

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE PETITION OF DUKE ENERGY     )  
MARSHALL COUNTY, L.L.C. FOR A     )     CASE NO. 99-514  
DECLARATORY ORDER                 )

O R D E R

The Commission has before it the application of Duke Energy Marshall County, L.L.C. ("Duke EMC") requesting a formal determination that it will not be a utility as defined in KRS Chapter 278 or otherwise subject to the certification requirements of KRS 278.020(1) and 278.025 as a result of constructing, owning, and operating electric generating facilities.

Duke EMC is a limited liability company which is directly wholly owned by Duke Energy North America, LLC, an indirectly wholly owned subsidiary of Duke Energy Corporation. The principal place of business of Duke Energy North America LLC is in Houston, Texas.

Duke EMC proposes to construct, own, and operate eight natural gas-fired, simple cycle combustion turbines having a total electric generating capacity of 640 MW. The Duke EMC facility will be located near Calvert City in Marshall County, Kentucky, and is estimated to be in operation by June 2001. The source of gas supply for these facilities will be an interstate gas transmission pipeline operated by Texas Gas Transmission Company which is approximately three miles south of the proposed site. The Duke EMC facility will be electrically interconnected with the Tennessee Valley

Authority (“TVA”) transmission system at its 161 KV Marshall County Substation which is adjacent to the Duke EMC proposed site. Alternatively, the facility may be electrically interconnected with two 161 KV lines which are owned by Big Rivers Electric Corporation and terminate at the TVA substation.

Duke EMC facility represents a capital investment of approximately \$200 million and will be licensed by the Federal Energy Regulatory Commission (“FERC”) as an exempt wholesale generator (“EWG”). The electricity produced will be sold exclusively in the wholesale market, with no sales being made to retail customers in Kentucky or elsewhere. The total output of the facility will be sold to one or more affiliate power marketers. Duke EMC has no intent to directly enter into contracts to sell power at wholesale to any utility in Kentucky.

The rates, terms, and conditions of sale established by Duke EMC will be subject to review and approval by FERC, and the construction and operation of the facilities will be subject to regulation by local, state, and federal environmental agencies.

In general, a public utility has been characterized as follows:

As its name indicates, the term “public utility” implies a public use in service to the public; and indeed, the principle determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities. There must be a dedication or holding out, either express or implied of produce [sic] or services to the public as a class. The term precludes the idea of service which is private in its nature and is not to be obtained by the public. . . .

64 Am.Jur.2d Public Utilities, § 1. There exists no presumption that a person is subject to regulation as a utility merely because that person is providing what is traditionally

characterized as utility products or services. To the contrary, the general rule of law is that:

A dedication of private property of an electric power company to a public utility service will not be presumed from the fact that the product of such property is the usual subject matter of utility service, nor does such presumption arise from the sale by private contract of such product and service to utility corporations for purposes of resale. Such dedication is never presumed without evidence of unequivocal intention.

27A Am. Jur.2d Energy and Power Sources, § 195. Here, the intent of the Applicants must be determined from the record.

The Kentucky Public Service Commission law defines an electric utility as follows:

[A]ny person except a city, who owns, controls, or operates or manages any facility used or to be used for or in connection with:

(a) The generation, production, transmission, or distribution of electricity to or for the public, for compensation, for lights, heat, power, or other uses. . . .

KRS 278.010(3)(a). Based on the facts set forth in the application, the Commission finds that Duke EMC is a person that intends to own, control, and operate a facility for the generation of electricity for compensation for uses including lights and power. Thus, the critical factor in determining the Applicant's status as a utility under KRS Chapter 278 is whether the generation and sales of electricity will be "to or for the public."

The Commission recently reviewed and analyzed this same issue in Case No. 99-058, In Re: Petition of Calvert City Power I, L.L.C. For Declaratory Order. By Order dated July 6, 1999, the Commission declared that a generating facility would not be a utility under KRS Chapter 278 if it is classified as an EWG; if its output will be sold

to an affiliated wholesale marketer; if there will be no sales to retail customers; and if it has no existing contracts to sell power to Kentucky jurisdictional utilities and no existing expectation to enter into such contracts. While the Commission stated in that Order that these jurisdictional issues should be decided on a case-by-case basis, the facts and circumstances presented there are essentially identical to those presented by Duke EMC.

Here, neither Duke EMC nor any of its affiliates has existing contracts, or the expectation to enter into contracts, to sell power to Kentucky-jurisdictional utilities or to Kentucky consumers for ultimate consumption. Therefore, the Applicant has no intent to directly or indirectly serve an indefinite public, to dedicate or hold its generation out to the public as a class, or to serve any utilities or end-users in Kentucky. All of the generation of Duke EMC will be sold to an affiliated power marketer who will resell the power at wholesale to marketers, brokers or utilities pursuant to FERC rate schedules.

In addition, the Applicant will not qualify as a retail electric supplier, as that term is defined by KRS 278.010(4), since it does not possess a certified territory as established by the Territorial Boundary Act, KRS 278.016-278.018. Consequently, the Applicant will have no legal right to provide retail electric service directly to any consumer for ultimate consumption.

In conclusion, the Commission finds that Duke EMC will not be a utility subject to our regulatory jurisdiction. No certificates of public convenience and necessity or of environmental compatibility, under KRS 278.020(1) and 278.025, respectively, need be obtained to construct the proposed generating facility. However, notwithstanding the absence of jurisdiction over the construction and operation of these electric generating

units, the Commission may have jurisdiction over any gas pipeline constructed, owned, or operated by Duke EMC. Such jurisdiction arises from the Commission's contractual agreement to perform construction and safety inspections for the United States Department of Transportation, Office of Pipeline Safety.

IT IS THEREFORE ORDERED that the request of Duke EMC for a Declaratory Order is granted. Duke EMC will not be a utility or a retail electric supplier as defined by KRS 278.010(3)(a) and 278.010(4), and will not be subject to the certification requirements of KRS 278.020(1) and 278.025, as a result of constructing, owning, or operating the facilities as described in its application.

Done at Frankfort, Kentucky, this 13<sup>th</sup> day of March, 2000.

By the Commission

ATTEST:

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Executive Director