gathering. In doing so, and where the state or commonwealth definition of gathering is not well defined, a state or commonwealth could make use of the FERC test or definition to render clear and consistent classifications as between FERC and a state, or across several states. In addition, because each state already has certain criteria and precedent established, this Article will explore whether there is room for adopting this suggestion under each state or commonwealth’s statutory provisions so that established frameworks do not have to be summarily jettisoned.

### III. THE FERC “GATHERING” TEST

The FERC regulates interstate natural gas pipelines under the Natural Gas Act (“NGA”);<sup>6</sup> however, under the NGA, the “gathering” of natural gas and gathering facilities are exempt from the FERC’s jurisdiction.<sup>7</sup>

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6. Natural Gas Act, 15 U.S.C.A. §§ 717–717Z (West 2009).

7. See *United Gas Imp. Co. v. Cont’l Oil Co.*, 381 U.S. 392, 402–03 (1965); *Texas v. Wisconsin*, 348 U.S. 851 (1954). It is well settled that facilities and activities relative to the gathering of natural gas are equally eligible for the NGA’s gathering exemption. See *Fed. Power Comm’n v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 503–04 (1949). Not explained here is the extent to which FERC still regulates to a limited extent the natural gas gathering owned or affiliated with FERC-regulated interstate natural gas pipelines.

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, *but shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or *to the production or gathering of natural gas*.<sup>8</sup>

What constitutes interstate “transportation” subject to the FERC’s regulation under the NGA, and what constitutes “gathering” exempt from the FERC’s jurisdiction and regulation is an important distinction. However, gathering is not a defined term in the NGA. The FERC has made it clear through various precedential holdings that, under the NGA, the FERC’s jurisdiction does not extend to facilities used for the production or gathering of natural gas, or to gathering services.<sup>9</sup> Because the NGA does not define “gathering,” FERC has developed criteria, which are now known as the modified “primary function” test, to determine which facilities are non-jurisdictional gathering facilities.<sup>10</sup>

For many years prior to the modified “primary function” test, FERC employed two principal tests. Under the “behind-the-plant” test, facilities upstream (i.e., toward the wellhead where the gas comes out of the ground) of compressors and processing plants were presumptively gathering facilities, while facilities downstream (i.e., toward the ultimate consumer) of the plants were presumptively transmission facilities. For gas that requires no processing, the FERC had also employed a “central-point-in-the-field” test. Under this test, lateral lines collecting and transporting gas from separate wells that converged into a single large line were classified as gathering facilities, while facilities downstream of the collection point in a field were classified as transmission facilities.

Since 1983, the FERC has subsumed those two tests into what eventually became known as the modified “primary function” test, which focuses on a number of physical factors and certain other criteria to determine whether facilities are primarily devoted to gathering or transportation.<sup>11</sup> Under the modified “primary function” test, the

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8. Natural Gas Act, § 717(b) (emphasis added). The purpose for this exemption from federal jurisdiction is beyond the scope of this Article; however, the NGA, generally, was designed by Congress to protect the consumer public from the economic power of natural gas companies.

9. See, e.g., *Laser Marcellus Gathering Co.*, 130 FERC ¶ 61,162 (2010).

10. See *Amerada Hess Corp.*, 52 FERC ¶ 61,268 (1990); *Farmland Indus., Inc.*, 23 FERC ¶ 61,063 (1983).

11. See, e.g., *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 368–69 (5th Cir. 1997).

FERC considers a number of physical and geographical factors, including: (1) the length and diameter of the pipelines; (2) the extension of facilities beyond the central point in the field; (3) the facilities' geographic configuration; (4) the location of compressors and processing plants; (5) the location of wells along all or part of the facilities; and (6) the operating pressures of the pipelines.<sup>12</sup> The FERC also considers the purpose, location, and operation of the facilities; the general business activities of the owner of the facility; and whether the jurisdictional determination is consistent with the NGA.<sup>13</sup>

The FERC test is a functional one like the RP-80 test. No single criterion is determinative. The criteria are applied on a case-by-case basis to determine whether the facility is "gathering" and not subject to FERC's jurisdiction.<sup>14</sup> A functional test, without bright lines for each factor, is flexible and achieves better, more reasonable results as opposed to bright-line criteria that are inflexible and do not take into account differences in terrain, the nature (wellhead pressure and quantities) of the production, and contents of the produced gas. This flexibility and the extensive body of FERC decisions applying this flexible, functional test is what makes a functional test a good model for adoption by the states and commonwealths with bright-line or less-applied gathering definitions or tests.

Also, in addition to gathering systems that exist solely within the confines of a state's or commonwealth's boundary lines, there are gathering systems that cross state lines. In either context, the FERC test has application in matters before the FERC. That is, if a system is determined by the FERC to be gathering (i.e., performing a gathering function based on the FERC's test) and exempt from its siting and economic regulation, the fact that the gathering system crosses state lines does not defeat that determination.<sup>15</sup> In the context of a single, interconnected gathering system crossing a state or commonwealth boundary line, it is even more important for the extent of siting and economic regulation of the gathering system to be consistent between the several states and commonwealths.<sup>16</sup>

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12. *Laser Marcellus Gathering Co.*, 130 FERC ¶ 61,758 n.8 (citing *Columbia Gas Transmission Corp.*, 93 FERC ¶ 61,278, ¶ 61,913 (2000)).

13. *Id.* ¶ 61,758 n.9 (citing *NorAm Gas Transmission Co.*, 75 FERC ¶ 61,127, ¶ 61,429 (1996)).

14. The FERC decisions applying these criteria are many and a summary of those decisions is beyond the scope of this Article.

15. *See Laser Marcellus Gathering Co.*, 130 FERC ¶ 61,759 (citing *Columbia Gas Transmission Corp.*, 85 FERC ¶ 61,191, ¶ 61,769 (1998), *order on reh'g*, 86 FERC ¶ 61,137 (1999) and *Panhandle Eastern Pipe Line Co.*, 68 FERC ¶ 61,209, ¶ 62,101 (1994)).

16. One is not required to affirmatively seek a FERC determination or declaration that a particular system is performing a gathering function, but seeking such a declaration is permissive, and some have sought FERC declarations that identified pipeline systems are gathering. If a state or commonwealth adopts the FERC test for

#### IV. STATE LAW TESTS

The jurisdictions addressed in this Article each have their own test for determining whether gathering pipelines are regulated by their respective public utility or public service commissions. Acknowledging the importance of state sovereignty but emphasizing the significant detriment that disparate regulatory treatment can have on development of midstream or gathering systems, it would be extremely efficient, from a regulatory perspective, for all jurisdictions to adopt and use the same test to determine whether facilities are considered gathering and to establish that gathering facilities and services should not be subject to siting or economic regulation by the state or commonwealth commissions that regulate public utilities.

The following is a survey of the current rules in each state and how the FERC test could be adopted therein.

##### A. *West Virginia*

##### 1. West Virginia Public Service Commission ("WVPSC") Jurisdiction

In West Virginia, the WVPSC has jurisdiction to regulate local gas distribution companies as public utilities and the transportation of gas by intrastate pipelines. In general terms, a public utility is a company that holds itself out to provide service to the general public and is subject to siting and economic regulation by the WVPSC. While intrastate pipelines operating in West Virginia are not required to obtain a certification of convenience and necessity from the WVPSC prior to beginning operations, the WVPSC is given the authority to issue such a certificate.<sup>17</sup> Pursuant to regulation, the WVPSC has elected not to regulate gathering lines.

##### a. *Exemption for Gathering Facilities*

Within the statute empowering the WVPSC to regulate intrastate pipelines, the legislature gave the WVPSC the option to not regulate gathering: "For reasons of safety, deliverability or operational efficiency the commission may, in its discretion, by rule or order, exclude from the requirements of this section any part of any pipeline solely dedicated to storage, *gathering*, or low pressure distribution of natural gas."<sup>18</sup> In exercising its discretion, the WVPSC promulgated its Rules Governing the Transportation of Natural Gas ("Gas Transportation Rules") and stated the following regarding its regulation of gathering:

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assessing whether a pipeline system is performing a gathering function, it could choose to adopt this same permissive procedural approach.

17. W. VA. CODE ANN. § 24-2-11(i) (LexisNexis Supp. 2011).

18. W. VA. CODE ANN. § 24-3-3a(c) (LexisNexis 2008) (emphasis added).



[C]onsistent with West Virginia Code § 24-3-3a(c), the Commission has *excluded gathering facilities* from the provisions of this rule. By doing so, it is the Commission's intent that pipeline facilities connecting producing wells to larger transmission lines will not be subject to the mandatory transportation requirements of these rules. . . . The Commission has made an initial determination that gathering facilities, which are pipelines and facilities used to collect the gas production of one or more wells so it can be introduced into a transportation system, should not be subject to the requirements of these rules. . . . As defined, gathering facilities *shall not be considered either public utilities or intrastate pipelines*.<sup>19</sup>

About ten years later, in 1995, the gathering exemption adopted by the WVPSC in General Order No. 228 was revisited when several parties asked the WVPSC to narrow the exceptions. The WVPSC declined to do so.<sup>20</sup> Key to the WVPSC's decision not to regulate gathering was evidence that the natural gas producing industry did not think that such regulation was needed, as most disputes were resolved informally and the lack of evidence that such regulation would benefit the public. So, as it stands today, the definition of "gathering facilities," which are not considered public utilities or intrastate pipelines, and therefore, are not regulated by the WVPSC, includes "all pipelines and related facilities used to collect the gas production of one (1) or more wells for the purpose of moving such production from the well(s) into the facilities of an interstate pipeline, a utility, or an intrastate pipeline."<sup>21</sup>

There have been very few litigated cases before the WVPSC discussing the characteristics of a gathering facility, and in those cases, settlements were reached or the cases were dismissed.<sup>22</sup>

### *b. Public Utility Analysis*

"Public utility" is defined by statute to "mean and include any person or persons . . . which is, or shall hereafter be held to be, a public service."<sup>23</sup> The term "public service" means a service that its owner creates and operates with the specific and unequivocal intention of devoting it to the general public:

The test as to whether or not a person, firm or corporation is a public utility is that to be such there must be a dedication or holding out either express or implied that such person, firm, or corporation is engaged in the business of supplying his or its product or services to

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19. Natural Gas Transp. Policies, 81 P.U.R.4th 453, 457–59 (W. Va. Pub. Serv. Comm'n Mar. 11, 1987) (emphasis added).

20. Rules Governing Transp. of Natural Gas, 159 P.U.R.4th 85 (W. Va. Pub. Serv. Comm'n Jan. 18, 1995) (emphasis added).

21. W. VA. CODE R. § 150-16-1.5.j (2011).

22. See e.g., Energy Dev. Corp. v. Cabot Oil & Gas Corp., No. 04-1459-GT-C, 2005 WL 2924730, at \*44 (W. Va. Pub. Serv. Comm'n Sept. 7, 2005).

23. W. VA. CODE ANN. § 24-1-2 (LexisNexis 2008).

the public as a class or any part thereof as distinguished from the serving of only particular individuals; and to apply this test the law looks at what is being done, not to what the utility or person says it is doing.<sup>24</sup>

Therefore, the “term ‘public utility’ . . . implies a public use . . . and it precludes the idea of service that is private in its nature and is not to be obtained by the public.”<sup>25</sup>

### *c. Regulation of Intrastate Pipelines*

Through extremely vague statutory language, the West Virginia legislature also has authorized the WVPSC “by rule or order, [to] authorize and require the transportation of natural gas in intrastate commerce by intrastate pipelines.”<sup>26</sup> Whether a pipeline is an intrastate pipeline requires the consideration of two statutorily defined terms. First, “intrastate pipeline” is defined by statute to include “(i) any utility or (ii) any other person, firm or corporation engaged in natural gas transportation in intrastate commerce to or for another person, firm or corporation for compensation.”<sup>27</sup> Second, “intrastate commerce” is defined as “the production, gathering, treatment, processing, transportation and delivery of natural gas entirely within” the state of West Virginia.<sup>28</sup> Seizing on the legislature’s empowerment, the WVPSC, pursuant to regulation, has the authority to require “intrastate pipelines . . . [to] provide non-discriminatory transportation of customer owned gas, upon request, upon a first come/first served basis, to persons requesting such service over the existing facilities of the . . . intrastate pipeline.”<sup>29</sup> It also has jurisdiction over the rates and charges of intrastate pipelines.<sup>30</sup>

The WVPSC has provided little to no guidance as to when a pipeline will be declared an intrastate pipeline. The cases in which the issue has arisen have been settled or dismissed and sometimes with the entity admitting that it was an intrastate pipeline.<sup>31</sup>

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24. *Wilhite v. Pub. Serv. Comm’n*, 149 S.E.2d 273, 274 (W. Va. 1966).

25. *Preston Cnty. Light & Power Co. v. Renick*, 113 S.E.2d 378, 385 (W. Va. 1960) (citations omitted); *see also Wilhite*, 149 S.E.2d at 274 (If the product or service “is sold under private contract and the seller does not hold himself out to sell such product to the public or render some service to the public he is not a public utility”).

26. W. VA. CODE ANN. § 24-3-3a(b) (LexisNexis 2008).

27. *Id.* § 24-3-3a(a)(1).

28. *Id.* § 24-3-3a(a)(4).

29. W. VA. CODE R. § 150-16-2.1 (2011).

30. § 24-3-3a(d)(2); *see also Cranberry Pipeline Corp.*, No. 04-0160-GT-42A, 2005 WL 1566754, at \*14–15 (W. Va. Pub. Serv. Comm’n Dec. 6, 2006).

31. *See Equitable Field Servs., L.L.C.*, No. 04-0404-GT-C (W. Va. Pub. Serv. Comm’n June 3, 2005); *Cranberry Pipeline Corp.*, No. 02-0655-GT-GI, 2004 WL 1857094 (W. Va. Pub. Serv. Comm’n July 13, 2004); *Cranberry Pipeline Corp.*, No. 03-0683-GT-42A, 2003 WL 22215265 (W. Va. Pub. Serv. Comm’n June 17, 2003).

*d. Obligation to Serve Field Tap Customers*

There is no statute in West Virginia that obligates a gatherer of natural gas to provide end-use service to a consumer. However, the WVPSC has promulgated the following regulation dealing with end-use service off of a transmission or gathering line:

When an applicant, or number of applicants, not large enough to merit the installation of an intermediate or low pressure distribution system, desire gas service which must be supplied from a *transmission or field line*, the utility shall, without cost to the customer, make the tap, install a stop cock, metering and appurtenant equipment, exclusive of the regulator or regulators, oil seal or other type pressure relief device, and the line. All meter and regulators installed according to this rule shall be housed at the expense of the customer.<sup>32</sup>

As evident from this regulation, there is an obligation to provide end-use service to a consumer from transmission and gathering lines; however, the onus is on the utility, i.e., the local distribution company, to hookup and serve field tap customers. Furthermore, the case law primarily deals with service-to-field tap customers off of lines that were once part of vertically integrated natural gas companies having production, transmission, distribution, and storage operations in West Virginia. In addition, WVPSC case law dealing with service-to-field tap customers usually also deals with service to customers off of lines that have been in existence for many years.

2. Adopting FERC “Gathering” Test in West Virginia

Similar to the FERC’s regulation under federal law, the WVPSC does not regulate “gathering” facilities or service under state law. The WVPSC’s criteria for determining what “gathering” means begins and ends with a general definition that includes all pipelines and related facilities used to collect production and move that production into an interstate pipeline, a public utility, or an intrastate pipeline.

In short, the WVPSC would be able to adopt the FERC test with no negative impact on its own jurisprudence. The biggest change would be the addition of certain FERC considerations to the state review in cases where such a review becomes required, but these would augment or enhance the WVPSC’s current definition of “gathering.” Moreover, the adoption of the FERC test would not impinge on the analysis of public utility or intrastate pipeline status for other systems. As such, the FERC test for determining “gathering” systems would be easily adopted in West Virginia without undermining established precedent.

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32. W. VA. CODE R. § 150-4-5.6.1 (2011) (emphasis added).

## B. *Pennsylvania*

### 1. Pennsylvania Public Utility Commission (“PaPUC”) Jurisdiction

Regulation of pipelines that might be viewed as gathering under WVPSC regulations or the FERC test may possibly be viewed as “public utilities” in Pennsylvania and subject to far greater regulation. Regulation by the Pennsylvania Public Utility Commission (“PaPUC”) of gathering pipelines that need to be constructed to transport Marcellus Shale gas is murky and is the subject of litigated proceedings before the PaPUC.<sup>33</sup> In fact, the midstream-gathering companies constructing or acquiring pipelines to transport gas within Pennsylvania have different opinions as to whether PaPUC’s regulation applies to their businesses. Some are actively seeking to be regulated (or be subject to light-handed regulation) by the PaPUC as “public utilities” and are possibly motivated to do so in order to obtain condemnation powers.<sup>34</sup> As of the writing of this Article, the extent to which the PaPUC will regulate midstream-gathering company services is still somewhat undecided. Given the significance of the issues involved in the PaPUC proceedings, it is possible that once proceedings before the PaPUC conclude, those decisions may end up before the Supreme Court of Pennsylvania.

### 2. Public Utility Analysis

In order to be considered a “public utility” subject to regulation by the PaPUC, a company must meet the definition of “public utility” under the Public Utility Code:

- (1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:
  - (i) Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power to or for the public for compensation.

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33. See Opinion & Order, Laser Northeast Gathering Co., No. A-2010-2153371 (Pa. Pub. Util. Comm’n June 14, 2011), <http://www.puc.state.pa.us/pcdocs/1135204.docx>; Opinion & Order, Laser Northeast Gathering Co., No. A-2010-2153371 (Pa. Pub. Util. Comm’n Aug. 25, 2011), <http://www.puc.state.pa.us/pcdocs/1144313.docx>; Order, Pentex Pipeline Co., No. 2011-2230314 (Pa. Pub. Util. Comm’n April 26, 2012), <http://www.puc.state.pa.us/pcdocs/1174737.docx>; Peregrine Keystone Gas Pipeline, L.L.C., No A-2010-2200201 (Pa. Pub. Util. Comm’n), <http://www.puc.state.pa.us/general/ConsolidatedCaseView.aspx?Docket=A-2010-2200201>. And, as of the writing of this Article, an administrative law judge, hearing *Peregrine Keystone Gas Pipeline*, issued a recommended decision rejecting Peregrine’s application seeking public utility status, and Peregrine subsequently withdrew its application. Application to Withdraw, *Peregrine Keystone Gas Pipeline, L.L.C.*, No. A-2010-2200201 (Pa. Pub. Util. Comm’n June 8, 2012), <http://www.puc.state.pa.us/pcdocs/1180525.pdf>.

34. See 26 PA. CONS. STAT. § 103 (2012); 15 PA. CONS. STAT. § 1511(g) (2012) (requiring public utilities (those granted such status by the PaPUC) to exercise eminent domain using the procedures in the Pennsylvania Eminent Domain Code).

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

(2) The term does not include:

- (iii) Any producer of natural gas not engaged in distributing such gas directly to the public for compensation.<sup>35</sup>

In addition to precedent by appellate courts and the PaPUC, the PaPUC has also adopted a policy statement as a guide for determining whether a proposed pipeline project or service will be subject to “public utility” regulation.<sup>36</sup> Included in that policy statement is a list of three, non-binding criteria that the PaPUC will evaluate in making a “public utility” determination.

The Commission will consider the status of a utility project or service based on the specific facts of the project or service and will take into consideration the following criteria in formulating its decision:

- (1) The service being provided by the utility project is merely incidental to nonutility business with the customers which creates a nexus between the provider and customer.
- (2) The facility is designed and constructed only to serve a specific group of individuals or entities, and others cannot feasibly be served without a significant revision to the project.
- (3) The service is provided to a single customer or to a defined, privileged and limited group when the provider reserves its right to select its customers by contractual arrangement so that no one among the public, outside of the selected group, is privileged to demand service, and resale of the service is prohibited, except to the extent that a building or facility owner/operator that manages the internal distribution system serving the building or facility supplies electric power and related electric power services to occupants of the building or facility.<sup>37</sup>

A recent example of a midstream pipeline company navigating these regulatory waters in Pennsylvania is the case of *Laser Northeast Gathering Company, LLC* (“*Laser*”), in which the company decided to seek “public utility” status, obtained such a finding from the PaPUC, and then—while on remand to an administrative law judge for additional fact finding—abruptly withdrew its application on Sep-

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35. See 66 PA. CONS. STAT. § 102 (2012) (emphasis added).

36. 52 PA. CODE § 69.1401 (2012).

37. *Id.* § 69.1401(c) (citing 66 PA. CONS. STAT. §§ 102, 2803 (2012) (relating to definitions)). Policy statements, while not binding, announce the tentative intentions of the Commission for the future. *Pa. Human Relations Comm’n v. Norristown Sch. Dist.*, 374 A.2d 671, 679 (Pa. 1977).

tember 8, 2011.<sup>38</sup> In *Laser*, the PaPUC, citing to precedent in Pennsylvania, held that a company providing gathering services could assert and prove that it is providing services “for the public” and thus, satisfy the definition of “public utility” under the Pennsylvania Public Utility Code.<sup>39</sup>

However, the *Laser* decisions also allowed for a gathering company to provide gathering services on an unregulated, non-public utility basis. The decisions in *Laser* hold that the PaPUC will allow regulated (public utility) and non-regulated gathering in accordance with criteria for making that determination set forth in the *Laser* decisions.<sup>40</sup> The PaPUC clarified operation of its decision regarding applicable law<sup>41</sup> to allow regulated (public utility) and non-regulated gathering in its second order issued in *Laser*:

- Laser will be transporting or conveying natural or artificial gas by pipeline or conduit for compensation.
- Laser will *serve any and all potential customers* needing to move gas through the pipeline system.
- Laser intends to utilize negotiated contracts to secure customers; *contracts are not meant to be exclusionary*, but rather to establish technical requirements, delivery points, and other terms and conditions of service.
- Laser has made *a commitment to expand its capacity, as needed, to meet increased customer demand.*

Conversely, *where these facts are not present, the proposed service would not qualify as “public utility” service* and, thus, would not be subject to economic regulation by the Commission.<sup>42</sup>

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38. See Petition to Withdraw, *Laser Northeast Gathering Co.*, No. A-2010-2153371, at 2 (Pa. Pub. Util. Comm’n Sept. 9, 2011), <http://www.puc.state.pa.us/pcdocs/1145772.pdf>.

39. *Laser Northeast Gathering Co.*, No. A-2010-2153371, at 24 (Pa. Pub. Util. Comm’n June 14, 2011) (footnotes omitted), <http://www.puc.state.pa.us/pcdocs/1135204.docx>. The phrase “for the public” has been developed through vigorously contested case law that spans the better part of the past century. Whether an enterprise is private or public does not depend on the number or types of persons served but upon whether or not it is open to all members of the public who may require the offered service. *Drexelbrook Assocs. v. Pa. Pub. Util. Comm’n*, 212 A.2d 237, 239 (Pa. 1965); *Borough of Ambridge v. Pub. Serv. Comm’n*, 165 A. 47, 48 (Pa. 1933).

According to Pennsylvania courts, the test for determining whether utility services are being offered “for the public” is as follows:

Whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

*Waltham v. Pa. Pub. Util. Comm’n*, 596 A.2d 1221, 1223–24 (Pa. Commw. Ct. 1991) (citing *Drexelbrook*, 212 A.2d at 239).

40. See Opinion & Order, *Laser Northeast Gathering Co.*, No. A-2010-2153371 (Pa. Pub. Util. Comm’n Aug. 25, 2011), <http://www.puc.state.pa.us/pcdocs/1144313.docx>.

41. See 66 PA. CONS. STAT. § 102; 52 PA. CODE § 69.1401(c).

42. Opinion & Order, *supra* note 40, at 19 (emphasis added).

The proceeding was on remand before an administrative law judge for further proceedings, including a determination of whether Laser should get a certificate when, on September 8, 2011, Laser, consistent with the PaPUC's orders in the case, stated that it was abandoning its bid to be treated as a "public utility." In Laser's petition to withdraw, Laser declared that it would operate as a non-regulated, non-public-utility gathering company, citing the criteria in the *Laser* decisions for being a non-regulated gathering company:

Laser's proposed plan and intent has now changed and it: (1) is no longer willing to serve any and all potential customers; (2) will use contracts to select and serve a defined and limited group of customers; and, (3) is no longer committed to expand its facilities to meet demand of the public as would a public utility. Thus, Laser will operate like [the other named and unregulated gathering companies] represent they operate and as the August 25, 2011 Clarification Order permits; that is, as a private pipeline as opposed to a public utility pipeline. (See August 25, 2011 Order at 19). Consequently, Laser no longer desires to pursue its application to become a public utility pipeline.<sup>43</sup>

Laser further observed that "the Commission's Policy Statement at 52 Pa. Code § 69.1401(c)(3) . . . suggests a lack of public utility status" when contracts are used to select and serve a defined and limited group of customers.<sup>44</sup> Like other non-regulated gathering and mid-stream companies in Pennsylvania, Laser stated that its "selected customers will be 'privileged' - as that term is used in the Policy Statement and by the Courts - as compared to the general public who will not be 'privileged to demand service.'"<sup>45</sup> Thus, Laser stated that it would not be a public utility and petitioned to withdraw its application. Laser's reasons for its change of course are not known, but the process of its application and withdrawal highlight the difficulties that companies face in developing midstream pipelines amongst disjointed federal and state regulations.<sup>46</sup>

On December 23, 2009, and prior to initially seeking public utility status as a gathering company before the PaPUC, Laser filed a petition for a declaratory order before the FERC, seeking a determination that its proposed project in Pennsylvania was a gathering system not subject to FERC jurisdiction. In support of its Petition, Laser

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43. See Petition to Withdraw, Laser Northeast Gathering Co., No. A-2010-2153371, at 2 (Pa. Pub. Util. Comm'n Sept. 9, 2011) (footnote omitted), <http://www.puc.state.pa.us//pcdocs/1145772.pdf>. The PaPUC granted Laser's Petition to Withdraw. See Opinion & Order, Laser Northeast Gathering Co., Docket No. A-2010-2153371 (Pa. Pub. Util. Comm'n December 5, 2011), <http://www.puc.state.pa.us//pcdocs/1156203.docx>.

44. Petition to Withdraw, *supra* note 43, at 2 n.1.

45. *Id.*

46. This same course of events unfolded in the Pentex proceeding with the applicant seeking public utility status subsequently filing to withdraw its petition stating that it would not operate as a public utility. See discussion, *supra* note 33.

demonstrated that its pipeline system satisfied the FERC criteria rendering the pipeline system an exempt “gathering” system. In June 2011, the FERC agreed with Laser and found the proposed system to be a gathering system and not subject to its jurisdiction.<sup>47</sup>

### 3. Adopting FERC “Gathering” Test in Pennsylvania

While a potential positive addition to state agency analysis, inserting the FERC test into Pennsylvania review may not be simple, but it could serve as additional guidance when applying the Pennsylvania Policy Statement to the facts of cases before the PaPUC. When addressing the “public utility” status of a pipeline project, the PaPUC addresses as its primary question whether the services being offered are “for the public” as opposed to the physical characteristics of the pipeline system. However, the FERC test does take into account the purpose, location, and operation of the facilities, the general business activities of the owner of the facility, and whether the jurisdictional determination is consistent with the NGA.

Arguably, the primary—if not only—purpose and function of midstream-gathering facilities and services (in Pennsylvania or any state or commonwealth) is to provide gas gathering transportation services (as well as gas treatment, processing, and hydrocarbon liquid extraction and fractionation services) to a limited, privileged, and commercially sophisticated group, being natural gas producers, pursuant to privately negotiated contracts. Many in the midstream-gathering industry would accept this as a given; although, supporting this conclusion or the conclusion that producing companies do not require protection from the economic or other power exerted by midstream-gathering companies with empirical or other data is beyond the scope of this Article. Assuming these conclusions are true, application of the Pennsylvania Policy Statement to a midstream-gathering facility or service strongly suggests that the midstream-gathering company is not a public utility. However, this conclusion is the subject of debate in the recently litigated and pending proceedings before the PaPUC, which also includes a debate over the meaning of some existing, limited precedent on this issue.<sup>48</sup>

If exemptions from “public utility” status were made for “gathering” facilities in Pennsylvania, the industry and the regulatory agencies could save considerable time and effort in providing clear

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47. *See, e.g.*, Laser Marcellus Gathering Co., 130 FERC ¶ 61,162 (2010).

48. Except for the possible existence of laws that might require a midstream-gathering company to provide a field tap for the provision of utility-like services to a residential customer, midstream-gathering companies are not in the business of providing gas or gas services to residential, industrial, or end-use customers, which services are typically the subject of public-utility-like regulation. Even in those situations, the service from the midstream-gathering facility may actually be considered to be provided by the local, public-utility, gas distribution company serving that area.



guidelines for companies looking to expand their presence or simply establish a presence in the midstream pipeline market. Given the strategic location of Pennsylvania in the Marcellus Shale play, such clarity would be good for all parties involved.

### C. *Ohio*

In Ohio, the primary regulatory agencies with oversight of pipelines in general are the Ohio Power Siting Board (“OPSB”) and the Public Utilities Commission of Ohio (“PUCO”).<sup>49</sup> The recent enactment of Senate Bill 315 has modified existing statutes to relieve gas gathering pipelines and gathering transportation activity from PUCO economic regulation and OPSB siting regulation.<sup>50</sup>

#### 1. OPSB Jurisdiction: “Major Utility Facility” Analysis

The Ohio Revised Code (“ORC”) chapter 4906 outlines the authority of the OPSB. The OPSB is authorized to issue certificates of environmental compatibility and public need for the construction, operation, and maintenance of a “major utility facility” as defined in ORC section 4906.01 because no person may construct a “major utility facility” in Ohio without first obtaining a certificate authorizing such construction from the OPSB.<sup>51</sup> This entails a lengthy permit application process that includes public meetings, hearings, OPSB staff investigations, site visits, and environmental assessments, among other steps.<sup>52</sup> Gathering lines were exempt from this certificate or permit process at OPSB; however, they were not defined in any detail by applicable rules.

ORC section 4906.01(B)(1)(c), as amended by Senate Bill 315, defines “major utility facility” to include

[a] gas pipeline that is greater than five hundred feet in length, and its associated facilities, is more than nine inches in outside diameter and is designed for transporting gas at a maximum allowable oper-

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49. As in other states and commonwealths, other regulatory agencies, such as the Ohio Environmental Protection Agency and the U.S. Army Corps of Engineers, may also be involved in permitting the project, depending on the location, nature, and the scope of the proposed pipeline facilities, but such entities are not discussed in this Article.

50. S.B. 315, 129th Gen. Assemb., Reg. Sess. (Ohio 2012). As of the writing of this Article, the Ohio legislature passed Senate Bill 315, which was signed by the Governor of Ohio on June 11, 2012. Senate Bill 315 imposed some additional safety regulation (and notice of construction filing procedures) on gathering pipelines that might otherwise have been exempt from such regulation, but those additional requirements are beyond the scope of this Article.

51. OHIO REV. CODE ANN. § 4906.04 (LexisNexis 2000).

52. OHIO POWER SITING BD., OHIO POWER SITING PROCESS FLOWCHART (May 2011), <http://www.opsb.ohio.gov/emplibary/files/opsb/flowchart.pdf>.

ating pressure in excess of one hundred twenty-five pounds per square inch.<sup>53</sup>

However, “major utility facility” does not include:

Gathering lines, gas gathering pipelines, and processing plant gas stub pipelines as those terms are defined in section 4905.90 of the Revised Code and associated facilities . . . .<sup>54</sup>

Thus, Senate Bill 315 has made it clear that there is no OPSB jurisdiction over gas gathering in Ohio.

## 2. PUCO Jurisdiction: Public Utility Analysis

The PUCO is “vested with the power and jurisdiction to supervise and regulate public utilities . . . , to require all public utilities to furnish their products and render all services exacted by the commission or by law . . . .”<sup>55</sup>

The controlling statute defines “public utility” to include the following:

(5) A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state . . . .

All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas companies providing for the supply of natural gas and for compensation for the same are subject to the jurisdiction of the

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53. In the current OPSB regulations, a “natural gas transmission line” is defined as a line that is greater than nine inches in outside diameter as well as capable of transporting gas at pressures in excess of 125 pounds per square inch. OHIO ADMIN. CODE § 4906-1-01(Q) (2012).

54. Act effective Sept. 10, 2012, § 4906.01(B)(2)(e), 2012 Ohio Laws (to be codified at OHIO REV. CODE ANN. § 4906.01(B)(2)(e)). After the enactment of Senate Bill 315, “gathering lines” and “gas gathering pipelines” will be defined as follows:

(C) ‘Gathering lines line’ and the ‘gathering of gas’ have the same meaning as in the Natural Gas Pipeline Safety Act and the rules adopted by the United States department of transportation pursuant to the Natural Gas Pipeline Safety Act, including 49 C.F.R. part 192, as amended.

(D) ‘Gas gathering pipeline’ means a gathering line that is not regulated under the Natural Gas Pipeline Safety Act and the rules adopted by the United States department of transportation pursuant to the Natural Gas Pipeline Safety Act, including 49 C.F.R. part 192, as amended. ‘Gas gathering pipeline’ includes a pipeline used to collect and transport raw natural gas or transmission quality gas to the inlet of a gas processing plant, the inlet of a distribution system, or to a transmission line.

S.B. 315, 129th Gen. Assemb., Reg. Sess. (Ohio 2012) (to be codified at OHIO REV. CODE ANN. § 4905.90(C)–(D)). As stated above, prior to the addition of the above language pursuant to enactment of Senate Bill 315, the OPSB statute exempted gathering lines from its jurisdiction; however, the statute, case law, and the rules promulgated to implement the statute did not provide a detailed definition of gathering lines.

55. OHIO REV. CODE ANN. § 4905.04 (LexisNexis Supp. 2012). According to the Ohio Supreme Court in *Industrial Gas Co. v. Public Utilities Commission*, 135 Ohio St. 408, 413 (1939), “[t]he question whether a business enterprise constitutes a public utility is determined by the nature of its operations.”

public utilities commission. The commission, upon application made to it, may relieve any . . . gatherer of natural gas, defined in this section as a gas company or a natural gas company, of compliance with the obligations imposed by this chapter and Chapters 4901., 4903., 4907., 4909., 4921., and 4923. of the Revised Code, so long as the . . . gatherer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as the . . . gatherer does not engage in the distribution of natural gas to consumers.

(6) A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state, *but not when engaged in the business of the transport associated with gathering lines, raw natural gas liquids, or finished product natural gas liquids.*<sup>56</sup>

With the enactment of Senate Bill 315, it is now clear that the language added to subsection (6) exempts the business associated with gathering line transportation from PUCO economic regulation. With respect to subsection (5), there previously was no definition of “gatherer of natural gas” as that term is used in the pertinent statute or the PUCO regulations. There are, however, several decisions where relief from regulation has been granted to gatherers pursuant to this provision, but such relief required the filing of a formal waiver application.<sup>57</sup> As set forth above in the discussion around the OPSB

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56. S.B. 315, 129th Gen. Assemb., Reg. Sess. (Ohio 2012) (emphasis added) (to be codified as amended at OHIO REV. CODE ANN. § 4905.05(A)(5)–(6)). The italicized language was added by Senate Bill 315 to clarify that the referenced gathering activity is not subject to PUCO economic (rate and tariff) regulation.

57. Res. Am., Inc., No. 91-417-GA-ARJ, 1991 Ohio PUC LEXIS 415, at 4–5 (Pub. Util. Comm’n Mar. 28, 1991); Euroamerican Transmission Co., No. 85-1786-GA-ARJ, 1986 Ohio PUC LEXIS 528 (Pub. Util. Comm’n Jan. 14, 1986); see also Atlas Am., Inc., No. 99-1519-GA-ARJ, 2000 Ohio PUC LEXIS 30 (Pub. Util. Comm’n Jan. 13, 2000) (granting gathering line system relief from jurisdiction and noting that “[t]he Commission has previously granted relief from jurisdiction to transporters, such as the applicant[s] . . . which allow the use of their gathering lines by producers for a fee”); Mark Res. Corp., No. 85-320-GA-ARJ, 1985 Ohio PUC LEXIS 1580 (Pub. Util. Comm’n May 14, 1985) (applicants operated wells and a gathering system where gas was delivered to LDCs and unrelated third parties were allowed to transport their case over the gathering system as well); Bloomfield Pipeline Ltd., No. 82-1301-GA-ARJ, (Pub. Util. Comm’n 1982) (applicant allowed producers to use its gathering system for a fee; PUCO found that Bloomfield Pipeline’s was not a public utility, but instead a private business, reasoning that the applicant could operate a gathering system without submitting to PUCO jurisdiction). *But see* Orndoff v. Pub. Util. Comm’n, 21 N.E.2d 334, 336 (Ohio 1939) (finding that natural gas from thirty-nine wells on nineteen leasehold estates sold to one company made Orndoff a public utility). In addition, the Ohio Legislative Service Commission’s final bill analysis of Ab. Sub. S.B. 187 describes the amendments to ORC § 4905.03:

Under continuing law, the PUCO, upon application to it, may relieve any ‘producer of natural gas,’ defined as a gas company or natural gas company, of compliance with the obligations imposed under the statutes governing utilities that are subject to PUCO regulation if the producer is not affiliated with or under the control of a gas company or natural gas company engaged

statutory language and requirements, Senate Bill 315 added a definition for “gas gathering pipeline” to existing definitions of “gathering line” and the “gathering of gas.”

### 3. Adopting FERC “Gathering” Test in Ohio

In Ohio, with the enactment of Senate Bill 315, there is no question that gas gathering lines and activities are exempt from PUCO economic regulation and OPSB siting regulation. The definitions of “gathering line,” “gathering of gas,” and “gas gathering pipeline” rely on the way those terms are used in the federal pipeline safety arena.<sup>58</sup> While Senate Bill 315 largely clarifies the extent of regulation (or lack thereof) with respect to gathering, and application of RP-80 (as incorporated by reference) may leave little room for ambiguity, the FERC test for determining whether a pipeline system is “gathering” may still be looked to and may serve a purpose in Ohio in limited situations to assist in clarifying whether or not a particular pipeline is gathering and appropriately exempt from PUCO and OPSB regulation.

## D. Kentucky

### 1. Kentucky Public Service Commission (“KYPSC”) Jurisdiction

It is important to note that the KYPSC has statutory authority to regulate intrastate pipelines, but pipelines dedicated to gathering are not considered intrastate pipelines and are therefore, not subject to regulation by the KYPSC.<sup>59</sup> Determining whether a pipeline qualifies as a gathering line is difficult because the KYPSC has not promulgated regulations directly addressing the topic. Some questions for whether pipelines in Kentucky will be classified as gathering lines include: (i) Will the lines directly connect to wells; (ii) Will gas flowing through the lines be compressed; (iii) Will gas flowing through the lines be processed gas; and (iv) the characteristics of the lines, e.g. line diameter, length, operating pressure. Pipelines will be considered intrastate if the following elements are satisfied: (i) the pipelines trans-

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in the transportation or distribution of natural gas or does not engage in the distribution of natural gas to consumers. *The act allows gatherers to apply for this relief.*

SEN. WHITE, OHIO LEG. SERV. COMM’N, S.B. 187 BILL ANALYSIS (1997) (emphasis added), <http://lsc.state.oh.us/coderev/ans122.nsf/All%20Senate%20Bills%20and%20Resolutions/1BD883A12CA9C83D85256599006D7C0D>.

58. See S.B. 315, 129th Gen. Assemb., Reg. Sess. (Ohio 2012) (to be codified at OHIO REV. CODE ANN. § 4905.90(C)–(D)). OHIO ADMIN. CODE 4901:1-16-01(e) (2012). The regulatory provision that amplifies this statute also defines “gathering line” in the same manner as in the federal pipeline safety rules, 49 C.F.R. § 192.3 (2011). Without getting into significant detail, the federal pipeline safety rules incorporate RP-80 by reference for purposes further expressed in those rules. See 49 C.F.R. § 192.7, 192.8 (2011). See also discussion, *supra* note 3.

59. Research with respect to KYPSC case law is somewhat limited as the commercial databases only provide access to orders dating back to 1996, while the KYPSC online database only provides access to orders dating back to the mid-1980s.

port the gas of others for compensation; and (ii) the production, gathering, treatment, processing, transportation, and delivery of the gas transported occurs entirely within Kentucky. If found to be an intrastate pipeline, the pipeline would have to provide nondiscriminatory access to its line(s) and would be subject to capacity constraints.

When regulating utilities, the KYPSC has made it clear that utility status is reserved for end-use service. In other words, should a pipeline company decide to provide end-use service to a consumer, the company's pipeline will be considered a utility that is subject to full regulation by the KYPSC. If no end-use service is provided, it is unlikely the KYPSC would consider a pipeline company operating gathering lines to be a utility.

A pipeline classified as a "common carrier" is obligated to "receive and transport the oil and gas that it is offered on a proportionate basis, based on the daily production of each producer whose oil or gas is offered for transportation."<sup>60</sup> A pipeline will be classified as a common carrier only when it is receiving, transporting, or delivering natural gas to an end-user. An owner of a natural gas well or gathering line is obligated to provide end-use service from such to the following consumers: (i) the owner of the property on which the well or gathering line is located; and (ii) the owner of property whose point of service is located within one-half (1/2) air miles of the well or gathering line. Rates for said service are determined by the KYPSC.

#### *a. Exemption for Gathering Facilities*

Pursuant to statute, gas-gathering activities are not regulated by the KYPSC. Indeed, while the KYPSC has been empowered to regulate intrastate pipelines, it has not been authorized to regulate natural gas gathering activities. For instance, excluded from the definition of "intrastate pipelines" is "any pipeline dedicated to storage or gathering or low pressure distribution of natural gas."<sup>61</sup> In a proceeding instituted by the KYPSC to exercise its ability to regulate intrastate pipelines, the KYPSC noted as follows:

The [KYPSC], pursuant to KRS 278.505, may require transportation by intrastate pipelines or local distribution companies ("LDCs") with unused or excess capacity. The definitions of both intrastate pipeline and LDC *exclude any part of any pipeline used for storage or gathering or low pressure distribution of natural gas*. The [KYPSC] therefore clarifies its Order entered May 29, 1987, to the extent that the part of any pipeline dedicated to storage or gathering or low pressure distribution of natural gas is not required to offer nondiscriminatory transportation of gas.<sup>62</sup>

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60. KY. REV. STAT. ANN. § 278.470 (LexisNexis 2003).

61. KY. REV. STAT. ANN. § 278.504(1) (LexisNexis 2003) (emphasis added).

62. Order on Reh'g, An Investigation of the Impact of Federal Policy on Natural Gas to Kentucky Consumers and Suppliers, Admin. Case No. 297, at 3 (Ky. Pub. Serv.

Determining whether a pipeline qualifies as a gathering line is difficult, as the KYPSC has not promulgated regulations addressing the topic. However, the KYPSC has adopted regulations dealing with gas service to consumers from gathering lines, and it has adopted the following definition: “‘Gathering line’ means any pipe which carries un-compressed gas and which is used to gather gas from a producing gas well.”<sup>63</sup> Given that the KYPSC has adopted the foregoing definition, it is reasonable to assume a similar definition may be applied to the gathering exception discussed above. Moreover, factors likely to influence whether proposed pipelines in Kentucky will be considered gathering lines include: (i) whether the lines are directly connected to wells; (ii) whether the gas that flows through the lines is compressed; (iii) whether the gas flowing through the lines has been processed; and (iv) the characteristics of the lines, e.g., line diameter, length, operating pressure.

#### b. *Public Utility Analysis*

As part of its regulatory authority, the KYPSC is given jurisdiction to regulate “all utilities” in Kentucky.<sup>64</sup> “Utility” is defined to include, among other things, “the transporting or conveying of gas, crude oil, or other fluid substance by pipeline *to or for the public, for compensation.*”<sup>65</sup>

The KYPSC has observed that “the term ‘public utility’ implies a public use in service to the public.”<sup>66</sup> More specifically, the key “characteristic of a public utility is that of service to, or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities.”<sup>67</sup> In order to be classified as a public utility, “[t]here must be a dedication or holding out, either express or implied of produce [sic] or services to the public as a class. The term precludes the idea of service which is private in its nature and is not to be obtained by the public.”<sup>68</sup>

The key factor in determining utility status in Kentucky is whether the service or product is being offered “to or for the public,” i.e., whether the product or service is being offered to “one or more end-

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Comm’n Oct. 23, 1987) (emphasis added), [http://psc.ky.gov/order\\_vault/Orders\\_1980-1988/Orders\\_1987/19000297\\_10231987.pdf](http://psc.ky.gov/order_vault/Orders_1980-1988/Orders_1987/19000297_10231987.pdf).

63. 807 KY. ADMIN. REGS. 5:026(5) (2012).

64. KY. REV. STAT. ANN. § 278.040(2) (LexisNexis 2003).

65. KY. REV. STAT. ANN. § 278.010(3)(c) (LexisNexis Supp. 2011) (emphasis added).

66. Duke Energy Metcalfe, L.L.C., No. 2001-005, 2001 Ky. PUC LEXIS 642, at 3 (Ky. Pub. Serv. Comm’n Mar. 23, 2001) (quoting 64 AM. JUR. 2d *Public Utilities* § 1 (2001)).

67. *Id.*

68. *Id.*

users.”<sup>69</sup> When a product or service is offered to an end-user or end-users, the person or entity offering the product or service will be subject to the KYPSC’s full regulation.<sup>70</sup>

Whether the person or entity offers other services that are non-utility in nature is insignificant. Indeed, the KYPSC has found that “[t]he sale of gas to the public supersedes other business activities of a utility and subjects it to” regulation.<sup>71</sup> As an example, “a pipeline company or producer that generally transports gas, but which sells some of its gas to an end-user, will be considered a distributor and seller of natural gas.”<sup>72</sup>

### c. Regulation of Intrastate Pipelines

In addition to giving the KYPSC the authority to regulate utilities, the Kentucky Legislature provided that the KYPSC

may, by rule or order, authorize and require the transportation of natural gas in *intrastate commerce by intrastate pipelines* . . . with unused or excess capacity not needed to meet existing obligations of the pipeline . . . , for any person for one or more uses, as defined by the commission by rule, in the case of (a) [n]atural gas sold by a producer, pipeline or other seller to such person; or (b) [n]atural gas produced by such person.<sup>73</sup>

As discussed in detail below, the KYPSC has decided to do so by order.

Whether a pipeline is subject to the foregoing regulation requires an examination of the statutory definitions of “intrastate commerce” and “intrastate pipeline.” The Kentucky Code defines “intrastate pipeline” as “any utility or any other person engaged in natural gas transportation in intrastate commerce, for compensation, to or for another person or to or for the public, but shall not include any part of any pipeline dedicated to storage or gathering or low pressure distribution of natural gas . . . .”<sup>74</sup> As for “intrastate commerce,” the Kentucky Code provides that such “includes the production, gathering, treatment, processing, transportation and delivery of natural gas entirely within . . . [Kentucky] which is not subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act or the Natural Gas Policy Act of 1978.”<sup>75</sup> In sum, a pipeline that provides transportation service to others for compensation is subject to

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69. Order, An Investigation of the Impact of Federal Policy on Natural Gas to Kentucky Consumers and Suppliers, Admin. Case No. 297, at 20 (Ky. Pub. Serv. Comm’n May 29, 1987), [http://psc.ky.gov/order\\_vault/Orders\\_1980-1988/Orders\\_1987/19000297\\_05291987.pdf](http://psc.ky.gov/order_vault/Orders_1980-1988/Orders_1987/19000297_05291987.pdf).

70. *See id.*

71. *Id.*

72. *Id.*

73. KY. REV. STAT. ANN. § 278.505(1) (LexisNexis 2003) (emphasis added).

74. KY. REV. STAT. ANN. § 278.504(1) (LexisNexis 2003).

75. *Id.* 278.504(4).

regulation by the KYPSC as an intrastate pipeline, provided the gas transported is produced, gathered, treated, processed, transported, and delivered entirely within Kentucky.

Pursuant to an order, the KYPSC has accepted the Kentucky legislature's invitation to regulate intrastate pipelines: "Given the increase in demand for, and the provision of, transportation, the [KYPSC] finds it necessary to regulate any company that transports gas to the public for compensation. This includes any entity—producer, pipeline company, distributor or other person(s)—that has facilities used to transport gas."<sup>76</sup> Furthermore, the KYPSC has provided as follows: "[p]ursuant to KRS 278.505, the [KYPSC] is requiring non-discriminatory transportation of natural gas by LDCs and transporters."<sup>77</sup> In requiring the regulation of intrastate pipelines, the KYPSC reasoned that the regulation was

[n]ecessary in order to provide efficient use of existing facilities, avoid duplication of facilities, assure nondiscriminatory transportation, and encourage use of locally produced gas. The [KYPSC] is of the opinion that the facilities, practices, and services of transporters must be regulated to assure compliance with the objections of this proceeding . . . .<sup>78</sup>

The service offered by intrastate pipelines regulated by the KYPSC must be nondiscriminatory. That is, the transportation service must "be provided without discrimination as to type and location of customer."<sup>79</sup> Such service is available "to any customer who requests it on a first come, first served basis[,] provided the pipeline has available capacity."<sup>80</sup> Available capacity is presumed, and it is the burden of the intrastate pipeline "to prove that capacity is not available."<sup>81</sup>

When offering intrastate pipeline transportation service, the KYPSC requires intrastate pipelines to have on "file a nondiscriminatory transportation tariff."<sup>82</sup> The rates included in an intrastate pipeline's tariff must "be fair and reasonable."<sup>83</sup> In the setting of intrastate transportation rates, the KYPSC has held that "rates

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76. Order, *supra* note 69, at 19.

77. Order on Reh'g, *supra* note 62, at 6. The KYPSC's use of the term "transporters" is of no significance, as the KYPSC apparently classifies intrastate pipelines subject to regulation as a "transporting utility": "a prima facie showing has been made that Kentucky Energy should be designated as an intrastate pipeline *which is operating as a transporting utility . . .*" Ky. Energy Transmission Corp., No. 92-177, at 2 (Ky. Pub. Serv. Comm'n May 1, 1992) (emphasis added), [http://psc.ky.gov/order\\_vault/Orders\\_1992/199200177\\_05011992.pdf](http://psc.ky.gov/order_vault/Orders_1992/199200177_05011992.pdf).

78. Order, *supra* note 69, at 20–21.

79. *Id.* at 53.

80. *Id.* at 53–54.

81. *Id.* at 54.

82. *Id.* at 53.

83. KY. REV. STAT. ANN. § 278.505(2) (LexisNexis 2003) (emphasis added).



charged for . . . transportation may be determined in the marketplace.”<sup>84</sup>

Another burden associated with being regulated by the KYPSC as an intrastate pipeline is the requirement to obtain a certificate of convenience and necessity prior to constructing facilities.<sup>85</sup> Indeed, the KYPSC has held that an intrastate pipeline “is required to obtain a certificate of convenience and necessity for construction of facilities . . . .”<sup>86</sup>

Factors that may determine whether proposed Kentucky pipelines will be considered intrastate pipelines include: (i) whether the lines are performing gathering activities; (ii) whether lines will cross state lines; (iii) whether the gas transported by the lines will be produced, gathered, treated, processed, transported, and delivered entirely within Kentucky; and (iv) whether the gas transported has been processed.

#### d. Regulation of Common Carriers

A pipeline is a common carrier only when it is receiving, transporting, or delivering natural gas to an end-user. Any company in Kentucky engaged in the “receiving, transporting or delivering [of] a supply of oil or natural gas for *public consumption* is declared to be a *common carrier*, and the receipt, transportation and delivery of natural gas into, through and from a pipeline operated by any such company is declared to be a *public use*.”<sup>87</sup> When oil or gas is received, transported, or delivered by a pipeline in a manner to be for public consumption, the pipeline

shall at all reasonable times receive, for transportation and delivery, from such pipes as may be connected up with any main or tributary lines, all oil or gas that may be held and stored or ready for delivery, if the main or tributary line has the means or capacity to receive, transport or deliver the oil or gas that is offered.<sup>88</sup>

If the pipeline has capacity constraints, then “the company operating the main or tributary line shall receive and transport the oil or gas that is offered on a proportionate basis, based on the daily production of each producer whose oil or gas is offered for transportation.”<sup>89</sup>

To determine whether a pipeline is operating as a common carrier, a determination must be made as to whether the pipeline is operating for “public consumption.” Similar to the “to or for the public” analysis regarding utility status, “public consumption” implies ultimate con-

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84. An Investigation of Natural Gas Retail Competition, Admin. Case No. 2010-00146, 2010 WL 3735850, at 20 (Ky. Pub. Serv. Comm’n Sept. 21, 2010).

85. KY. REV. STAT. ANN. § 278.020(1) (LexisNexis Supp. 2011).

86. Order on Reh’g, *supra* note 62, at 7.

87. KY. REV. STAT. ANN. § 278.470 (LexisNexis 2003) (emphasis added).

88. KY. REV. STAT. ANN. § 278.490 (LexisNexis 2003).

89. *Id.*

sumption by consumers: “The Kentucky statute [278.470] applies only to companies engaged in the transportation of gas ‘for public consumption’—that is, for ultimate use by Kentucky consumers.”<sup>90</sup>

*e. Obligation to Serve Field Tap Customers*

There is an obligation in Kentucky for gas pipeline companies to provide end-use service from wells and gathering lines. Specifically, under certain circumstances, a “gas pipeline company obtaining gas from producing wells located within [Kentucky]” is obligated to provide end-use service.<sup>91</sup> The circumstances under which a real property owner has the right to service from a well or a gathering line are as follows: (i) “the owner of the property on or over which any producing well or gas gathering pipeline is located”; or (ii) “the owner of real estate whose property and point of desired service is located within one-half (1/2) air-mile of said company’s producing gas well or gas gathering pipeline.”

As a right to receiving service from a well or gathering line, certain terms and conditions apply. Examples of the key terms and conditions are as follows: (i) the rates and charges for service from a well or gathering line are determined by the KYPSC;<sup>92</sup> (ii) the gas pipeline company or producer has no responsibility to maintain “any fixed or specified gas pressure”;<sup>93</sup> (iii) a gas pipeline company or producer has the right “to abandon any gas well or any gathering pipeline, or any part thereof, and to remove any such abandoned pipeline or lines”;<sup>94</sup> and (iv) the expense associated with “the tap or hookup shall be borne by the consumer.”<sup>95</sup>

## 2. Division of Oil and Gas Regulation

In Kentucky, the construction of gathering lines is permitted through the Department of Natural Resources, Division of Oil and Gas (“DNR”). A section of the Kentucky statutes, and part of a larger statutory provision governing the conservation and protection of all mineral resources, provides that state government is responsible for “regulating all aspects of oil and gas exploration, production, development, gathering, and transmission . . . .” It authorizes the DNR to “promulgate regulations relating to gathering lines . . . .”<sup>96</sup> “Gathering lines” are defined in the regulations as follows:

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90. *Langford v. Equitable Life Assurance Soc’y of the U.S.*, 32 B.R. 746, 748 (Bankr. W.D. Ky. 1982).

91. KY. REV. STAT. ANN. § 278.485 (LexisNexis 2003).

92. *Id.* § 278.485(1).

93. *Id.* § 278.485(4).

94. *Id.* § 278.485(6).

95. *Id.* § 278.485(8).

96. KY. REV. STAT. ANN. § 353.500(2) (LexisNexis 2003).

‘Gathering line’ means any pipeline that is installed or used for the purpose of transporting crude oil or natural gas from a well or production facility to the point of interconnection with another gathering line, an existing storage facility or a transmission or main line, including all lines between interconnections, except those lines or portions thereof subject to the exclusive jurisdiction of the United States Department of Transportation under 49 C.F.R. Parts 1191, 192, 194 and 195.<sup>97</sup>

Prior to the installation of a gathering line, a permit application must be filed with the DNR for the installation and operation of the line.<sup>98</sup> The operator of any gathering line, including one existing as of the date of promulgation of the rule, must obtain a gathering line operator’s license.<sup>99</sup> A selling operator must require a successor operator to notify the DNR in advance of commencing use or operation of the gathering line.<sup>100</sup> Many other requirements (testing the line, burial depth, marking the line, construction techniques when crossing agricultural lands, on-site inspections, record-keeping requirements, emergency response plans) apply and are set forth in these regulations.

### 3. Adopting FERC “Gathering” Test in Kentucky

The KYPSC has not promulgated regulations defining what qualifies as a gathering line, nor has it established considerations for determining such. While the KYPSC has defined “gathering line” by such features as the carrying of uncompressed gas, the FERC test would provide a more robust rubric to evaluate pipeline systems to determine whether they should be treated as unregulated “gathering.” The DNR’s regulations are appropriately narrow and confined to address a limited class of gas gathering pipelines, which cannot and should not be expanded by the FERC test absent some additional action in Kentucky before the KYPSC or its legislature. The FERC test could also be used, if necessary, to compliment the detailed definition of “gathering” in the DNR’s regulations without broadening the DNR’s already existing and more detailed regulations. The adoption of the FERC test also would not impinge on the established standards of determining what entities are subject to regulation as public utilities or intrastate facilities.

## V. CONCLUSION

Monumental financial investments are required to construct the required midstream-gathering pipeline facilities to transport all of the

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97. 805 KY. ADMIN. REGS. 1:190 § 1(5) (2012). The regulations apply to gathering lines installed after March 18, 2004. *Id.* § 2.

98. *Id.* § 5.

99. *Id.* § 3.

100. *Id.* § 6.

expected Utica and Marcellus natural gas production to the market place. These investments will most likely be concentrated in West Virginia, Pennsylvania, and Ohio. Businesses making decisions about those financial investments always seek regulatory certainty with respect to how the investment will be regulated by the states, commonwealths, and the FERC. In the face of state and commonwealth law and regulation that does not provide significant guidance on the extent to which pipeline systems are “gathering” facilities (exempt from economic or siting regulation), it would be most helpful if there were another body of law and precedent to look to in order to assist state and commonwealth regulators making that determination. The FERC test and the extensive body of FERC precedent applying that test to determine whether a pipeline system is “gathering” is well developed. It could be adopted or consulted by the states and commonwealths addressed in this Article in a manner appropriate for them (e.g., rulemaking, policy statement, and decisional case-by-case) without significant obstacles from the existing law and regulation of each.