



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EQUITRANS, LP,

Petitioner,

v.

WEST VIRGINIA PUBLIC SERVICE COMMISSION,
RONALD HALL, ASHTON HALL, AND HOPE GAS INC. D/B/A
DOMINION ENERGY WEST VIRGINIA,

Respondents.

FILE COPY

BRIEF OF DIVERSIFIED PRODUCTION LLC,
AND DIVERSIFIED MIDSTREAM LLC, AS *AMICI CURIAE*
IN SUPPORT OF EQUITRANS, LP's PETITION FOR APPEAL
SEEKING SUSPENSION AND VACATION

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Diversified Production LLC, (“Diversified Production”) and Diversified Midstream LLC (“Diversified Midstream”) (collectively, “Diversified”) file this brief as *amici curiae* in support of the Petition for Appeal filed by Equitrans, LP (“Equitrans” or “Petitioner”). Diversified Production and Diversified Midstream are wholly-owned subsidiaries of Diversified Gas & Oil Corporation, an independent energy company. Diversified Production delivers natural gas into Equitrans’ gathering facilities in West Virginia, and Diversified Midstream owns natural gas gathering facilities in West Virginia.

As both a producer and owner of gathering facilities in West Virginia, Diversified is concerned about the March 16, 2022 order (the “March 16 Order”) of the Public Service Commission (“Commission”) in the underlying action *Ronald L. Hall, et al, v. Hope Gas, Inc., dba Dominion Energy West Virginia*, Case No. 20-0994-G-C- (filed Dec. 7, 2020). Specifically, the Commission erroneously declared that it possesses jurisdiction over Equitrans’ gathering facilities and required Equitrans to allow a gas meter to be installed on its gathering facilities.²

The March 16 Order is an overreach by the Commission, as it lacks jurisdiction over gathering facilities. This Court should suspend and vacate the Commission’s March 16 Order and clarify that there is no statutory basis for the jurisdiction the Commission claims it

¹ Pursuant to West Virginia Rule of Appellant Procedure 30(e)(5), Diversified, by counsel, represents that no counsel for a party to this action authored this Brief in whole or in part. Moreover, no such counsel made a monetary contribution specifically intended to fund the preparation or submission of this Brief. Finally, no other person who would need to be identified under Rule 30(e)(5) made a monetary contribution toward this Brief.

² *Amici* notes the Commission’s uses the phrases “gathering assets,” “gathering system,” and “gathering facilities” interchangeably in its orders. For purposes of clarity, *amici*’s arguments expressed herein concern “gathering facilities” as they are defined in the Commission’s *Rules Governing the Transportation of Natural Gas*: “pipelines and related facilities used to collect the gas production of one (1) or more wells into the facilities of an interstate pipeline, a utility, or an intrastate pipeline.” W. Va. Code R. 150-16-2.10.

possesses.³ Otherwise, the Commission may lay claim to rate-making authority over gathering facilities, which have historically been excluded from the definition of “public utility” and “intrastate pipeline,” and therefore, have fallen outside the purview of the Commission’s jurisdiction.

Accordingly, Diversified hereby files this brief of *amici curiae* and accompanying motion for leave to file pursuant to W. Va. R. App. Proc. 30.

INTRODUCTION

Diversified hereby submits this brief as *amici curiae* in support of the Petition for Appeal filed by Equitrans. The Legislature has confined the Commission’s jurisdiction to public utilities, and gathering facilities are not public utilities. Specifically, the Commission has asserted its authority over gathering facilities pursuant to sections 24-1-1 and 24-2-1 (regarding public utilities) and 24-3-3a (regarding intrastate pipelines) of the West Virginia Code. But the Commission’s own *Rules Governing the Transportation of Natural Gas* dictate that gathering facilities are not subject to Commission jurisdiction because they are neither public utilities nor intrastate pipelines.

Affirming the Commission’s March 16 Order could lead to untoward consequences, as it will enable the Commission to act *ultra vires* in a variety of other regulatory matters over which it possesses no statutory authority. If, contrary to express statutory guidance, the Commission can exercise jurisdiction over gathering facilities in this case, the next step could be regulation of

³ Pursuant to Rule 30(b) of the West Virginia Rules of Appellate Procedure, Diversified provided notice on May 20, 2022, to counsel of record for all parties of its intention to file an *amici curiae* brief. Insofar as the filing of the Petition for Appeal initiated proceedings in this Court pursuant to West Virginia Code § 24-5-1 and West Virginia Rule of Appellate Procedure 14(c), Diversified has included in its Motion for Leave to File Brief of *Amici Curiae* a request for additional time beyond that typically contemplated by Rule 30(d).

rates on gathering facilities (also in violation of the law and the Commission's own rules). It is crucial that this Court suspend and vacate the March 16 Order and clarify that the Commission does not possess jurisdiction over natural gas gathering facilities as either public utilities or intrastate pipelines.

BACKGROUND AND STATEMENT OF THE CASE

The underlying proceeding stems from a request by Ronald Hall to Hope Gas, Inc. d/b/a Dominion Energy West Virginia ("Hope") for a gas meter to serve property at 3471 Eight Mile Ridge in Wetzel County on existing gathering facilities owned by Equitrans. App. 605–06. Hope requested permission from Equitrans to install the meter, but Equitrans denied the request due to ongoing abandonment proceedings pending with the Commission. *Id.* at 615. Mr. Hall then filed a verified complaint with the Commission against Hope, and Equitrans was added as a Respondent. *Id.* at 375. Mr. Hall ultimately transferred the property to his granddaughter Ashton Hall, who was later added as a complainant. *Id.* at 606.

Equitrans filed a motion to dismiss Mr. Hall's complaint, arguing that the Commission did not possess jurisdiction over its gathering facilities, and therefore, it could not require Equitrans to allow a meter to be installed on its gathering facilities. App. 376; Mot. To Dismiss at 4–5, *Hall*, No. 20-0994-G-C (filed March 22, 2021). The Commission rejected this argument in the March 16 Order, cursorily stating, "We have explained in prior orders, in detail, our authority over the gathering assets." *Id.* at 608.

In rejecting Equitrans' jurisdictional argument, the Commission offered only a cursory reference to its earlier decision of January 14, 2022 (the "January 14 Order"), entered in a consolidated matter involving a general investigation into Equitrans' request to the Federal

Energy Regulatory Commission (“FERC”) to abandon by sale its gathering facilities in West Virginia. *See* Commission Case Nos. 20-0454-G-GI, 20-0329-G-P, 20-0660-G-X (the “General Investigation Matter”). The January 14 Order is also the subject of a Verified Petition for Writ of Prohibition currently pending in a separate action with this Court. *See State ex rel. Equitrans, LP v. W. Va. Pub. Serv. Comm’n*, No. 22-0229. Diversified has filed a Motion for Leave to File an Amicus Brief in that matter as well.

Concluding that it possessed jurisdiction based on that January 14 Order, the Commission adopted the recommendation of an administrative law judge that the Hall property “should be provided with Hope natural gas service through use of the Equitrans gathering system.” App. 377. Therefore, the Commission “require[d] Equitrans to permit [Hope] to place a meter on the existing tap to provide natural gas service” to the property. *Id.* at 374. Equitrans’ timely Petition for Appeal followed.

STANDARD OF REVIEW

This Court has summarized the standards for review of an order of the Commission as follows: (1) “[w]hether the Commission exceeded its statutory jurisdiction and powers”; (2) “whether there is adequate evidence to support the Commission’s findings”; and (3) “whether the substantive result of the Commission’s order is proper.” *Cent. W. Virginia Refuse, Inc. v. Pub. Serv. Comm’n of W. Virginia*, 438 S.E.2d 596, 598 (W. Va. 1993) (quoting Syl. Pt. 2, *Monongahela Power Co. v. Public Serv. Comm’n of W. Va.*, 276 S.E.2d 179 (W. Va. 1981)). Because the Commission does not possess jurisdiction over gathering facilities, it is “exceed[ing] its statutory jurisdiction and powers,” and thus, this Court should suspend and vacate the March 16 Order.

ARGUMENT

I. The Commission Has Exceeded its Statutory Jurisdiction and Powers in the March 16 Order Because West Virginia Law Does Not Provide the Commission with Jurisdiction Over Gathering Facilities.

In the March 16 Order, the Commission stated that it “incorporate[s] and reaffirm[s] [its] prior decisions” concluding that “by statute,” the Commission has jurisdiction and authority over Equitrans’ operation of its gathering facilities in West Virginia. App. 610. But as explained below, no statute confers the Commission with jurisdiction over gathering facilities.

A. Public Service Commission jurisdiction may only be conferred by statute.

First and foremost, “[t]he Public Service Commission of West Virginia has no jurisdiction and no power or authority except as conferred on it by statute and necessary implications therefrom, and its power is confined to regulation of public utilities. It has no inherent power or authority.” *W. Va. Highlands Conservancy, Inc. v. Pub. Serv. Comm’n of W. Virginia*, 527 S.E.2d 495, 498 (W. Va. 1998) (quoting Syl. Pt. 2, *Wilhite v. Public Service Commission*, 149 S.E.2d 273, 274 (W. Va. 1966)). This Court has explained, “Quite clearly the [Commission] would transcend its statutory jurisdiction, power and authority if it should undertake to exercise control over business enterprises not falling within the classification of public utilities.” *Eureka Pipe Line Co. v. Pub. Serv. Comm’n*, 137 S.E.2d 200, 205 (W. Va. 1964). The Commission tries on several different statutes to support its claim of jurisdiction over gathering facilities, but none of them fit.

B. Sections 24-1-1 and 24-2-1 of the West Virginia Code do not provide the Commission with authority over gathering facilities.

In the March 16 Order, the Commission relies upon the January 14 Order entered in the General Investigation Matter.⁴ But in the January 14 Order, the Commission mistakenly relies on section 24-1-1 of the West Virginia Code, which “confer[s] upon the [Commission] the authority and duty to enforce and regulate the practices, services and rates of *public utilities*[.]” W. Va. Code § 24-1-1(a) (emphasis added), and section 24-2-1, which provides that the jurisdiction of the Commission “shall extend to all *public utilities* in this state and shall include any *utility* engaged in . . . transportation of . . . gas . . . by pipeline,” *id.* § 24-2-1(a) (emphasis added). It is noted that “public utility” or “utility” are defined as “any person or persons . . . engaged in any business, whether herein enumerated or not, which is, or shall hereafter be held to be, a public service.” W. Va. Code § 24-1-2; *see* W. Va. Code R. 150-16-2.10.

Taken together, the Commission reasoned that the aforesaid provisions give it “broad authority to regulate public services, which encompasses the transportation of natural gas.” App. 529. It elaborated no further on its authority under these statutes but implied in the Commission’s analysis is that gathering facilities are “public utilities.” The Commission is wrong.

First, gathering facilities are not “public utilities,” as clearly stated in the Commission’s own *Rules Governing the Transportation of Natural Gas* (the “Transportation Rules”):

⁴ In Case No. 22-0229, which is currently pending before this Court, the Commission has argued that this Court should not entertain Equitrans’ petition for a writ of prohibition because the instant Petition for Appeal “rais[es] the same issues.” Resp. of Pub. Serv. Comm’n at 14, *State ex rel. Equitrans, LP v. W. Va. Pub. Serv. Comm’n*, No. 22-0229 (filed May 9, 2022). However, even if the legal issues are the same, this Petition for Appeal is not an “adequate means” to “obtain the desired relief” sought in Case No. 22-0229. *State ex rel. Hoover v. Berger*, 483 S.E.2d 12, 21 (W. Va. 1996). For one thing, Big Dog Midstream, LLC is not a party to this case but is a party to Case No. 22-0229, and “[j]udgments are only binding on parties or their privies and not on strangers in the action.” *Fischer v. Fischer*, 338 S.E.2d 233, 235 n.2 (W. Va. 1985). And in any event, the “desired relief” sought in each action is different, and there is a high probability that the General Investigation Matter underlying Case No. 22-0229 will be completely undermined if the jurisdictional error is not corrected in advance. *State ex rel. Vanderra Res., LLC v. Hummel*, 829 S.E.2d 35, 40 (W. Va. 2019) (internal quotation marks omitted).

The term “gathering facilities” shall include 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. *For the purposes of these rules, gathering facilities shall not be considered either public utilities or intrastate pipelines.*

W. Va. Code R. 150-16-2.10 (emphasis supplied). These rules were promulgated in 1987 and the above definition of “gathering facilities” has remained unchanged. The rules make clear that the law viewed (and still views) gathering facilities as not being public utilities.

By definition – indeed by the Commission’s own definition as set forth in the Transportation Rules – a gathering facility is not a public utility. The Commission inexplicably misreads section 24-1-1, 24-2-1, and 24-3-3a in its attempt to adopt a new definition of gathering facilities that conflicts with long-standing law and precedent. “Fairness requires administrative bodies abide by their rules until they are lawfully changed by law.” *Black v. State Consol. Pub. Ret. Bd.*, 505 S.E.2d 430, 438 (W. Va. 1998) (alteration and internal quotation marks omitted). Administrative agency rules and regulations adopted pursuant to the Administrative Procedure Act, as the Transportation Rules were, “have the force and effect of law,” and it is well-settled that “an administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs,” *Id.* (quoting Syl. Pt. 1, *Powell v. Brown*, 238 S.E.2d 220 (W. Va. 1977) (alteration omitted)). When a state administrative agency “reverses course from its precedents, it must give reasonable notice and supporting rationale before it changes its standards[.]” *C & P Tel. Co. of W.Va. v. Pub. Serv. Comm’n of W.Va.*, 301 S.E.2d 798, 804 (W. Va. 1983). By disregarding the Transportation Rules in the January 14 Order, the Commission has violated its administrative obligations and created jurisdiction where none existed.

Moreover, the Commission's characterization of the gathering process as the "transportation of natural gas" does not give rise to jurisdiction of gathering pipelines. App. 529. By well-established law, the Commission can regulate only *public utilities* that transport natural gas or, as set forth below, interstate or intrastate pipelines or local distribution companies that transport natural gas pursuant to Section 24-3-3a. For the reasons explained, gathering facilities are not public utilities. To leave undisturbed the Commission's clearly erroneous application of these statutes would allow the Commission to create an end-run around clear statutory language and the Commission's own rules.

Therefore, because gathering facilities are not public utilities, the Commission cannot possess jurisdiction over them pursuant to sections 24-1-1 and 24-2-1 of the West Virginia Code.

C. Section 24-3-3a of the West Virginia Code does not provide the Commission with authority over gathering facilities.

In the January 14 Order – which the Commission relied upon in the March 16 Order – the Commission erroneously concludes that section 24-3-3a of the West Virginia Code provides it with the "authority to regulate certain gathering lines under its jurisdiction over common carriers." App. 528–29. Again, this conclusion directly conflicts with the unambiguous language of the statutory section itself and the Commission's own rules applying the same. Section 24-3-3a provides:

The [C]ommission may by rule or order, authorize and require the transportation of natural gas in intrastate commerce [a] *by intrastate pipelines*, [b] by interstate pipelines with unused or excess capacity not needed to meet interstate commerce demands or [c] by local distribution companies for any person for one or more uses, as defined by rule, by the [C]ommission in the case of:

- (1) Natural gas sold by a producer, pipeline or other seller to such person; or
- (2) Natural gas produced by such person.

W. Va. Code § 24-3-3a(b) (emphasis added). “Intrastate pipeline” means “(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.” *Id.* § 24-3-3a(a)(1) (emphasis added).

In the January 14 Order, the Commission reasoned, “There is no dispute that the Equitrans gathering lines are used to transport natural gas for third-party producers within West Virginia for compensation.” App. 529. Therefore, the Commission believes it has authority over the gathering facilities “to the extent it has been used to transport gas in West Virginia for third parties for a fee.” *Id.*

All of which could seem sensible enough in the abstract, or at least in the absence of the Commission’s own rules. Reading section 24-3-3a in isolation without also reviewing the Transportation Rules results in an erroneous conclusion by the Commission that its authority over “intrastate pipelines” extends to “gathering facilities.” Unfortunately for the Commission, its own Transportation Rules provide that the term “gathering facilities” “shall not be considered either public utilities *or intrastate pipelines*.” W. Va. Code R. 150-16-2.10 (emphasis supplied). The Commission’s intent in fashioning this exclusion was “that pipeline facilities *connecting producing wells to larger transmission lines* will not be subject to the mandatory transportation requirements of [the Transportation Rules].” *W. Va. Pub. Serv. Comm’n General Order No. 228*, at 7, 1987 WL 257463, 81 P.U.R.4th 453, 457–58 (March 11, 1987) (emphasis supplied). As the Commission explained the rationale underlying this exclusion:

[G]athering 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 [transportation] rules. As the critical issue shall be the determination of where specific gathering facilities end and transportation lines begin, the Commission had

requested proposed definitions of gathering facilities. The Commission adopted, with modification, the definition proposed by [the former International Oil and Gas Association]. As defined, gathering facilities shall not be considered either public utilities or intrastate pipelines.

Id. (emphasis added).

Simply put, West Virginia law is clear: gathering facilities are not intrastate pipelines. In the March 16 Order, the Commission ignored the law and its own rules, straining to explain that “gathering systems” can, in fact, be intrastate pipelines, as they “are used to transport natural gas” pursuant to § 24-3-3a(a)(1). This is simply wrong. Section 24-3-3a was never meant to apply to gathering facilities, and the Commission cannot change its erstwhile reading of this statute without undergoing the proper administrative procedures.

II. If this Court Does Not Suspend and Vacate the March 16 Order, the Commission’s Erroneous View of its Jurisdiction Could Improperly Extend into Other Arenas.

In the General Investigation Matter, in response to Petitioners’ requests for reconsideration of the January 14 Order, the Commission Staff claimed that the Commission “limited” its jurisdiction “to the extent [the gathering system] currently or has been used to transport gas in West Virginia for third parties for a fee and to the extent it is currently or has been used to provide gas to end use customers in West Virginia.” *Staff Response to Petitions for Reconsideration* at 1, Case No. 20-0329-G-P (W. Va. P.S.C. filed Jan. 27, 2022) (quoting January 14 Order at 5). While the Commission did use these words, its jurisdictional holding was decidedly not a *limited* proposition.

The Commission acted beyond its lawful authority in the January 14 Order in the General Investigation Matter and, in turn, it has exceeded its statutory jurisdiction and powers in this case, crafting *ad hoc* jurisdictional conclusions based on a clearly erroneous application of West

Virginia law. Such a practice belies the plain language of the statutes and rules discussed above and bestows impermissibly broad authority in the Commission.

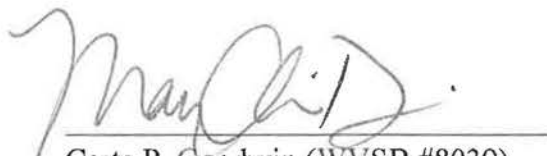
Further, declaring jurisdiction over the installation of a meter on gathering facilities would be just the beginning. Absent suspension and vacation of the March 16 Order, the Commission could continue to exceed its jurisdiction and power in other matters concerning gathering facilities, including, among other things, rate-making authority. *See* W. Va. Code § 24-1-1(a) (providing the Legislature “confer[s] upon the [Commission] the authority and duty to enforce and regulate the practices, services and *rates of public utilities*” (emphasis added)); *id.* § 24-3-3a(d)(2) (demonstrating Commission authority over “*rates and charges of any intrastate pipeline* with respect to any transportation authorized and required under [§ 24-3-3a(b)]” (emphasis added)).

For these reasons, this Court must reinforce the statutory boundaries of the Commission’s authority. The March 16 Order should be suspended and vacated.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to suspend and vacate the March 16 Order and clarify that the Commission does not possess jurisdiction over gathering facilities.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Carte P. Goodwin", is written over a horizontal line.

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Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2022, a true and correct copy of the foregoing *Brief of Diversified Production, LLC, and Diversified Midstream, LLC, as Amici Curiae in Support of Equitrans, LP's Petition for Appeal Requesting Suspension and Vacation* was served via U.S. Mail and/or electronic mail on the following counsel of record:

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