

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Brian J. Moline, Chair
 Robert E. Krehbiel
 Michael C. Moffet

In the Matter of the Generic Investigation to)
Consider a General Commission Policy with) Docket No. 06-GIMG-400-GIG
Regard to Exit Tap Customers and Gas)
Gathering Services.)

ORDER

NOW, the above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being duly advised in the premises, the Commission enters this Order.

I. BACKGROUND AND PROCEDURAL HISTORY

1. On October 19, 2005, the Commission issued an Order initiating an investigation to determine a policy regarding customers served directly or indirectly with natural gas service by means of a gas gathering system.

2. On November 2, 2005, Midwest Energy, Inc. (Midwest) filed a Petition for Reconsideration of the cost assessment portion of the Commission's October 19, 2005 Order. Midwest argued it should not be responsible for one-third of the costs of this docket.

3. On November 3, 2005, Atmos Energy (Atmos) filed a Motion to Intervene.

4. On November 4, 2005, BP America Production Company (BP) filed a Motion to Intervene.

5. On November 9, 2005, Duke Energy Field Services (Duke Energy) filed a Petition to Intervene.

6. On November 10, 2005, the Southwest Kansas Royalty Owners Association (SKROA), SemGas Gathering, LLC (SemGas), American Energies Corporation, American Energies Gas Service, LLC and American Energies Pipeline, LLC (collectively, American Energies), and Shawmar Oil & Gas Company, Inc. (Shawmar) each filed a Petition or Motion to Intervene.

7. On November 10, 2005, the Commission Staff (Staff) filed a Response to Midwest's Petition for Reconsideration.

8. On December 1, 2005, the Commission issued an order granting Midwest's Petition for Reconsideration and setting a date for hearing to address Midwest's objections to the assessment of costs in the above-captioned matter.

9. On December 8, 2005, Southwest Kansas Non-Profit Public Utilities (Non-Profit Utilities) filed a Petition to Intervene out of time and requested an extension of time within which to file comments.

10. On December 9, 2005, responses to the questions contained in the Commission's October 19, 2005 Order were filed by ONEOK Field Services Company (OFS), Aquila, Inc. (Aquila), the Citizens' Utility Ratepayer Board (CURB), Midwest, American Energies, Shawmar and SemGas.

11. On December 9, 2005, the Commission issued its Order Granting Intervention to Atmos, BP, Duke Energy, SKROA, SemGas, American Energies and Shawmar.

12. On December 12, 2005, WGP-KHC, LLC, Duke Energy and BP filed comments responding to the questions contained in the Commission's October 19, 2005 Order.

13. On December 15, 2005, the Commission issued a further Order Assessing Costs in order to assess the costs of the docket to additional parties participating in the docket.

14. On December 23, 2005, the Non-Profit Utilities filed comments responding to the questions contained in the Commission's October 19, 2005 Order.

15. On December 29, 2005, Staff filed a Motion for Extension of Time in which to file its Report and Recommendation citing the unavailability of Staff during the holiday season, the need to coordinate between the Commission's Topeka and Wichita offices and the substantial volume of comments filed which require a complete review and analysis. Also on December 29, 2005, Staff filed a Motion to Cancel Hearing and Deny Reconsideration.¹ Staff cited to the Commission's December 15, 2005 assessment order, pointing out that additional parties had been added to the assessment list, diluting the amount assessed to Midwest. In addition, Staff counsel indicated it contacted counsel for Midwest and reported that Midwest is satisfied that the December 15, 2005 order addresses its concerns.

16. On January 3, 2006, the Commission issued an order granting Staff's motion for an extension of time and denying reconsideration of its assessment order.

17. On January 4, 2006, the Commission issued its Order Granting Intervention to the Non-Profit Utilities.

18. On January 27, 2006, Staff filed a Report and Recommendation (Report). Staff failed to notarize the verification attached to its Report and subsequently, on January 30, 2006, filed a notarized verification.

19. On February 10, 2006, the Commission issued an Order Soliciting Additional Comments based on Staff's recommendation.

20. On March 14, 2006, OFS, Aquila, Duke Energy and SemGas filed additional comments responding to the Commission's February 10, 2006 Order.

¹ See *infra* paragraph 2.

21. On March 16, 2006, BP filed additional comments responding to the Commission's February 10, 2006 Order.

22. On July 12, 2006, the Non-Profit Utilities filed additional comments in response to Staff's Report and Recommendation and requested that such additional comments be accepted out of time.

23. On October 6, 2006, BP replied to the Non-Profit Utilities' July 12, 2006 comments.

II. ANALYSIS

A. Commission Jurisdiction

24. The Commission initiated this docket in order to develop regulatory policy regarding natural gas service provided using gathering systems, or what is more commonly referred to as "exit tap" or "farm tap" service. Over the past few years, cessation of gas service involving exit tap customers has increasingly led to disagreements concerning the nature and extent of the service obligations imposed on gathering systems. It is hoped that policy guidelines regarding exit tap service can provide customers, gatherers and public utilities with certainty and direction for future decision-making purposes.

25. Before the Commission can make a determination of policy, it must first determine the extent of its jurisdiction over gathering systems and gas gathering services. The parties expressed several opinions related to the jurisdiction of the Commission over gathering systems and gas gathering services.

26. CURB commented that the Commission lacks definitive jurisdiction to address the issue, stating: "CURB is concerned that the problems of the Hugoton Field are simply too

complex and serious to be handled by any agency without jurisdiction or authority to act to address the broad range of concerns.”²

27. Several of the gathering company interveners focused comments on K.S.A. 66-105a, noting that it specifically exempts gas gathering systems used primarily for transporting natural gas from a wellhead or metering point to a point of entry to a main transmission line from being regulated as public utilities or common carriers.³ Generally, the comments from the gatherers indicated they disagree that they have any obligation to provide exit taps on their systems, and also argued that the Commission does not have jurisdiction over exit taps.

28. Additionally, another gatherer argued that curtailment or cessation of service to customers served by gatherers is solely within the discretion of the gathering system operator.⁴

29. The Non-Profit Utilities disagreed with the gatherers and argued that Commission jurisdiction over gathering services is extensive and explicit. The Non-Profit Utilities asserted that the legislative intent behind the Chapter 55 gathering statutes includes protection of gathering system exit tap customers, arguing as follows:

To ensure continued regulatory oversight of gathering facilities and maintain the same protection of open access to all customers previously enjoyed while also responding to gatherer’s concern that they not be subject to the full regulatory cost-of-service regulation of public utilities, the Kansas legislature enacted the gathering statute codified as K.S.A. 2004 Supp. 55-1,103.⁵

30. Kansas natural gas public utilities also serve customers off of gas gathering systems. Midwest commented generally that Commission jurisdiction over gathering systems

² Comments of CURB, 5 (December 9, 2005).

³ Comments of BP, 1 (March 16, 2006); Comments of SemGas, 6-7 (December 9, 2005).

⁴ Comments of BP, 6-7 (December 12, 2005); Comments of OFS, 1-4 (December 9, 2005).

⁵ Comments of Non-Profit Utilities, 2 (December 23, 2005).

is limited, but argued that gathering system operators should be required to make a showing that cessation of service is necessary.⁶

31. Staff filed a Report and Recommendation containing several observations and recommendations concerning the Commission's jurisdiction over gathering services. Staff specifically noted that significant differences exist between Chapter 55 and Chapter 66 of the Kansas Statutes Annotated, and that an understanding of the interaction and effect of provisions in each is necessary to resolve the issues presented in this docket.⁷ Staff concluded that significant differences exist between the comprehensive regulatory regime provided for under the Commission's Chapter 66 jurisdiction and the limited provisions related to gathering services contained in Chapter 55.⁸ Staff specifically noted K.S.A. 66-105a and its express exemption of gathering services from the Commission's public utility jurisdiction as a seminal statute related to this matter.⁹ Staff also stated that K.S.A. 55-1,103 does not expressly guarantee a right for persons to remove gas from gathering systems.¹⁰

32. Staff provided a technical and policy memorandum attached to its Report and Recommendation discussing the operational characteristics of gas gathering and exit tap service, and provided an analysis of how such facts should be considered by the Commission in determining its regulatory policy. In its Memorandum, Staff discussed competing functions of gathering systems and suggested that the Commission institute a functionality test for the purpose of defining the primary and incidental functions of such a system.¹¹ Staff also advised that significant exit tap service is provided pursuant to privately negotiated right-of-way (ROW)

⁶ Comments of Midwest, 2-6 (December 9, 2005).

⁷ Staff Report and Recommendation, 2-3 (January 27, 2006).

⁸ *Id.* at 2.

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 3.

¹¹ Staff Memorandum, 3-5, 8.

agreements, and that the Commission should not assert jurisdiction over provisions in such agreements.¹² Staff additionally noted that in certain circumstances gathering service operators will provide service that is jurisdictional, because these companies are providing service outside of any right-of-way agreement.¹³ Finally, Staff noted that the Kansas Self-Help Gas Act, K.S.A. 66-2101 *et seq.*, would also preclude jurisdiction in certain circumstances.¹⁴

33. In response to Staff's Memorandum, several parties offered additional comments. The gathering parties agreed for the most part with the Commission Staff that gathering systems are not subject to Commission jurisdiction. However, the gatherers sought clarification on certain areas as well as expressed disagreement with Staff's "functionality" analysis. In particular, BP raised the issue that the Rural Self-Help Gas Act provides further exemptions that are not explained in Staff's analysis.¹⁵

34. OFS also addressed Staff's Report and Recommendation, focusing its comments primarily on the assertion that the proper H₂S contamination threshold should be 4 parts per million (ppm).¹⁶ Additionally, OFS argued Staff's Report and Recommendation is confusing and contradictory concerning the application of FERC's "primary function test."¹⁷ OFS indicated it believes Staff has misapplied that test.¹⁸

35. The Non-profit Utilities challenged Staff's Report and Recommendation, arguing that the statutory analysis contained within it was incorrect.¹⁹ Moreover, the Non-Profit Utilities

¹² *Id.* at 8.

¹³ *Id.* at 13-14.

¹⁴ *Id.*

¹⁵ Comments of BP, 3-4 (March 16, 2006).

¹⁶ Comments of OFS, 1-4 (March 14, 2006).

¹⁷ *Id.* at 5-8.

¹⁸ *Id.* at 6.

¹⁹ Comments of the Non-Profit Utilities, 1 (July 12, 2006). (The Non-Profit Utilities filed their comments out-of-time. The Commission will, nonetheless, take note of these comments given the legislative nature of this docket. For future reference, the Commission reminds the Non-Profit Utilities to articulate a reason why the Commission should accept late-filed documents.)

argued that Staff's Report and Recommendation, if followed by the Commission, would result in poor public policy.²⁰

36. The Commission agrees with Staff that its jurisdiction over gathering systems is more limited than its jurisdiction over traditional natural gas public utilities. Traditional natural gas public utilities have a duty to provide reasonably efficient and sufficient service at just and reasonable rates determined by the Commission. K.S.A. 66-1,202; K.S.A. 66-117. Additionally, such utilities cannot alter the terms of service for a customer without first providing notice to the Commission and receiving Commission approval. K.S.A. 66-117. In order to examine the jurisdictional issues related to a system transporting unprocessed gas it is first necessary to make a determination if the system can be defined as a public utility or common carrier. K.S.A. 66-105a appears to control. K.S.A. 66-105a provides:

...the term "public utility" as used in K.S.A. 66-104, and amendments thereto, and the term "common carriers" as used in K.S.A. 66-105, and amendments thereto, shall not include any gas gathering system, as defined in K.S.A. 55-150, and amendments thereto.

37. Gas gathering systems are defined in K.S.A. 55-150(d), as follows:

"Gas gathering system" means a natural gas pipeline system used *primarily* for transporting natural gas from a wellhead, or a metering point for natural gas produced by one or more wells, to a point of entry into a main transmission line, but shall not mean or include: (1) Lead lines from the wellhead to the connection with the gathering system which are owned by the producing person; and (2) gathering systems under the jurisdiction of the federal energy regulatory commission." (Emphasis supplied.)

The term "primarily" indicates that the legislature recognized gas gathering systems served other secondary functions. Even though such secondary functions are not gas gathering functions as defined by K.S.A. 55-150(d), a gas gathering system is exempt under K.S.A. 66-105a so long as the system is used primarily to perform a gathering function. However, the statutory definition

²⁰ *Id.* at 3-5.

of “gas gathering system” does not indicate what should be considered part of the gathering system beyond that used for the gathering function. Therefore, with regard to Commission authority over exit taps, the question is whether the legislature intended to exempt certain specific functions of “gathering systems” or whether it intended to enact an exemption covering all uses of any facilities classifiable as a “gathering system” using the statutory definition.

38. In addressing this issue, the Commission first observes that the statutes could benefit from some clarification. The statutory language does not readily reveal the legislative intent. Nonetheless, the Commission believes that the statutes can be interpreted in a manner that produces reasonable results while also remaining consistent with the statutory language. In order to do so, we first review the “gas gathering services” legislation that was enacted concurrently with K.S.A. 66-105a. The 1997 Legislature, in Senate Bill 333, while excluding gathering systems from public utility and common carrier regulation, at the same time subjected them to specific Commission regulation under a new set of Chapter 55 statutes, K.S.A. 55-1,101 *et seq.*

39. In determining the Commission’s jurisdiction over exit taps under these statutes, the key statute appears to be K.S.A. 55-1,103, which mandates the following requirements on persons offering gas gathering services:

Limitations on manner of offering services and facilities. (a) Persons offering gas gathering services in this state, or facilities essential to provision of such services, shall provide, in a manner that is just, reasonable, not unjustly discriminatory and not unduly preferential, access to any person seeking such services or facilities.

(b) Persons performing gas gathering services shall engage in practices in connection with such services, and charge fees for such services, that are just, reasonable, not unjustly discriminatory and not unduly preferential.

40. After reviewing the statute and the various suggested interpretations by the parties, the Commission concludes that the requirements of K.S.A. 55-1,103 to provide just,

reasonable and non-discriminatory access and rates do not extend to exit taps. Such requirements are imposed on “gathering services,” “facilities essential” to such services, and “practices in connection” with gathering services. Exit taps do not appear to fall within any of these three categories. Gas gathering service clearly does not directly encompass exit tap service because exit tap service does not involve transporting natural gas “to a point of entry into a main transmission line” as set out in K.S.A. 55-150. Furthermore, as suggested by Staff, exit taps do not involve transportation of natural gas but rather distribution to end users. If exit taps are not directly involved in the gathering function, it would logically follow that exit tap facilities are not essential to gathering services, with the possible exception of situations involving right-of-way agreements, discussed below. Finally, exit taps cannot be considered a practice “in connection with” a gathering service as contemplated by K.S.A. 55-1,103(b). Exit taps by definition are an incidental part of gathering systems. However, except for right-of-way situations, exit taps are not necessary in any way to the gathering function and there is no direct connection between the two. (As discussed more fully below, when the procurement of a gathering ROW is contractually conditioned on the provision of exit tap service, the exit tap service becomes a practice in connection with gathering service.) Therefore, the Commission concludes that it is without jurisdiction to regulate exit tap service pursuant to K.S.A. 55-1,101 *et seq.*, unless the exit tap service was obtained through a ROW agreement. Stated another way, where exit tap service is obtained through a ROW agreement, the Commission has jurisdiction over such service pursuant to K.S.A. 55-1,101 *et seq.*

41. The Commission additionally notes that it is empowered to promulgate additional rules and regulations necessary to regulate the use of gathering systems. K.S.A. 55-1,105. However, the Commission concludes that it is restricted to promulgating regulations that are

“necessary to improve access to gas gathering services or to improve market competition or protect the public interest in such services.”

42. Although it is apparent that the gas gathering services statutes do not contemplate Commission regulation of exit taps under that regime (*i.e.*, K.S.A. 66-1,101 *et seq.*), the statutes nonetheless seem to contemplate some level of regulatory oversight. For example, K.S.A. 55-1,106 envisions Commission rate regulation of gas sold to consumers from a gathering system: “The commission may exempt natural gas sold directly to a consumer from the wellhead before the gas enters a gathering system from rate averaging or pricing systems that apply to *gas sold from a gas gathering system.*” (Emphasis supplied.) Furthermore, K.S.A. 55-1,107 appears to recognize that retail sales of natural gas from a gas gathering system require a certificate of convenience and necessity from the Commission.²¹ These statutes thus reflect the fact that the use of any facilities for the conveyance and sale of natural gas generally comes within the definition of a public utility in K.S.A. 66-104.

43. We consequently return to the basic issue. Although the 1997 Legislature excluded gathering systems from public utility regulation in its enactment of K.S.A. 66-105a, it did not define what is included in a gathering system vis-à-vis what is still considered a public utility service subject to regulation. After due consideration, the Commission concludes that the legislature only intended to remove from utility regulation those functions or services which were to become subject to regulation under the gathering statutes, K.S.A. 55-1,101 *et seq.*, enacted concomitantly with K.S.A. 66-105a. Since we have found that exit taps, unless

²¹ The statute reads, in relevant part: “In any retail natural gas service area where the commission has granted a certificate of convenience and necessity to sell natural gas at retail from a gas gathering system, the commission may issue other certificates of convenience and necessity to make such sales in such area. A person purchasing natural gas or gas gathering services from a person offering gas gathering services in a retail natural gas service area where the commission has issued more than one certificate of convenience and necessity shall not be assessed an exit fee for electing to purchase natural gas or gas gathering services from another person offering gas gathering services.”

associated with a ROW agreement, are not a gathering service because they do not involve transporting natural gas to a point of entry into a main transmission line, this category of exit taps remains subject to regulation as a public utility service. We do not believe that other interpretations can be adequately supported.²²

44. BP and SemGas assert that public utility jurisdiction does not apply to the gas gatherer but only applies in exit tap situations after a change in custody of the natural gas after the gas has passed through the last facilities owned by the gathering system. BP apparently construes the definition of “gas gathering system” in K.S.A. 55-150(d) and “gas gathering service” in K.S.A. 55-1,101 to include the entire pipeline system owned by the gatherer, regardless of the purpose or function of the component pieces or facilities:

It is BP’s position that so long as a “gas gathering system” is used primarily for “transporting natural gas from a well head ... to a point of entry into the main transmission line,” the gas gathering system is exempted from regulation as a public utility or as a common carrier even though the gathering system also transports gas to secondary exit points on the gathering system. ...BP respectfully suggests that “gas gathering services” involve both the transportation of gas from a wellhead to a main transmission line as well as transportation to secondary exit points on the gas gathering system when the statutory definitions of a “gas gathering system” and “gas gathering services” are construed together.²³

45. Under this view, exit taps would apparently not be subject to regulation under the gathering statutes and would only be subject to utility regulation when someone other than the gatherer owned or operated the meter or pipe downstream of the gathering system. This interpretation might be more supportable if the exit taps were considered a gathering service under the gathering statutes. However, BP does not suggest that this is the case. Instead, BP agrees with Staff’s conclusion that exit taps are not subject to K.S.A. 55-1,101 *et seq.*

²² Staff’s functionality analysis appears to be factually supportable but does not comport well with the statutory language. The Commission’s view of legislative intent better resolves some of the ambiguities in the statutes.

²³ Comments of BP, 5-6 (March 16, 2006).

Consequently, under BP's interpretation the Commission's jurisdiction over the exit taps would solely depend on whether the exit tap facilities were owned by the gatherer or by another party. For example, if the exit tap meters were part of the "gathering system" by BP's definition, the Commission would have no regulatory responsibility at all. On the other hand, if the exit tap meters were owned by another party, the service would be regulated as a utility service. The Commission does not see a discernible rationale for such a distinction. Except for the right-of-way situations discussed below, there does not seem to be any less reason to be concerned about the exit tap service provided by gathering system owners than other entities. Certainly, there was nothing in the legislative history of Senate Bill 333 to suggest such an artificial distinction.

46. Consequently, the Commission believes that exit tap services are indeed subject to regulation as public utility services unless exclusion is warranted under some heretofore unexamined statute or circumstances would prescribe otherwise. As suggested above, one special circumstance may be exit taps that are provided as part of a right-of-way or lease agreement. Several parties agreed that such arrangements were not subject to utility regulation. For example, BP argued that "free" gas provided pursuant to a lease agreement does not fall within the statutory definition of utility service in K.S.A. 66-104 since it is not the "general commercial supply of gas," and involves a pipeline less than 15 miles in length, as measured from the producing well to the exit tap. In addition, Staff suggests that the provision of service under right-of-way arrangements could be considered part of the gathering system and therefore exempt from public utility regulation under K.S.A. 66-105a. These interpretations have merit. Exit taps that are provided pursuant to right-of-way agreements would appear to be integral to the operation of the gathering system. Although they are not technically gathering services, the Commission believes that they are the kind of secondary functions that the legislature intended to

include within the scope of K.S.A. 55-150(d). Furthermore it would seem that such exit tap services would be subject to Commission review under K.S.A. 55-1,103 since they either involve “facilities essential” to gathering service or “practices in connection” with gathering services. However, the Commission would observe that because such right-of-way agreements are presumably fairly standard with deviations that are negotiated in light of individual circumstances, it may be difficult for the Commission to determine whether any such agreements are unreasonable or unreasonably discriminatory.

47. Additional limitations on Commission regulation of exit tap services are imposed by the Kansas Self-Help Gas Act. K.S.A. 66-2101 *et seq.* K.S.A. 66-2102 provides an exemption for gas providers from Commission public utility jurisdiction as follows:

Any rural gas user who desires to constructs [sic] its own pipeline connection to a gas supply system and any gas provider assisting the rural gas user shall not be considered a public utility.

K.S.A. 66-2101(k) defines a “rural gas user” as follows:

...any person currently using natural gas from a wellhead or gathering facility for agricultural purposes on property they own, lease or operate that is located outside city limits and not presently receiving gas service from an existing gas service utility.

K.S.A. 66-2101(f) defines a “gas provider” as follows:

...any person that provides gas, gas transportation, gas supply management or other gas services and any related facilities associated with delivering gas to a rural gas user.

48. As with gas gathering systems, the above cited statutes indicate that the legislature has provided an exemption from Commission jurisdiction by excluding public utility service in specified circumstances. The exemption in this case is very limited and extends only to “gas providers” that provide service to a “rural gas user.”

49. Determining when a gas gatherer becomes a “gas provider” is a factually dependent endeavor that requires case-by-case analysis. In a general sense, the Commission acknowledges that a gathering service could be deemed a “gas provider” pursuant to the Kansas Self-Help Gas Act. The Commission notes that for such a situation to arise, the customer served must be using the gas procured for “agricultural purposes” and must not presently be receiving gas service by an “existing gas service utility.”²⁴ Providing exit tap gas to a customer utilizing the gas for purely residential consumption would therefore not qualify a gas gatherer for the exemption contained in the Kansas Self-Help Gas Act.

50. The Commission notes that under its interpretation of the statutes, a gathering system’s transport or provision of natural gas in concert with a certificated public utility for immediate distribution to end users would be subject to regulation as a public utility service.²⁵ It can hardly be asserted that such service involves transportation to a main transmission line or that it is essential to or done in connection with such transportation. Indeed, such service would obviously be even less related to gathering services than exit taps that do not arise from right-of-way agreements. Under general public utility or common carrier obligations, such transportation service would be required to be provided to all who request such service. As many commenting parties noted, however, such open access for exit taps would cause severe operational difficulties for gathering systems whose primary purpose and function is to transport gas to transmission lines. In recognition of this, and the unusual interplay between Chapters 55 and 66 with regard to gathering systems, the Commission finds that the obligation to provide such transportation

²⁴ “Existing gas service utility” is also defined in the Kansas Self-Help Gas Act. The term generally refers to traditional natural gas public utilities with existing natural gas infrastructure to serve end use customers.

²⁵ Additionally, when common carrier transportation service is not regulated by the FERC, it may fall under K.S.A. 66-105, and therefore allow for common carrier regulation by the Commission.

service should extend only to existing exit taps or exit taps that are provided at the discretion of the gas gatherer.

B. Commission Exit Tap Policy

51. The Commission received many comments concerning the proper policy that the Commission should adopt in relation to exit tap service. Staff's policy recommendations were contained in the Memorandum attached to its Report and Recommendation.²⁶

52. CURB focused mainly on the policy issues related to exit tap service in Kansas. CURB commented generally on how exit tap service fits into a larger policy issue regarding irrigation, stating that: "The fates of the Hugoton field and the Oglallah aquifer are inextricably intertwined, and it cannot be emphasized enough that policy makers must take both of these resources into account in making decisions about one or the other."²⁷

53. The Non-Profit Utilities clearly advocated for the Commission to adopt a clear and decisive regulatory policy with the purpose of holding gathering services responsible for providing exit tap service. The Non-Profit Utilities argued that exit tap customers are intended to be protected by the provisions of K.S.A. 55-1,101 *et seq.* and urged the Commission to "issue a clear statement that [K.S.A. 55-1,103] protects the continuing right of all customers to access and use gathering system facilities and to not be discriminated against because of the destination and ultimate use of the gas."²⁸

54. The gathering interveners reserved most of their comments for the jurisdictional aspects of the issue. However, Duke Energy filed written testimony prepared for the legislature on the issue with the KCC, commenting that its facilities were not designed for end user

²⁶ Staff Memorandum, 7-9.

²⁷ Comments of CURB, 2 (December 9, 2005).

²⁸ Comments of the Non-Profit Utilities, 1-2 (December 23, 2005).

purposes and declining reservoir pressure characteristics in the region made any open access exit tap service requirement inappropriate.²⁹

55. The utility interveners also offered suggestions concerning Commission policy. Midwest commented on considerations relevant to converting public utility customers to an alternative energy source, stating: “Where the Commission has authority to order cost reimbursement, no customer reimbursement should be required if the customer or a predecessor (parent, business, partner, etc.) at that location contractually acknowledged potential interruption or discontinuance of service due to inadequacy or quality of gas supply.”³⁰ Aquila also commented on reimbursements for customers served off of gathering systems, advocating that utilities should be required to pay conversion costs for residential customers only.³¹

56. Among other recommendations, Staff recommended that Commission involvement in gathering system matters be limited to the effect of exit tap service on gathering services.³² Additionally Staff noted that the “open access” rights for exit taps would result in a reconfiguration of the gathering system in a manner that would be detrimental to the development of the production reservoir.³³ When exit tap service involves right-of-way agreements, Staff recommended that terms and conditions of exit tap agreements should be considered private contractual matters.³⁴ Staff also recommended that if abandonment of a public utility service customer becomes necessary, some amount of compensation should be paid to the customer, and a standard amount of compensation should be determined.³⁵

²⁹ Supplement Response of Duke Energy, attached testimony on SB 576, 1-2 (March 14, 2006).

³⁰ Comments of Midwest Energy, 9 (December 9, 2005).

³¹ Comments of Aquila, 8 (December 9, 2005).

³² Staff Memorandum, 7.

³³ *Id.*

³⁴ *Id.* at 8.

³⁵ *Id.* at 9.

57. The Commission finds that three key areas should be addressed: (1) curtailment of service to public utility exit tap customers, (2) curtailment of service to gathering system ROW customers, and (3) establishing a general benchmark for safe H₂S thresholds in relation to the exercise of the Commission's powers pursuant to K.S.A. 66-105a.

(1) Curtailment of service to public utility exit tap customers

58. K.S.A. 66-105a provides the Commission with jurisdiction to address curtailment of exit tap services, regardless of the nature or status of the service as a public utility service. The Commission also concludes that any public utility who serves customers off of gathering systems is responsible for providing sufficient and efficient service regardless of the means by which such utility has secured its gas supply. If a utility finds that it can no longer provide service due to pending curtailment of gathering service gas, the utility must seek abandonment approval from the Commission. The Commission may or may not decide that conversion to an alternative energy source is appropriate based on the facts of the particular curtailment situation. The appropriate amount of conversion costs paid should be determined based upon the circumstances relating to the affected customer. The Commission does not feel that a standard amount of conversion should be established in this order, but that as a general rule, conversion payments to a residential customer should enable a customer to replace his or her furnace, water heater, cooking stove and/or dryer, if those appliances are operated by natural gas. Additionally, the cost of a propane fuel tank and an initial supply of fuel should also be considered for reimbursement.

(2) Curtailment of service to gathering system ROW customers

59. The Commission concludes that when an exit tap customer who takes service pursuant to a ROW agreement is curtailed or denied gas service by a gathering company, the

Commission is authorized to evaluate the reasonableness of the curtailment pursuant to its Chapter 55 jurisdiction over gathering services. However, the Commission should not become a forum for the resolution of private contractual disputes. Rather, the Commission should focus on whether curtailment of service is “just and reasonable.” The Commission will defer to the district court matters of contractual interpretation.

(3) Curtailment of service related to unsafe levels of H₂S concentration or other safety-related reasons; benchmarks

60. The Commission concludes that there may be many factors in determining if a safety-related curtailment is reasonable under K.S.A. 66-105a. If a gas gatherer can justify its disconnection of exit tap customers by presenting substantial evidence that conditions impacting safety and/or health exist, the Commission will not disturb the decision to curtail service. As a general rule, however, the Commission adopts Staff’s recommendation that H₂S concentrations in excess of 15 ppm in gas provided for residences or other confined domestic uses is not safe and any such concentrations would warrant curtailment.³⁶

III. FINDINGS AND CONCLUSIONS

61. Based on the analysis above, the Commission makes the following findings and conclusions regarding the extent of its jurisdiction over exit tap customers and gas gathering services. First, the Commission finds and concludes it lacks jurisdiction under the gas gathering statutes to require open access to remove gas from a gathering system. K.S.A. 55-1,101 *et seq.* The statutes do not present a clear legislative intent to mandate exit taps on gas gathering systems.

62. Next, currently there are numerous exit taps on gathering systems that supply gas to homes, businesses, irrigation engines and public utilities. The Commission finds and

³⁶ Staff Memorandum, 15.

concludes it has varying jurisdiction over these existing exit taps. The category of exit tap and type of jurisdiction found herein are as follows:

(1) Some exit taps are provided under right-of-way agreements between the landowner and the gas gatherer. In that situation, the right-of-way is essential to the gathering system and essential to the gatherer being able to provide gas gathering services. This category of exit tap falls within the purview of K.S.A. 55-1,101 *et seq.* and is therefore exempt from public utility jurisdiction under Chapter 66.

(2) All other exit taps are not essential to the gathering system or to providing gathering services. These exit taps are not essential for transporting gas from a wellhead or metering point to a main transmission line. Because these exit taps do not fall under the definition of a gas gathering system, they are therefore not exempt from utility jurisdiction under K.S.A. 66-105a. Commission jurisdiction over this category of exit taps varies depending on the use of the tap, for example:

(a) Exit taps providing gas directly to a residence or business fall under public utility regulation.

(b) Exit taps providing gas to a public utility fall under common carrier regulation. The Commission will exercise such regulation only with regard to existing exit taps or exit taps that are provided at the discretion of the gas gatherer.

(c) Exit taps providing gas to operate irrigation equipment are exempt under the Kansas Self-Help Gas Act, K.S.A. 66-2101 *et seq.*, depending on each specific fact situation.

63. In addition to making jurisdictional pronouncements, the Commission investigated establishing policy in three key areas: curtailment of public utility exit tap customers, curtailment of right-of-way agreement customers and a safe H₂S threshold. The Commission believes the following policy determinations appropriately address the issues presented in this case. First, under current law and Commission precedent, when a public utility can no longer provide service due to curtailment of its gas supply, it must seek abandonment approval from the Commission. Based on the facts of each case, the Commission will decide what conversion costs, if any, should be paid by the public utility. Next, when right-of-way agreement exit tap customers are curtailed, the Commission will evaluate the curtailment under the just, reasonable and not unduly preferential standard of K.S.A. 55-1,103. Matters involving right-of-way agreement interpretation will be deferred to District Court. Finally, as a general rule, the Commission adopts Staff's recommendation that H₂S levels in excess of 15 ppm in gas provided for residential and business use are not safe. However, if a gas gatherer can justify its disconnection of exit tap customers by presenting substantial evidence that conditions impacting safety and/or health exist, the Commission will not disturb the decision to curtail service.

64. The Commission believes this Order is based on a reasonable interpretation of the statutes and gives gas gatherers and exit tap customers a framework to follow. Further, given the determinations contained herein, the Commission concludes this general investigation.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. The Commission adopts and incorporates herein the findings and conclusions set out in paragraphs 61-64 above as its Order.

B. A party may file a petition for reconsideration of this Order within 15 days of the date this Order is served. If service is by mail, three additional days may be added to the 15-day time limit to petition for reconsideration.

C. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Krehbiel, Com.; Moffet, Com.

Dated: NOV 22 2006

ORDER MAILED

NOV 22 2006

 Executive
Director

Susan K. Duffy
Executive Director

MT:JM:SBC