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News & Insights from the Marcellus and Utica Shales



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Pa. PUC Developments on Regulation of Midstream Operators

In two recent developments, the Pennsylvania Public Utility Commission ("PUC" or "Commission") appears to have settled, at least for the time being, the long outstanding question of whether midstream natural gas services might generally be regulated as "public utility" services. As summarized below, these developments indicate that, until specific facts and circumstances dictate otherwise, the PUC will not, as a rule, exercise its "public utility" jurisdiction over these operations.

On August 20, 2012, the PUC entered into a Joint Stipulation ("Stipulation") with the Pennsylvania Independent Oil and Gas Association ("PIOGA") in a case before the Commonwealth Court of Pennsylvania that centered on this "public utility" regulatory question. By way of background, PIOGA initiated the Commonwealth Court proceeding in late 2011 with a Petition for Review of two PUC Orders that, in the context of a PUC proceeding by Laser Northeast Gathering Company, LLC ("Laser"), arguably would have provided the basis for characterizing all midstream natural gas gathering services as "public utility" services. Specifically, as argued by PIOGA, although Laser ultimately withdrew its application for "public utility" status, the Commission's Orders in the underlying case ultimately could have established precedent for future determinations by the PUC that all other such midstream developers are "public utilities" subject to the PUC's jurisdiction. For this reason,

In The News



The State of Drilling in the Empire State

by **Kevin M. Eddy**
Pittsburgh

Despite being home to the first natural gas well in the United States, the State of New York has prohibited the use of hydraulic fracturing within its borders. Since the election of Governor Andrew Cuomo, the question in the oil and gas industry is whether he will lift the ban. Shortly after his election, Governor Cuomo tasked the Department of Environmental Conservation with drafting rules to allow for hydraulic fracturing. While the DEC issued proposed rules and held public hearings on those proposed rules, the likelihood of hydraulic fracturing coming to New York hit a major stumbling block.

[Read the full article on our website.](#)



Pa. Litigation Update: *Butler* and Act 13

October has been a busy month for oil and gas-related issues before the Pennsylvania Supreme Court. Two questions with major implications for drilling companies were heard.

The first, [*Butler v. Charles Powers Estate*](#), concerns the interpretation of mineral reservation clauses in deeds. The Supreme Court was asked to determine whether the Superior Court erred in remanding the case to the trial court to allow testimony regarding scientific and historical evidence about the

PIOGA sought the Commonwealth Court's reversal of the PUC's *Laser* orders on the grounds that natural gas gathering services do not meet the definition of "public utility" services under the Commission's regulations.

The Stipulation between PIOGA and the PUC resolved this basic definitional and jurisdictional question. Specifically, the Stipulation memorialized the agreement between these parties that the determination of "public utility" status is "necessarily a fact-based determination," and that the PUC in the *Laser* case "made no general or final factual findings and established no precedent ... that the service provided by midstream gathering companies, *per se*, qualifies as public utility service." Furthermore, the Stipulation noted the PUC's understanding and declaration that, while a gathering company might be able to prove its "public utility" status after a full evidentiary hearing, the "technical and operational nature of midstream gathering service" dictates that these services are "generally provided on a private contract basis rather than on a 'public utility' service basis."

On a related note in another proceeding, the PUC on September 13, 2012, issued an Order approving the withdrawal of the application for "public utility" authority of another midstream developer, Peregrine Keystone Gas Pipeline, LLC ("Peregrine"). In so doing, the Commission also vacated the Recommended Decision issued by the presiding Administrative Law Judge in that case, which presented a firm declaration that midstream gathering services are not public utilities. Despite the request of PIOGA in this proceeding, the Commission's Order withdrawing Peregrine's application refused to declare that its prior *Laser* orders have no precedential effect. The PUC did, however, acknowledge that, as espoused in its Commonwealth Court Stipulation, the Commission has not established a specific precedent on this issue in favor of PUC regulation of midstream companies.

PIOGA has since filed with the PUC a Petition for Reconsideration of the Order in the *Peregrine* case, challenging the PUC's independent determination to vacate the ALJ's Recommended Decision. Specifically, PIOGA argues that the Recommended Decision represents the "only fully developed, on-the-record analysis of the issues" related to the question of whether the PUC should exercise jurisdiction over midstream entities. According to PIOGA, the Recommended Decision "is an integral part of the body of guidance provided to interested persons and the general public by the Commission . . . concerning natural gas midstream services and, as such, should be preserved and not discarded."

[Read the full article on our website.](#)

Marcellus shale formation and whether the natural gas contained within the shale is a "mineral." The Supreme Court will likely focus on its earlier precedent holding that there is a rebuttable presumption that parties intend the term "mineral" to include only metallic substances and that only the parties' intent can rebut the presumption to include non-metallic substances.

[The second case](#) will examine the Pennsylvania Commonwealth Court's ruling striking down the zoning provisions of Act 13. The Supreme Court will determine whether the Pennsylvania legislature can prohibit local municipalities from enacting zoning ordinances affecting oil and gas drilling and operations that are more restrictive than the state's requirements. The Supreme Court will determine the scope to which the Pennsylvania Oil and Gas Act may preempt local zoning ordinances impacting oil and gas exploration.

We will continue to follow these two important cases and keep you informed as to how you may be affected. For more background, see our articles on Act 13 [here](#), [here](#), [here](#), and [here](#). We wrote about the Butler case [here](#) and [here](#).



First Round of Marcellus Drilling Fees Tops Pa. Estimates

The state of Pennsylvania collected \$197.6 million in the first round of Marcellus Shale impact fees. The money collected will be distributed later this year, with most of it going to counties and municipalities in the drilling region.

[Read more.](#)



New Pipeline to Carry Natural Gas from Pa. to N.Y.

Williams and Cabot Oil & Gas are working together to develop a new pipeline to carry natural gas from northeast Pa. to major northeastern markets. The initial capacity would be enough to fuel about 3 million homes. If the environmental report and permit application are approved, construction will begin by April 2014.

[Read more.](#)



Useful Resource: Spilman Webinar

Spilman attorney M. Katherine Crockett discusses the USEPA's new oil and gas air rules package in a timely and informative Webinar.

[View the Webinar.](#)



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With nearly 30 years of experience, Carl is well-versed in commercial real estate law, including lending law, mineral law and title insurance. He has represented natural resources companies in the refinance, purchase and sale of mineral interests and commercial properties. He also has experience issuing lender and owner title insurance policies. Carl is consistently recognized by *The Best Lawyers in America* for excellence in corporate law. [Click here to read his full professional biography.](#)

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