

APPLICATION OF LASER NORTHEAST GATHERING COMPANY, LLC

June 02, 2011

On May 19, 2011, the Pennsylvania Public Utility Commission (“PUC” or “Commission”) announced its long-awaited decision regarding the Laser Northeast Gathering Company, LLC (“Laser”), case that contains vital issues of first impression developed in a contested, on-the-record Application proceeding. While the final PUC Order has not yet been issued, the details, as gleaned from the various Commissioners’ statements, provide insight and PUC direction as to its ultimate ruling in this contentious matter.

Background

By way of brief background, on January 19, 2010, Laser filed with the PUC an Application for a Certificate of Public Convenience to begin to offer gas gathering by pipeline to the public, in certain areas of Susquehanna County, Pennsylvania and transporting (or conveying) service through to Broome County, New York to a tie-in with the Millennium interstate pipeline. Laser argued that the Public Utility Code provisions are clear that transporting natural gas “to or for the public” (open to a first-come, first-served basis up through system capacity) comprises Public Utility service. Laser also argued that “minimal rate regulation,” or “light-handed regulation,” had a firm statutory basis, and in fact was already in practice and otherwise endorsed by the PUC.

Many Protests and Petitions to Intervene were subsequently filed, including by several state advocates, many industry participants, many affected landowners, and several PA legislators. On September 10, 2010, Laser and several parties submitted a Joint Petition for Settlement (“Settlement”) intended to resolve all issues. Briefs and Reply Briefs were filed by the settling parties, as well as other active, non-settling parties.

Recommended Decision

On December 1, 2010, Administrative Law Judge (“ALJ”) Susan D. Colwell issued her Recommended Decision (“R.D.”) rejecting the Settlement and denying Laser’s Application. The ALJ found that Laser’s proposed service does not constitute public utility service within the meaning of Section 102 of the Public Utility Code, since its potential customers are not part of the statutory definition of “public.” In addition, the ALJ found that the Commission may not entertain under any procedural vehicle the notion of “light-handed” regulation, in which the PUC would have oversight over gas safety and not rates and rate design. Accordingly, the ALJ held that the Commission has no jurisdiction over gas gathering service, or the terms of the non-unanimous Settlement.

May 19 Public Meeting

At the May 19, 2011, Public Meeting, the Commission, by a 3-2 vote, essentially rejected the ALJ's R.D. A majority of the PUC approved Commissioner Wayne Gardner's Motion, which held that Laser's proposed natural gas gathering and transporting service does indeed qualify as Public Utility service. Commissioner Gardner found that Laser will provide service to "any customer requiring transportation of gas over its system to the extent capacity exists," and not just to a defined, privileged and limited group of customers. In addition, the Commissioner found the Settlement terms, upon qualification with more detail, are indeed applicable and enforceable. The Settlement terms are key because they provide voluntary restrictions on eminent domain, certain best practices and various other landowner protections, some of which were under protective seal. Of particular interest to Commissioner Gardner is the Settlement term providing that Laser agrees not to seek an exclusive service territory. As such, according to a majority of PUC Commissioners, Laser's scope of service rises to the level of Public Utility service.

The Commissioner specified that while Laser's gas gathering and transportation service can meet the definition of "public utility," not all gathering and transportation service providers will be considered public utilities and subject to PUC jurisdiction. As the Commissioner noted: "Whether such entities are public utilities turns on the specific facts surrounding each pipeline's operations, including whether the gathering and transportation services are offered to or for the 'public.'"

Vice Chairman Coleman issued a concurring Statement, noting eminent domain authority as a valid concern and that he supports affording greater protections to property owners affected by Laser's project. He indicated that Section 1501 of the Public Utility Code gives the Commission discretion to regulate the conduct of certificated gathering companies in their interactions with property owners, but the history of pipeline regulation in Pennsylvania shows that "the legislature determined that public interest would be served by providing for pipeline utilities that enable producers and shippers to bring their oil, gasoline, natural gas, etc., to market at reasonable rates, and that eminent domain was a sometimes necessary element to effectuate this intent."

Commissioner Gardner did dismiss Laser's request for "light-handed" regulation, but believes that approving negotiated rates as tariffed rates is permissible and consistent with what the PUC has seen from other jurisdictional utilities.

Remand

However, the Commissioner believes the Settlement terms and Application should be remanded to the ALJ to determine if they are in the public interest and “the granting of a certificate of public convenience is necessary or proper for the service, accommodation, convenience, or safety of the public under the applicable sections of the Public Utility Code” and specifically directed that the following questions be answered to more fully develop the record:

- If a Certificate of Public Convenience is determined to be necessary or proper, should any conditions be imposed as conditions precedent?
- Should an exclusive service territory be considered?
- Should Laser’s interconnect contracts be publicly available to police and prevent unreasonable discrimination in violation of Section 1304 of the Code?
- Is Laser’s proposed tariff reasonable under the Code?
- Are the Settlement terms in the public interest?

Late Intervention / Opportunity for Active Participation

One of the most interesting and compelling components is the directive that, upon remand, the ALJ “shall permit intervention by interested persons not currently participating in the proceeding for a limited time,” ostensibly to complete and fully flesh out the record. This invitation allows parties not yet active, but nonetheless wishing to weigh-in and be heard on the salient issues yet to be decided, to now (for a limited time) do so.

PUC Order

Of course, once the PUC issues its Order at this docket, more specific detail will be available to more fully understand the Commission’s intent. However, based on the controlling Motion and the various Commissioners’ Statements, it appears the ultimate PUC determination will be as set forth above as well as in the forthcoming deliberations before the ALJ. We will advise further upon issuance of the PUC Order.

Information / Intervention

In the interim, if you have questions or need more information regarding the status or regulatory implications of this case on your company, or, if you are interested in formally intervening or providing comment, please feel free to contact Jim Dougherty (jdougherty@mwn.com) of McNees Wallace & Nurick LLC, at 717.237.5249.

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