

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 22-0293

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EQUITRANS, L.P.
Petitioner

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vs.

**PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, RONALD HALL, ASHTON
HALL, AND HOPE GAS, INC. DBA DOMINION ENERGY WEST VIRGINIA**
Respondents

**PETITION FOR APPEAL OF A FINAL ORDER OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA IN CASE NO. 20-0994-G-C**

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I. QUESTION PRESENTED

1. Should an order issued by the Public Service Commission exceeding its legitimate powers by asserting jurisdiction over Equitrans, L.P., a non-utility, and requiring Equitrans, L.P. to allow a utility tap to be connected to its low-pressure natural gas gathering facility be suspended and vacated?

Suggested Answer: Yes.

II. STATEMENT OF THE CASE

This appeal arises out of an order of the Public Service Commission of West Virginia (the “PSC”) in *Ronald L. Hall, et al, v. Hope Gas, Inc., dba Dominion Energy West Virginia*, Case No. 20-0994, dated March 16, 2022, (“March 16, 2022, Order”) (App. at 605) adopting, with modifications, a Recommended Decision (App. at 374) as a Final Order improperly asserting jurisdiction over Equitrans, L.P. (“Equitrans”), a federally-regulated interstate pipeline company, in an attempt to require Equitrans, a non-utility, to allow Hope Gas, Inc. dba Dominion Energy West Virginia (“Hope”) to provide utility service on Equitrans’ low-pressure gathering facilities (the “Gathering Facilities”). The jurisdictional issue on appeal in this case is the same as that pending in *State of West Virginia ex rel. Equitrans, L.P., and Big Dog Midstream, LLC v. Public Service Commission of West Virginia*, Case No. 20-0229, arising out of various PSC orders in a PSC General Investigation and other matters pending before the PSC, including *Hall*. The March 16, 2022, Order, is included in the Verified Writ of Prohibition at Footnote 1 for which Equitrans seeks prohibition from this Court. However, because the March 16, 2022, Order is a final order, Equitrans files this Petition for Appeal to preserve its rights. Should the Court accept the Writ of Prohibition, Equitrans urges the Court to stay consideration of this Petition for Appeal as the resolution of the Writ of Prohibition may be dispositive of this case.

With respect to the merits of this appeal, the PSC has historically relied upon on an affidavit to claim jurisdiction over Equitrans. However, the PSC’s assertion of jurisdiction in this manner is improper because the PSC’s jurisdiction is limited to that conferred by statute. After it became apparent that its assertion of jurisdiction based on affidavit was without force, the PSC then pivoted to recast the Gathering Facilities as “devoted to the public service”¹ to bring them within its

¹ Ironically, this action illustrates the self-serving actions of the PSC as it pertains to the Gathering Facilities: The PSC is forcing Equitrans to allow public utilities to offer distribution services off

statutory authority. Yet, the PSC simultaneously, and correctly, admits the Gathering Facilities' "non-utility" status. Indeed, Equitrans and the Gathering Facilities are not and have never been public utilities. In a last-ditch effort, the PSC pivoted again and then claimed that the Gathering Facilities are actually intrastate pipelines subject to PSC jurisdiction. However, this assertion directly conflicts with the West Virginia Code and the PSC's own Rules Governing the Transportation of Natural Gas, including the PSC's specific exclusion that "gathering facilities shall not be considered either public utilities or intrastate pipelines."

Accordingly, Equitrans seeks vacation of the March 16, 2022, Order.

A. Equitrans and Its Legacy Gathering Facilities

Formed in 1995, Equitrans is a natural gas interstate pipeline company regulated by the FERC under the Natural Gas Act and other federal statutes. App. at 338. Equitrans' core business is the operation of high-pressure natural gas interstate transmission lines and natural gas storage. App. at 158–159. Its current operations include approximately 950 miles of transmission pipelines in West Virginia, Pennsylvania, and Ohio that connect to other interstate pipelines and distribution companies. *Id.* Equitrans' transmission system is presently supported by 41 compressor units and 18 associated natural gas storage reservoirs with approximately 857 million cubic feet per day of maximum dependable withdrawal and 41 billion cubic feet of working capacity. *Id.*

In addition, Equitrans currently owns and operates the Gathering Facilities, which are approximately 927 miles of low-pressure gathering lines and eleven compressor stations in West Virginia and Pennsylvania. App. at 159, 167. The Gathering Facilities gather and transport gas from conventional, low-pressure wells in northern West Virginia to local and interstate markets.

of a gathering line because the public utilities have not improved their own distribution system. Rather than focus on the lack of existing utility infrastructure in the area by exercising its jurisdiction over public utilities, the PSC seeks to improperly pull Equitrans into its jurisdiction.

App. at 167. Equitrans does not own the gas gathered through the Gathering Facilities, nor does it own the wells producing the gas. App. at 380. Equitrans does not provide utility gas distribution service, but instead provides gathering service to its customers. App. at 160–164, 359.

Equitrans provides gathering service to local distribution companies operating as public utilities, including Hope; Peoples Gas WV LLC; and Mountaineer Gas Company (collectively, the “Public Utilities”). App. at 160–164, 358. In turn, the Public Utilities provide natural gas utility service and sell natural gas to approximately 3,500 distribution customers² who are connected to the Public Utilities’ taps and meters on the Gathering Facilities. *Id.* Equitrans also gathers gas procured by the Public Utilities and delivers that gas to the interstate pipeline grid.

Equitrans determined that low-pressure gathering is not part of its core business and, accordingly, plans to divest the Gathering Facilities by sale. App. at 160. It began to market the Gathering Facilities to potential purchasers in 2019. *Id.* On April 30, 2020, Equitrans filed with FERC, its regulator, an application to abandon the Gathering Facilities and requested a process that would allow it to continue to market the Gathering Facilities to potential buyers. App. at 157, 165.

Thereafter, Hope filed with the PSC an application to abandon service to its distribution customers connected to Hope’s taps and meters on the Gathering Facilities. App. at 298–323. Hope noted that it could have avoided abandoning its distribution customers by exercising its

² Through its orders, the PSC has referenced varying numbers of distribution customers, but Equitrans would have to refer to the Public Utilities for the precise number for each of their customers, as none of the distribution customers are customers of Equitrans.

contractual “option to purchase any portion of the [Gathering Facilities] for one dollar (\$1.00)[.]” but Hope declined to do so. App. at 301.³

On September 27, 2021, Equitrans notified FERC that it entered into a purchase and sale agreement (“PSA”) dated September 23, 2021, with Big Dog Midstream for the majority of the Gathering Facilities⁴ and intended to abandon them by sale to Big Dog Midstream, rather than abandoning them in place. App. at 383. Accordingly, following FERC’s approval of Equitrans’ abandonment by sale, the Gathering Facilities will be transferred from Equitrans to Big Dog Midstream, at which time Big Dog Midstream will continue providing the same gathering services to customers, including the Public Utilities. *Id.*

B. The PSC’s Assertion of Jurisdiction over Equitrans

Although the PSC “acknowledge[d] that Equitrans is an interstate pipeline company fully regulated by FERC,” it has stated that Equitrans is subject to PSC jurisdiction because “Equitrans is bound by prior commitments to seek [PSC] approval before discontinuing natural gas transportation to distribution customers served off the [Gathering Facilities].” App. at 203. The “prior commitments” refers to what has been called the “Crawford Affidavit” in the underlying PSC proceedings, described more fully below.

In the underlying *Hall* case (as well as the various other matters pending before the PSC related to Equitrans and the Gathering Facilities), Equitrans challenged the PSC’s assertion of

³ In addition to Hope’s contractual option to purchase the Gathering Facilities, Equitrans also provided all the Public Utilities an opportunity to purchase the Gathering Facilities, but the Public Utilities declined to do so.

⁴ Equitrans and Big Dog Midstream entered into an agreement pursuant to which Big Dog Midstream will acquire gathering facilities located in Greene County, Pennsylvania and Braxton, Doddridge, Gilmer, Harrison, Marion, Marshall, Monongalia, Ritchie, Taylor, Tyler, and Wetzel Counties, West Virginia. App. at 383. Equitrans entered a separate agreement to sell additional gathering assets located in Pennsylvania to Peoples Natural Gas Company LLC. App. at 342–346.

jurisdiction. (App. at 607) Equitrans has filed motions, objections, exceptions to Recommended Decisions, and a petition for reconsideration of prior orders. Equitrans has made its position clear that that the PSC “does not have jurisdiction over Equitrans, and subject matter jurisdiction cannot be created or waived by an affidavit or other agreement of a party.” App. at 221. On August 19, 2020, in a separate proceeding, the PSC denied an Equitrans’ petition for reconsideration, reasserting jurisdiction based on the Crawford Affidavit and asserting, for the first time, that a 50-year-old decision, *Boggs v. Pub. Serv. Comm’n*, 154 W. Va. 146, 174 S.E.2d 331 (1970), was “instructive and pertinent to the [PSC’s] continuing authority over” the Gathering Facilities. App. at 284. In several successive orders, as well as continued filings with FERC, the PSC continued to assert jurisdiction over Equitrans, relying primarily on the Crawford Affidavit.⁵ Indeed, the PSC made it clear that “[w]hile Equitrans is an interstate pipeline company and its proposal to abandon the Gathering System and exit FERC’s jurisdiction is not within our statutory purview, Equitrans nonetheless, as a successor subsidiary of Equitable Resources, is subject to the Commission’s jurisdiction and is obligated to satisfy the conditions imposed by this Commission under W. Va. Code § 24-2-12.” App. at 338.

Meanwhile, on January 14, 2022, the PSC issued an order in several consolidated cases, “modify[ing] the November 10, 2021 Order” and now asserting “authority over the gathering assets” under the Crawford Affidavit. App. at 527–528. The PSC also summarily revived its *Boggs* argument and asserted, for the first time, “authority to regulate certain gathering lines” pursuant to West Virginia Code Section 24-3-3a. *Id.* Equitrans and Big Dog Midstream filed

⁵ See App. at 329–341 (December 3, 2020 Order); App. at 356–361 (June 8, 2021 Order); App. at 362–373 (August 11, 2021 Order); App. at 374–382 (August 12, 2021 Order); see also App. at 207–216 (May 28, 2020 Filing with FERC); App. at 268–273 (June 29, 2020 Filing with FERC); App. at 388–392 (October 12, 2021 Filing with FERC).

motions objecting to and requesting reconsideration of the PSC’s January 14, 2022 order.⁶ App. at 540, 572.

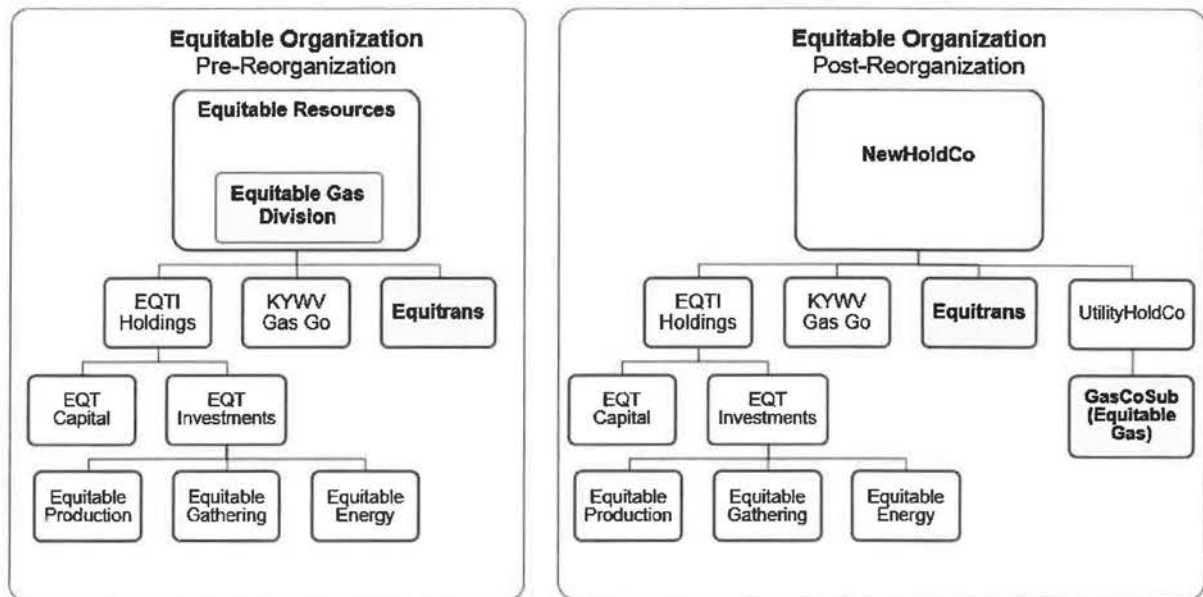
In its March 16, 2022, Order, the PSC made plain that it “incorporate[s] and reaffirm[s] [its] prior decisions holding that by statute, precedent and previous Commission Orders the Commission has jurisdiction and authority over Equitrans’ operation of its gathering assets in West Virginia.” App. at 610.

C. The Crawford Affidavit

The “Crawford Affidavit” is a document filed in 2007, when Equitable Resources, Inc. (“Equitable Resources”), Equitrans’ former parent company, sought to reorganize its corporate structure. App. at 81–89, 198. At that time, Equitable Resources’ retail delivery arm, Equitable Gas Company (“Equitable Gas”), operated as a “public utility division” of Equitable Resources. App. at 4, 198–199. Meanwhile, the Gathering Facilities were owned by Equitrans, which operated as a wholly separate subsidiary of Equitable Resources. App. at 4, 36.

Under the reorganization plan, Equitable Gas became a separate subsidiary under the name “GasCoSub” under a new intermediate parent company “UtilityHoldCo.” App. at 3–9. Equitable Resources, as the ultimate publicly traded parent company, was replaced by a new holding company “NewHoldCo.” *Id.* The reorganization did not affect Equitrans and its Gathering Facilities—Equitrans remained a wholly separate subsidiary and was not even made a party to the proceedings. App. at 36. The PSC conditionally approved the reorganization plan on February 29, 2008. App. at 64.

⁶ Diversified Production LLC also filed a motion objecting to the PSC’s assertion of jurisdiction over gathering facilities and requesting reconsideration of the PSC’s January 14, 2022 order. App. at 580–588.



See App. at 19–20 (reproduced for clarity).

During the reorganization proceedings, PSC staff and other interested parties advocated for the PSC to “use its authority over Equitable Resources to require affiliated non-utility entities [i.e., Equitrans] to make gas service available to different utility customers off of transmission, gathering or production lines[.]” App. at 55. However, the Administrative Law Judge found “this alleged authority is, at best, questionable[.]” stating that the PSC’s “jurisdiction over non-utility assets [i.e., the Gathering Facilities] post-reorganization is about the same as it is over similar assets pre-reorganization,” and concluded “[t]he [PSC] has never had any effective jurisdiction over the non-utility assets of Equitable Resources, Inc. [i.e., Equitrans].” *Id.*

The PSC entered a February 29, 2008 order approving the reorganization, subject to certain conditions. App. at 64. One of those conditions required Equitable Resources to execute an acknowledgement affidavit. App. at 77–79. On April 14, 2008, Equitable Resources Senior Vice President and President of Midstream and Distribution, Randall L. Crawford, submitted what has become known as the “Crawford Affidavit” acknowledging:

- (i) the PSC would have “complete regulatory jurisdiction over all facilities, rates, and services of the entity designated in the reorganization plan as ***GasCoSub***” (i.e., the new public utility subsidiary, formerly Equitable Gas);
- (ii) the PSC would retain “any and all ***jurisdiction that it may still have*** after the realignment plan becomes effective, or may hereafter acquire either through changes in methods of operation or services rendered, over Equitable Resources, Inc. or any affiliate or successor” (i.e., Equitrans);
- (iii) Equitable Resources and its affiliates and successors would not “discontinue service to any ***customer served by a main line tap*** on production, transmission or gathering line or facility of any Equitable Resources affiliate or subsidiary or their successors, without first obtaining the authority of the [PSC]”; and
- (iv) Equitable Resources and its affiliates and successors would “make service available to all future applicants who would be entitled to natural gas or transportation service from such production, transmission or gathering pipelines or facilities ***under the statutes and applicable regulations to the same extent*** as if a separation of properties had not taken place[.]”

App. at 85–89 (emphasis added). The PSC granted final approval of Equitable Resources’ reorganization plan on October 16, 2008. App. at 91.

D. The March 16, 2022, Order

The March 16, 2022, Order arises out of a PSC complaint originally filed by Ronald L. Hall against Hope⁷ related to a denial of meter tap request for natural gas service from a non-utility, Equitrans gathering line. App. at 605. In the now adopted Recommended Decision, Equitrans was ordered to make its gathering line available for use by Hope so that it could provide natural gas service to Hall. App. at 381.⁸ In adopting the Recommended Decision, the PSC incorporated and reaffirmed its claim of jurisdiction. App. at 610. However, the PSC cannot assert jurisdiction based on the Crawford Affidavit and, moreover, is statutorily limited to regulation of “public

⁷ Ashton Hall was later added as a Complainant. Hope remains the utility Defendant. Equitrans was joined as a Respondent.

⁸ Equitrans filed Exceptions as to other aspects of the Recommended Decision, but seeks an appeal only on the basis of lack of PSC jurisdiction.

utilities,” which Equitrans is not. Accordingly, Equitrans seeks a suspension and vacation of the March 16, 2022, Order because the PSC is attempting to regulate beyond its jurisdiction.

III. SUMMARY OF THE ARGUMENT

By asserting jurisdiction over Equitrans and the Gathering Facilities, the PSC is manufacturing jurisdiction where none exists, resulting in the inappropriate regulation of a private company and its assets. Only the West Virginia Legislature may vest the PSC with jurisdiction, and that jurisdiction is limited to the regulation of public utilities. No affidavit, PSC order, or court order may confer jurisdiction to the PSC beyond that statutory grant. Because the PSC is exceeding its legitimate powers by improperly exercising jurisdiction, the Court should vacate the March 16, 2022, Order declaring that the PSC does not have jurisdiction over Equitrans or the Gathering Facilities for the following reasons.

Most significantly, West Virginia Code Section 24-2-1(a) expressly limits the PSC's jurisdiction to "public utilities." Equitrans and the Gathering Facilities are, by the PSC's own admission, not public utilities, and any attempt by the PSC to regulate them is contrary to law. Despite the clarity of the West Virginia Legislature's jurisdictional grant to the PSC, it attempts to expand that jurisdiction. Each of these attempts fails.

The PSC first attempts to invoke the Court's 50-year-old opinion in *Boggs* as an alternative basis for jurisdiction by arguing that the Gathering Facilities are dedicated to public service. However, the PSC's own Rule 150-15-2.10, adopted *after* the *Boggs* opinion, expressly states that "gathering facilities shall not be considered either public utilities or intrastate pipelines." Therefore, any reliance by the PSC on the *Boggs* opinion is misplaced.

Then, to avoid the fact that the Gathering Facilities are not public utilities, the PSC argues that the Gathering Facilities are actually intrastate pipelines. However, again, this argument directly conflicts with Rule 150-16-2.10, which expressly excludes gathering facilities from the definition of "intrastate pipelines," and must be rejected.

Finally, because the West Virginia Legislature's jurisdictional grant, statutes, rules, and regulations all clearly exclude the Gathering Facilities from PSC regulation, the PSC has no choice but to attempt to rely on the Crawford Affidavit for its claim of jurisdiction. However, the PSC cannot sidestep these statutory limitations, or its own rules, to assert jurisdiction under the Crawford Affidavit because an affidavit cannot confer jurisdiction.

Therefore, this Court should vacate the March 16, 2022, Order.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

A hearing is provided for in W. Va. Code § 24-5-1. Oral argument is appropriate under the criteria of W. Va. R. App. P. 19(a) as it would aid in the decisional process. This case is appropriate for Rule 19 oral argument because it involves assignments of error in the application of settled law.

V. ARGUMENT

A. The March 16, 2022, Order should be vacated because the PSC is exceeding its legitimate powers by improperly exercising jurisdiction.

West Virginia Code § 24-5-1 provides for a review of a final order of the PSC. The standard of review of a PSC order includes whether the PSC exceeded its authority. Syl. Pt. 2, *Monongahela Power Co. v. Public Service Commission of West Virginia*, 166 W.Va. 423, 276 S.E.2d 179 (1981). And, “[a] final order of the [PSC] . . . based upon a mistake of law, will be reversed and set aside by this Court.” Syl. Pt. 3, *Atlantic Greyhound Corp. v. Public Service Commission*, 132 W.Va. 650, 54 S.E.2d 169 (1949).

This Court should suspend and vacate the March 16, 2022, Order because (1) as discussed in detail below, the PSC’s attempt to assert jurisdiction here exceeds the bounds of the PSC’s statutory jurisdiction under West Virginia Code § 24-2-1(a) (“jurisdiction of the [PSC] shall extend to all public utilities in this state”) and (2) the facts set forth above are not in dispute. The only dispute is whether the PSC can create jurisdiction over an entity that is not a public utility (Equitrans) regarding the operation of non-utility assets (the Gathering Facilities). Simply put, the answer is no.

B. The Court should vacate the March 16, 2022, Order because the West Virginia Legislature limited the PSC’s jurisdiction to public utilities.

The PSC “derives its powers and jurisdiction wholly from the statute.” *City of Bluefield v. Pub. Serv. Comm’n*, 94 W. Va. 334, 118 S.E. 542, 545 (1923). It “is without power to consider issues not expressly included within its grant of legislative authority.” *W. Va. Highlands Conservancy, Inc. v. Pub. Serv. Comm’n of W. Va.*, 206 W. Va. 633, 636, 527 S.E.2d 495, 498 (1998); see also Syl. Pt. 1, *Eureka Pipe Line Co. v. Pub. Serv. Comm’n*, 148 W. Va. 674, 674, 137 S.E.2d 200, 199 (1964) (“The Public Service Commission of West Virginia . . . can exercise only

such jurisdiction, power or authority as is authorized by statute.”). West Virginia Code § 24-2-1(a) provides that the “jurisdiction of the [PSC] shall extend to all public utilities in this state.” Thus, “its power is confined to regulation of public utilities.” *W. Va. Highlands*, 206 W. Va. at 634, 527 S.E.2d at 496 (quoting Syl. Pt. 2, *Wilhite v. Pub. Serv. Comm’n*, 150 W. Va. 747, 748, 149 S.E.2d 273, 274 (1966)).⁹

As it relates to the natural gas industry specifically, “[n]o such legislative authority is given to the [PSC] to regulate transportation of oil and gas products by a **non-public utility**.” *Wilhite*, 150 W. Va. at 763–64, 149 S.E.2d at 283 (emphasis added).¹⁰ Thus, “[q]uite clearly the [PSC] 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*, 148 W. Va. at 683, 137 S.E.2d at 205 (emphasis added).

Preliminarily, the PSC’s ability to regulate the Gathering Facilities, and thereby Equitrans, depends entirely on whether they are public utilities, and the PSC admits they are not. Instead, the PSC attempts to circumvent the public utility statutory limitation on its jurisdiction in three ways: through the reliance on the inapplicable and outdated *Boggs* case, the misapplication of a statute, and the legal effect of the Crawford Affidavit. For the reasons discussed below, it is clear that the

⁹ See also Syl. Pt. 7, *Div. of Just. & Cmty. Servs. v. Fairmont State Univ.*, 242 W. Va. 489, 490, 836 S.E.2d 456, 457 (2019) (Administrative agencies “must find **within the statute** warrant for the exercise of any authority which they claim.” (emphasis added)); *State ex rel. State Farm Mut. Auto. Ins. Co. v. Marks*, 230 W. Va. 517, 529, 741 S.E.2d 75, 87 (2012) (“An administrative body is vested with only that power specifically granted to it **by the Legislature**.” (emphasis added)).

¹⁰ The Legislature similarly limited the PSC’s authority over abandonment proceedings to cases involving **public utilities**. See W. Va. Code § 24-2-12 (2022) (emphasis added) (“Unless the consent and approval of the [PSC] is first obtained: . . . (c) **no public utility** . . . may assign, transfer, lease, sell, or otherwise dispose of its . . . property[.]” (emphasis added)); W. Va. Code § 24-3-1 (2022) (“No . . . **public utility** shall discontinue any . . . public service facility . . . without first obtaining authority from the [PSC] so to do[.]” (emphasis added)).

Gathering Facilities are not public utilities and that all of the PSC's attempts to bring the Gathering Facilities within its jurisdiction fail.

1. The Gathering Facilities are not public utilities.

The PSC has admitted, as it must, that the Gathering Facilities are not public utilities. The Legislature defined a "public utility" to mean "any person or persons, or association of 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 (2022). This Court has further clarified the meaning of "public utility" as follows:

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 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.

Syl. Pt. 3, *W. Va. Highlands*, 206 W. Va. at 634, 527 S.E.2d at 496 (quoting Syl. Pt. 3, *Wilhite*, 150 W. Va. at 748, 149 S.E.2d at 274) (emphasis added). Moreover, public utility status "will not be presumed from the fact that the product or service is a product or service usually supplied by a utility." *Wilhite*, 150 W. Va. at 760, 149 S.E.2d at 281. In fact, dedication to a public service "is *never presumed* without evidence of *unequivocal intention*." *Id.* (emphasis added).

Critically, the PSC's own regulations expressly reject any jurisdiction over gathering facilities:

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 (2022) (emphasis added); *see also* PSC, General Order No. 228 at 7 (Mar. 8, 1987) (provided for reference, App. at 618–672). Indeed, the PSC previously

considered and expressly rejected a proposal to narrow the definition of “gathering facilities” to exclude “mixed purpose gathering lines” that both gather gas and provide service to end-users. PSC, General Order No. 228.1 at 4 (Jan. 18, 1995) (provided for reference, App. at 673–705).¹¹

Here, the PSC has expressly admitted that the Gathering Facilities are “non-utility facilities,” App. at 336, which is entirely consistent with its own regulation. *See* W. Va. Code R. 150-16-2.10 (“[G]athering facilities shall not be considered . . . public utilities[.]”).¹² Likewise, the PSC does not and cannot claim that Equitrans is a public utility because, unlike the Public Utilities, Equitrans does not sell and has never sold its services to the public. Equitrans has no retail utility customers. App. at 358–359. It does not sell gas, it does not produce gas, and it does not even own the gas gathered through its Gathering Facilities. App. at 380. During the 2007 reorganization proceedings, the administrative law judge astutely noted that the PSC *never* had jurisdiction of Equitrans. App. at 55. Instead, as a FERC-regulated interstate natural gas pipeline

¹¹ In the proceedings at issue, the PSC attempts to parse distinctions between “gathering systems used exclusively for gathering by the owner of the system, gathering systems used by non-owners for transportation of gas, gathering systems used both for gathering and serving end use customers, and gathering systems of a former utility, its owner, and their successor.” App. at 527. However, the clear and express language of Rule 2.10 instructs that these are distinctions without jurisdictional effect. Moreover, to the extent that the PSC is attempting to revise Rule 2.10 outside the normal rulemaking process, this re-interpretation is improper. *See Consumer Advoc. Div. of Pub. Serv. Comm’n of W. Va., on Behalf of Residential & Small Com. Customers of Hope Gas, Inc. v. Pub. Serv. Comm’n of W. Va.*, 182 W. Va. 152, 156, 386 S.E.2d 650, 654 (1989) (“Interpretation of . . . rules . . . is proper only when an ambiguity exists” and “‘interpretation’ by an administrative agency of its own rules should be disregarded when such ‘interpretation’ conflicts with the clear language of the rules[.]”).

¹² FERC has also determined that the Gathering Facilities serve a gathering function. *See* App. at 168.

company,¹³ Equitrans provides transportation, storage, and gathering service only for or to its private customers, including the Public Utilities themselves. App. at 160–164, 293–294, 359.¹⁴

In plainest terms, the Gathering Facilities and Equitrans are not and never were “public utilities;” therefore, they are not and never were subject to the PSC’s jurisdiction.

2. The PSC cannot rely on *Boggs* to expand jurisdiction to the Gathering Facilities.

Despite admitting the Gathering Facilities are not public utilities, the PSC invokes a 50-year-old decision in *Boggs*, 154 W. Va. 146, 174 S.E.2d 331, as “instructive and pertinent to the [PSC’s] continuing authority over” the Gathering Facilities. App. at 284. However, *Boggs* reiterates that “[t]he extent of the jurisdiction of the Public Service Commission is set out in [West Virginia Code Section] 24-2-1”—i.e., it is limited to public utilities. 154 W. Va. at 151, 174 S.E.2d at 335. While the PSC parrots certain phrases from the *Boggs* opinion to imply it has jurisdiction over the Gathering Facilities as a “public utility,” it ultimately and correctly concedes they are “non-utility facilities.” App. at 336.

¹³ The PSC has routinely recognized its lack of jurisdiction over other FERC-regulated interstate natural gas companies, which is contrary to their assertion of jurisdiction over Equitrans. See, e.g., *Hohman v. Columbia Gas Transmission Corporation*, Case No. 05-0892-G-C, Order dated Oct. 12, 2006 at 2 (provided for reference, App. at 706–709) (“CGTC is an interstate pipeline company as defined by the Natural Gas Policy Act of 1978 and is regulated exclusively by the [FERC] as opposed to the [PSC].”); *Knapp v. Hope Gas, Inc., dba Dominion Energy West Virginia and Dominion Transmission, Inc.*, Case No. 19-0001-G-GT-C, Order dated March 11, 2019, at 2 (provided for reference, App. at 710–712) (dismissing complaint for lack of jurisdiction); *Fuller v. Columbia Gas Transmission, LLC*, Case No. 18-1530-GT-C, Order dated April 16, 2019 at 2 (provided for reference, App. at 713–714) (“It is reasonable to dismiss this complaint because the Commission lacks jurisdiction over Columbia Gas.”); *Dean-Bowles v. Columbia Gas Transmission aka TransCanada Gas*, Case No. 19-0562-GT-C, Order dated August 15, 2019 at 2 (provided for reference, App. at 715–716) (“It is reasonable to dismiss this complaint because the Commission lacks jurisdiction over Columbia Gas.”).

¹⁴ The fact that Equitrans has customers that are public utilities is not relevant. See *Wilhite*, 150 W. Va. at 762, 149 S.E.2d at 282 (holding that when a company serves only a limited number of customers “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.”).

Moreover, with respect to gathering facilities, the PSC superseded *Boggs* with its own rule that disclaims jurisdiction over gathering facilities. See W. Va. Code R. 150-16-2.10 (“[G]athering facilities shall not be considered . . . public utilities[.]”). *Boggs* indicates that even when a facility is “dedicated to public use over a long period of time[.]” the PSC’s jurisdiction may nevertheless be terminated if it “demonstrate[s] clearly and unequivocally its intent to relinquish such jurisdiction.” Syl. Pt. 1, *Boggs*, 154 W. Va. at 146, 155, 174 S.E.2d at 332, 337. Importantly, the PSC promulgated this regulation seventeen years *after* *Boggs* was decided and eight years *before* the formation of Equitrans. See W. Va. Code R. 150-16-1.5(f) (1987); PSC, General Order No. 228 at 7. Thus, whatever authority the PSC may have had over gathering facilities at the time of *Boggs* was clearly terminated when the PSC adopted Rule 150-16-2.10. See *Murray Energy Corp. v. Steager*, 241 W. Va. 629, 638 n.13, 827 S.E.2d 417, 426 n.13 (2019) (quoting *Appalachian Power Co. v. State Tax Dep’t of W. Va.*, 195 W. Va. 573, 583 n.8, 466 S.E.2d 424, 434 n.8 (1995)) (“Of course, an agency must follow and apply its rules and regulations in existence at the time of agency action.”). Put simply, the PSC cannot rely upon *Boggs* to summarily convert “non-utility facilities” like the Gathering Facilities to a public utility, particularly in contradiction of its own regulation.

3. Section 24-3-3a does not apply to the Gathering Facilities.

Alternatively, the PSC asserts that the Gathering Facilities are actually “intrastate pipelines” subject to PSC jurisdiction under West Virginia Code Section 24-3-3a. Focusing only on one of its definitions out of context, the PSC summarily concludes that Section 24-3-3a provides “authority to regulate certain gathering lines under its jurisdiction over common carriers.” App. at 528–529. However, the PSC again ignores its own Rule 150-16-2.10, which expressly states: “*gathering facilities shall not be considered either public utilities or intrastate pipelines.*”

As if the express language of the rule were not clear enough, the PSC also issued General Order 228 concurrently with its adoption of Rule 150-16-2.10. It specifically references Section 24-3-3a and states:

[C]onsistent with West Virginia Code § 24-3-3a(c), the [PSC] has excluded gathering facilities from the provisions of this rule. By doing so, it is the [PSC's] intent that pipeline facilities connecting producing wells to larger transmission lines will not be subject to the mandatory transportation requirements of these rules.

PSC, General Order No. 228 at 7. Moreover, as previously noted, the PSC has already considered and expressly rejected a proposed rule change that would have subjected gathering facilities to the transportation rules. *See* PSC, General Order No. 228.1 at 4.

Even if the PSC had not exempted gathering facilities from regulation, the Gathering Facilities at issue are not “intrastate pipelines” as defined by the Legislature in Section 24-3-3a. “‘Intrastate pipeline’ means (1) any utility [which the PSC admits the Gathering Facilities are not] 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.” W. Va. Code § 24-3-3a(a)(1) (emphasis added). The Legislature further defined “intrastate commerce” as “production, gathering, treatment, processing, transportation and delivery of natural gas *entirely within this State.*” *Id.* at § 24-3-3a(a)(4) (emphasis added). However, Equitrans operates the Gathering Facilities *across state lines*, in both West Virginia and Pennsylvania. Thus, Equitrans and the Gathering Facilities are not “intrastate pipelines” and the PSC cannot invoke 24-3-3a as a back door to regulate the operation of the Gathering Facilities.

In short, the PSC is “transcend[ing] its statutory jurisdiction, power and authority” by requiring Equitrans to allow the tap. Accordingly, the Court should vacate the March 16, 2022, Order. *Eureka*, 148 W. Va. at 683, 137 S.E.2d at 205

4. The Crawford Affidavit cannot create PSC jurisdiction.

Apparently aware of its jurisdictional limitations, the PSC further sidesteps the mandate of the West Virginia Legislature and its own Rules in an attempt to establish jurisdiction over Equitrans by relying on the Crawford Affidavit. In its November 10, 2021, order in the General Investigation regarding Equitrans, the PSC asserted that “Equitrans, as a subsidiary of Equitable Resources, is bound by the Crawford Affidavit . . . to continue service and seek approval of abandonment from the [PSC],” and “[a]ny successor of Equitrans . . . *whether a utility or not*, is subject to the conditions imposed by . . . the Crawford Affidavit.” App. at 400–401 (emphasis added); *see also* App. at 528. In the March 16, 2022, Order, the PSC repeated its reliance upon the Crawford Affidavit as a basis for jurisdiction and stated that “...Equitrans shall make available to all future applicants who request natural gas or transportation service from such gathering assets.” App. at 610.

Setting aside the PSC’s misinterpretation of the Crawford Affidavit,¹⁵ the PSC’s orders relying on the Affidavit are without legal effect because jurisdiction cannot be created where none exists—it may only be created by the Legislature. *State ex rel. Smith v. Thornsberry*, 214 W. Va. 228, 233, 588 S.E.2d 217, 222 (2003) (“Unlike personal jurisdiction, subject-matter jurisdiction may not be waived or conferred by consent and must exist as a matter of law for the court to act.”);

¹⁵ To be sure, Equitrans disputes the PSC’s interpretation of the Crawford Affidavit. Although not germane to the legal question presented in this Writ, the Affidavit only acknowledged whatever “*jurisdiction that it may still have* . . . over Equitable Resources, Inc. or any affiliate or successor,” including Equitrans. App. at 86. However, at no time did the PSC identify any jurisdiction it ever had over Equitrans. It is a core axiom of law that an agency cannot do indirectly what it cannot do directly. *See Gelpcke v. City of Dubuque*, 68 U.S. 175, 192 (1863) (“It is almost unnecessary to say, that what the legislature cannot do directly, it cannot do indirectly.”). Yet, that is precisely what the PSC is trying to do here. For the legal infirmities discussed herein, the Court need not address any underlying factual errors in the PSC’s misinterpretation of the Crawford Affidavit.

Syl. Pt. 4, *Blankenship v. Estep*, 201 W. Va. 261, 262, 496 S.E.2d 211, 212 (1997) (“Consent of parties cannot confer upon a court jurisdiction which the law does not confer[.]”). “No such legislative authority is given to the [PSC] to regulate transportation of oil and gas products by a non-public utility.” *Wilhite*, 150 W. Va. at 763–64, 149 S.E.2d at 283. Accordingly, the PSC has no legislative authority over Equitrans and the Gathering Facilities, which the PSC admits are not public utilities.

Thus, even if the Crawford Affidavit stands for the proposition asserted by the PSC (which it does not), the PSC cannot rely on the Affidavit to create jurisdiction over Equitrans or the Gathering Facilities. Because the PSC’s use of the Crawford Affidavit to regulate the operation of the Gathering Facilities exceeds its legitimate power, the Court should vacate the March 16, 2022, Order.

VI. CONCLUSION

For the forgoing reasons, Equitrans respectfully requests that the Court suspend and vacate the March 16, 2022, Order.

Respectfully submitted this 15th day of April, 2022.



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THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0293

EQUITRANS, L.P.
Petitioner

vs.

**PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, RONALD HALL, ASHTON
HALL, AND HOPE GAS, INC. DBA DOMINION ENERGY WEST VIRGINIA**
Respondents

**PETITION FOR APPEAL OF A FINAL ORDER OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA IN CASE NO. 20-0994-G-C**

CERTIFICATE OF SERVICE

I, Stephen E. Hastings, counsel for Petitioner, hereby certify that on this day, April 15, 2022, I served a true and correct copy of the foregoing "*Petition For Appeal*" upon counsel listed below via hand-delivery or via United States Mail, postage prepaid, as set forth below:

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