COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF EAST KENTUCKY POWER COOPERATIVE, INC. FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR CONSTRUCTION OF AN ASH LANDFILL AT J.K. SMITH STATION, THE REMOVAL OF IMPOUNDED ASH FROM WILLIAM C. DALE STATION FOR TRANSPORT TO J.K. SMITH AND APPROVAL OF A COMPLIANCE PLAN AMENDMENT FOR ENVIRONMENTAL SURCHARGE RECOVERY	)	CASE NO. 2014-00252

ORDER

On September 8, 2014, East Kentucky Power Cooperative, Inc. ("EKPC") filed an application, pursuant to KRS 278.020(1), KRS 278.183, and 807 KAR 5:001, Sections 14 and 15, seeking a Certificate of Public Convenience and Necessity ("CPCN") to construct an ash landfill at its J.K. Smith Generating Station ("Smith Landfill") to receive coal ash removed and transported from EKPC's William C. Dale Generating Station ("Dale Station"). EKPC also seeks approval of an amendment to its Environmental Compliance Plan for purposes of recovering the costs for the proposed project through EKPC's environmental surcharge. The total cost of the project is approximately $26.9 million.

On September 26, 2014, the Commission issued an Order establishing a procedural schedule for the processing of this matter. The procedural schedule established a deadline for requests to intervene and provided for two rounds of discovery on EKPC's application, the opportunity for the filing of intervenor testimony, discovery upon intervenor testimony, and the opportunity for EKPC to file rebuttal

testimony. The Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention ("AG"), and Grayson Rural Electric Cooperative Corporation ("Grayson") were granted intervention. A formal evidentiary hearing was conducted on February 3, 2015. EKPC filed responses to post-hearing information requests on February 10, 2015. EKPC submitted its post-hearing brief on February 17, 2015. On February 19, 2015, Grayson filed a motion requesting a one-week extension, or until February 24, 2015, in which to file its post-hearing brief. Grayson stated that it was unable to timely file its post-hearing brief due to inclement winter weather. On February 24, 2015, Grayson filed its post-hearing brief. On February 19, 2015, the AG filed a motion requesting an extension of time in which to file a paper copy of his brief. The AG noted that on February 17, 2015 an electronic version of his brief was transmitted by e-mail to all parties and Commission Staff. However, due to inclement weather on February 16, 2015, the AG was unable to file a paper copy of his brief by the February 17, 2015 deadline. On February 19, 2015, the AG filed a paper copy of his brief with the Commission. The matter now stands submitted to the Commission for a decision.

The Commission finds that the Grayson and the AG have established good cause to permit them an extension of time in which to file their post-hearing briefs. The briefs of the AG and Grayson, filed on February 19, 2015, and February 24, 2015, respectively, are accepted for filing and deemed part of the official record of this matter.

BACKGROUND

EKPC's Dale Station is located on the Kentucky River at Ford, Clark County, Kentucky.[1] Dale Station consists of four base-load coal units.[2] Dale Units 1 and 2 were commissioned in 1954, and each is rated at 25 megawatts ("MW").[3] Dale Units 3 and 4, each rated at 75 MW, were commissioned in 1957 and 1960, respectively.[4] The Dale Station currently has two ash ponds and one dry storage area for coal ash (collectively "Dale Ash Ponds").[5] EKPC currently has two types of permit-by-rule at the Dale Station. The first is a permit-by-rule pursuant to 401 KAR 45:060, Section 1(5), for the Dale Ash Ponds that are used as impoundments for the storage of coal ash and operated in compliance with a Kentucky Pollutant Discharge Elimination System permit.[6] The second is a permit-by-rule pursuant to 401 KAR 45:060, Section 1(7) for structural fills that were built at Dale Station by beneficially reusing coal ash.[7] Currently, the Dale Ash Ponds contain approximately 560,000 cubic yards of coal ash,[8] 80 percent of which is fly ash and 20 percent consists of bottom ash.[9]

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1 Application at 1.

2 *Id.* at 1-2.

3 *Id.* at 2.

4 *Id.*

5 *Id.* at 3.

6 Direct Testimony of Jerry B. Purvis ("Purvis Testimony") at 7.

7 *Id.* at 8.

8 Direct Testimony of Matt Clark ("Clark Testimony") at 17.

9 Purvis Testimony at 5.

Beginning in 1985, EKPC used the Hancock Creek Landfill to permanently dispose of coal ash produced by the Dale Station. The Hancock Creek Landfill reached maximum capacity and was closed in 2010. At that time, EKPC began an evaluation to identify a new disposal site for the coal ash generated at the Dale Station. EKPC and outside consultants[10] identified and examined the following alternatives.

1. Alternative 1 – Construct a new special waste landfill at the Dale Station.

2. Alternative 2 – Construct a new special waste landfill in close proximity to the Dale Station. EKPC was unable to negotiate a deal with the landowners for the purchase of the property identified by EKPC as potentially suitable to develop a special waste landfill.[11]

3. Alternative 3 – Remove Dale Station coal ash and transport by truck to EKPC's Spurlock Generating Station special waste landfill ("Spurlock Landfill"). The cost for this alternative was approximately $35.6 million.[12]

4. Alternative 4 – Remove Dale Station coal ash and transport by rail to Spurlock Landfill. The cost for this alternative was approximately $30.7 million.[13]

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[10] EKPC retained Kenvirons, Inc. to provide expertise on landfill issues; Redwing Ecological Services, Inc. to provide expertise on water and wetland impacts; and Burns and McDonnell to evaluate on-site options related to coal ash generated at the Dale Station. *See* EKPC's Response to Commission Staff's Initial Request for Information, Item 3.

[11] Clark Testimony at 7-8.

[12] Clark Testimony at 8-11; and Application at 11.

[13] *Id.*

5. Alternative 5 – Remove Dale Station coal ash and transport by truck to a private solid waste landfill in Montgomery County, Kentucky, operated by Rumpke of Kentucky. The cost for this alternative was approximately $32.9 million.[14]

6. Alternative 6 – On-site closure of Dale Ash Ponds by consolidating the coal ash in Ash Pond 2 and installing a cap consisting of a geomembrane, 18 inches of protective soil cover, followed by six inches of topsoil for seeding. Burns & McDonnell estimated the cost for this alternative to be $34.8 million.[15]

7. Alternative 7 – On-site closure of Dale Ash Ponds by dewatering the wet coal ash in Ash Pond 2, then placing an intermediate soil and geomembrane liner on top of Ash Pond 2, consolidating the remaining dewatered coal ash from Ash Ponds 3 and 4 over the intermediate liner system and installing a final cap over the coal ash. A protective soil cover of 18 inches and six inches of topsoil cover would then be placed over the cap. Burns & McDonnell estimated the cost for this alternative at $36.6 million.[16]

8. Alternative 8 – Remove Dale Station coal ash and transport by truck to a newly constructed Smith Landfill. This alternative is the subject of the instant application.

As of April 2014, EKPC made the decision to retire Dale Units 1 and 2 and is currently exploring the marketing of the assets of those units.[17] Also at that time, EKPC decided to place Dale Units 3 and 4 into indefinite storage beginning April 2015 as a

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[14] *Id.*

[15] Clark Testimony at 12.

[16] *Id.*

[17] Direct Testimony of Don Mosier at 4.

result of the Mercury and Air Toxics Standards ("MATS") rule.[18] EKPC subsequently sought and obtained, at the behest of its regional transmission operator, PJM Interconnection, LLC, a one-year extension of the deadline to comply with MATS, or through April 2016, with respect to Dale Units 3 and 4.[19]

EKPC asserts that once Dale Units 3 and 4 are placed in indefinite storage and the Dale Generating Station is effectively closed, the Dale Ash Ponds would no longer be used as impoundments and, as a result, would lose their permit by rule status provided by 401 KAR 45:060, Section 1(4).[20] EKPC contends that it is faced with two feasible options for complying with state environmental requirements: either obtain a permit to operate the Dale Ash Ponds as a special waste landfill or remove the coal ash currently stored in the Dale Ash Ponds and permanently dispose of it in the off-site Smith Landfill, which has already been permitted as a special waste landfill.[21]

PROPOSED PROJECT

EKPC maintains that the proposed project represents the most prudent and least-cost alternative to ensure compliance with applicable state environmental law. EKPC notes that the design of the Smith Landfill will also comply with the Disposal of Coal Combustion Residuals from Electric Utilities rule ("CCR Rule") that was recently issued by the U.S. Environmental Protection Agency on December 19, 2014. Further, EKPC points out that it has consulted with KDWM regarding the closing of the Dale Ash

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[18] *Id.*

[19] Supplemental Direct Testimony of Don Mosier at 3; and EKPC's Response to Commission Staff's Third Request for Information, Item 1.

[20] Purvis Testimony at 8.

[21] *Id.* at 11. On July 29, 2013, EKPC obtained a permit from the Kentucky Division of Waste Management ("KDWM") to construct a special waste landfill at the Smith Generating Station.

Ponds and KDWM has indicated in writing that it is in agreement with EKPC's proposed plan to close the impoundments.[22]

EKPC contends that the on-site alternative, Alternative 1, was unworkable due to the physical constraints of the property itself. EKPC noted that one possible area within the Dale Station's 80-acre site was adjacent to the Kentucky River and within the 100-year floodplain, which would not have satisfied Special Waste Landfill siting requirements. The other area at the Dale Station was unsuitable for development of a landfill due to its location on a severe slope above a public road, limited size, and proximity to neighboring homes.[23]

EKPC rejected Alternatives 3, 4, 5, 6, and 7 after concluding that the costs associated with these alternatives were greater than the cost of the proposed project. EKPC also stated that Alternatives 6 and 7, like Alternative 1, would have kept the coal ash produced by the Dale Station permanently located adjacent to the Kentucky River, raising siting-requirement concerns that would make it unlikely that EKPC could successfully obtain a special waste landfill permit.[24]

EKPC states that the Smith Generating Station site, which is located on 3,272 acres, would allow for the construction of the Smith Landfill of sufficient size to provide for the required disposal of coal ash from the Dale Station, along with associated

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[22] Purvis Testimony at 15.

[23] Clark Testimony at 6-7.

[24] *Id.* at 13.

infrastructure and necessary buffers to adjoining property owners.[25] The size of the Smith Landfill also provides acres for borrowing soil essential to construction of a landfill and backfilling the Dale Ash Ponds.[26] Although the total permitted capacity under the special waste landfill permit is 3,834,579 cubic yards, EKPC is requesting to construct a 750,000 cubic yard landfill cell.[27] Thus, the Smith Landfill could be used to dispose of coal ash from EKPC's Spurlock or Cooper Generating Stations in the event of an emergency.

The proposed project would consist of construction of the Smith Landfill; dewatering wet ash at Dale Ash Ponds; discharge of treated water from the site; relocation of transmission lines at the Dale Station; removal of coal ash from the Dale Ash Ponds and hauling it to the Smith Landfill; and restoring the Dale Ash Ponds site after the ash is removed.[28] The current project schedule assumes that the Smith Landfill construction will begin in April 2015 and will be able to accept dry coal ash from the Dale Station for use as a protective cover by late summer/early fall of 2015.[29] Remaining coal ash from the Dale Ash Ponds will be hauled starting in April 2016.[30] The duration of the hauling is estimated to take 53 weeks and is estimated to be completed over the course of a small part of the 2015 construction season and over

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[25] *Id.* at 14.

[26] *Id.*

[27] *Id.* at 15-16.

[28] Direct Testimony of Ed Tohill ("Tohill Testimony") at 10.

[29] Clark Testimony at 19.

[30] Tohill Testimony, Exhibit ET-1, at 6-1.

most of the 2016 and 2017 construction seasons, with the project expected to be completed by November 2017.[31]

The proposed hauling plan to transport the coal ash from the Dale Station to the Smith Landfill is 27.3 miles each way and encompasses state highways and interstates, with the exception of plant drives.[32] EKPC estimates that 132 truckloads of coal ash can be hauled from Dale Station to the Smith Landfill each eight-hour work day.[33] EKPC asserts that the haul route has been publicly vetted and was incorporated into the permit for the Smith Landfill.[34]

DISCUSSION

CPCN

No utility may construct or acquire any facility to be used in providing utility service to the public until it has obtained a CPCN from this Commission.[35] To obtain a CPCN, the utility must demonstrate a need for such facilities and an absence of wasteful duplication.[36]

"Need" requires:

> [A] showing of a substantial inadequacy of existing service, involving a consumer market sufficiently large to make it economically feasible for the new system or facility to be constructed or operated.

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[31] *Id.*, Exhibit ET-1, at 6-1 and 6-2.

[32] Tohill Testimony at 16.

[33] *Id.*

[34] Clark Testimony at 20.

[35] KRS 278.020(1).

[36] *Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 252 S.W.2d 885 (Ky. 1952).

> [T]he inadequacy must be due either to a substantial deficiency of service facilities, beyond what could be supplied by normal improvements in the ordinary course of business; or to indifference, poor management or disregard of the rights of consumers, persisting over such a period of time as to establish an inability or unwillingness to render adequate service.[37]

"Wasteful duplication" is defined as "an excess of capacity over need" and "an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties."[38] To demonstrate that a proposed facility does not result in wasteful duplication, we have held that the applicant must demonstrate that a thorough review of all reasonable alternatives has been performed.[39] Selection of a proposal that ultimately costs more than an alternative does not necessarily result in wasteful duplication.[40] All relevant factors must be balanced.[41] The statutory touchstone for ratemaking in Kentucky is the requirement that rates set by the Commission must be fair, just and reasonable.[42]

EKPC contends that the proposed project satisfies the criteria for issuing a CPCN under KRS 278.020(1) because the Smith Landfill is needed to allow EKPC to

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[37] *Id.* at 890.

[38] *Id.*

[39] Case No. 2005-00142, *Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky* (Ky. PSC Sept. 8, 2005).

[40] *See Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 390 S.W.2d 168, 175 (Ky. 1965). *See also* Case No. 2005-00089, *Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity for the Construction of a 138 kV Electric Transmission Line in Rowan County, Kentucky* (Ky. PSC Aug. 19, 2005), Final Order.

[41] Case No. 2005-00089, East Kentucky Power Cooperative, Inc. (Ky. PSC Aug. 19, 2005), Final Order at 6.

[42] KRS 278.190(3).

comply with existing state environmental regulations and the recently issued federal CCR Rule and will not result in wasteful duplication.

Having reviewed the record and being otherwise sufficiently advised, the Commission finds that EKPC has sufficiently demonstrated that there is a need for the project. We note that the Dale Ash Ponds will lose its permit by rule status due to the imminent retirement of the Dale Station, and EKPC would need to obtain a special waste permit to continue the operation of the existing impoundments or find a reasonable alternative method to dispose of the coal ash currently stored at the Dale Ash Ponds. The proposed project is needed to address the disposition of the Dale Ash Ponds; the fact that Dale Units 3 and 4 will not be retired until April 2016 does not change the need for the proposed project, because those two units will ultimately be decommissioned.

The Commission further finds that the proposed alternative reflects the most reasonable least-cost alternative to address the permanent disposal of the Dale Ash Ponds coal ash. The proposed Smith Landfill project was the least expensive option, ranging from approximately $5 million to $10 million lower, as compared to the other alternatives evaluated and considered by EKPC. Accordingly, the Commission finds that EKPC should be authorized a CPCN for the construction of the proposed Smith Landfill project.

Applicability of KRS 278.183

EKPC contends that the proposed project satisfies the requirements for being included in its Environmental Compliance Plan under KRS 278.183. EKPC asserts that KRS 278.183 guarantees a utility the right to recover costs associated with complying

with state and federal environmental requirements that apply to coal-combustion wastes and by-products from facilities used for production of energy from coal. EKPC argues that the bottom ash and fly ash that are stored at the Dale Ash Ponds are coal combustion wastes. EKPC further argues that the ash would qualify as a by-product of a facility used for the production of energy from coal because it was produced in the course of the Dale Station's production of electricity by burning coal over the course of its operations. EKPC maintains that under existing state and newly issued federal rules regarding the permanent storage of such coal-combustion wastes and by-products, removal of the ash from the Dale Station is necessary.

The AG did not express a specific position on this issue. The AG characterized the instant issue of using KRS 278.183 as a recovery mechanism for costs associated with the retirement of aging coal-fired generating plants as a new use of this recovery mechanism. Because this is a matter of first impression before the Commission, the AG advocates for a cautious expansion of the use of the environmental surcharge statute and that all similar future projects should be evaluated strictly on a case-by-case basis, supported by findings of fact specific to the application presented, and not based on the mere approval or disapproval of similar past projects previously adjudged by the Commission.

Grayson contends that "EKPC is attempting to stretch the bounds of the environmental surcharge statute by requesting that all the costs associated with"[43] the proposed project be recovered pursuant to KRS 278.183. Grayson further contends that the statute's intent was for a utility to be allowed recovery only for the costs of

[43] Grayson's Post-Hearing Brief at 4.

having scrubbers and that the expenses associated with coal ash removal projects cannot be recovered through the environmental surcharge because the production of coal ash "happened a long time ago"[44] and not as a result of new environmental law.

Having reviewed the record and being otherwise sufficiently advised, the Commission finds, based on the unique circumstances presented herein, that EKPC should be allowed to recover the costs associated with the proposed project via the environmental surcharge mechanism. KRS 278.183(1) provides, in relevant part, as follows:

> a utility shall be entitled to the current recovery of its costs of complying with the Federal Clean Air Act as amended and those federal, state, or local environmental requirements which apply to coal combustion wastes and by-products from facilities utilized for production of energy from coal in accordance with the utility's compliance plan . . . .

Here, EKPC proposes a plan that would allow it to be in compliance with federal and state environmental requirements applicable to coal-combustion wastes and by-products from facilities utilized for production of energy from coal. The proposed Smith Landfill project serves as a means by which EKPC will be able to dispose of the coal ash currently stored at the Dale Ash Ponds in a more permanent manner and be in compliance with Kentucky's special landfill waste requirements and the standards recently imposed by the CCR Rule. Accordingly, EKPC should be allowed to recover the costs associated with the proposed project via the environmental surcharge mechanism.

[44] *Id.*

Treatment of the Removal and Hauling Costs Associated with the Proposed Project

EKPC proposes to recover the total project cost of $26,962,000 through the environmental surcharge over a ten-year period. The project consists of three major components.

- Construction of the Smith Landfill $4,000,000
- Reclamation of the Dale Ash Ponds site $13,095,807
- Hauling the ash from Dale Station to the Smith Landfill $9,866,193

In support of its request to capitalize the ash transfer costs, EKPC states that the transfer costs of the ash to the Smith Landfill are costs associated with the retirement of the Dale Ash Ponds. EKPC points out that the accounting treatment would be to accumulate these costs on a retirement work order as prescribed by the Rural Utilities Service ("RUS") Uniform System of Accounts ("USoA") for retirement costs. EKPC proposes that it be permitted to treat these accumulated costs as capital expenditures for environmental surcharge purposes. Upon completion of the transfer of the ash to the Smith Landfill, EKPC proposes to recover the amortization of the ash transfer costs, and a return on the unamortized balance over a ten-year period.

EKPC notes that the instant matter is distinguishable from the transfer of ash to its now closed Hancock Creek Landfill, and cited the treatment afforded Louisville Gas & Electric ("LG&E") in Case No. 2004-00421.[45] EKPC states that the transfer of ash to the Hancock Creek Landfill was from operating the Dale Station, and the appropriate accounting treatment was to expense those costs as incurred over a 25-year period. In the instant matter, EKPC asserts there are no significant ongoing operations at Dale

[45] Case 2004-000421, The Application of Louisville Gas and Electric Company for Approval of Its 2004 Compliance Plan for Recovery by Environmental Surcharge (Ky. PSC July 6, 2005).

Station, with the transfer costs becoming a one-time expense occurring over three years. In relying on the LG&E case, EKPC noted that the Commission found that the transfer of the ash to an on-site landfill was deemed to extend the useful life of LG&E's existing ash pond at Mill Creek, and the transfer costs should be treated as a capital expenditure. EKPC further noted that LG&E was allowed to defer the ash transfer costs and earn a return on the unamortized deferred balance.

The Commission finds that the ash hauling costs associated with the proposed project should not be treated as a capital cost. The Commission is of the opinion that, for ratemaking purposes, the nature of the hauling costs at issue is more reasonably characterized to be an operating cost, notwithstanding the accounting treatment required by the RUS USoA to the contrary. Unlike the facts as presented in Case No. 2004-00421, the hauling costs proposed herein neither extend the life of any asset, namely the Dale Ash Ponds, nor do they add value to the new Smith Landfill. The Commission recognizes the need for EKPC to incur these costs due to environmental regulatory requirements, but we are also cognizant of our duty to minimize the impact of such costs on EKPC's ratepayers. The Commission notes the analysis provided by EKPC which indicates a savings to the ratepayers of approximately $3.6 million over the life of the proposed project if the ash transfer costs are expensed rather than capitalized.[46] While the analysis shows that the savings do not occur until over nine years into the project, the Commission believes that it is important that the ratepayers be afforded the benefit of available cost savings. The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that for

[46] EKPC's response to post-hearing information request.

ratemaking purposes, the ash transfer costs of $9,866,193 should be expensed and recovered as incurred through the environmental surcharge.

IT IS THEREFORE ORDERED that:

1. EKPC is granted a CPCN to construct the Smith Landfill to receive coal ash removed and transported from the Dale Ash Ponds.

2. EKPC's request to amend its Environmental Compliance Plan for purposes of recovering the costs of the proposed project through its environmental surcharge is granted.

3. EKPC's request to recover the costs of the J.K. Smith Landfill and the reclamation of the Dale Ash Ponds site over a ten-year period is approved.

4. EKPC shall treat the hauling costs associated with the proposed project for ratemaking purposes as an expense and recovered as incurred through its environmental surcharge.

5. Grayson's motion for an extension of time to file its post-hearing brief is granted.

6. The AG's motion for an extension of time to file a paper copy of its post-hearing brief is granted.

By the Commission

ENTERED
MAR 06 2015
KENTUCKY PUBLIC
SERVICE COMMISSION

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