

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF GRANE CREEK, L.L.C.)
FOR DECLARATORY ORDER) CASE NO. 2000-072

O R D E R

The Commission has before it the application of Grane Creek, L.L.C. (“Grane Creek”) 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.

Grane Creek is a limited liability company which is a wholly owned indirect subsidiary of Columbia Electric Corporation. Both Grane Creek and Columbia Electric Corporation are organized under the laws of Delaware and headquartered in Herndon, Virginia.

Grane Creek proposes to construct, own, and operate several natural gas-fired, simple cycle combustion turbines having a total electric generating capacity of 500 MW. The Grane Creek facility will be located in Henderson County, Kentucky, and is estimated to be in operation by June 2001. The source of gas supply for these turbines will be an interstate gas transmission pipeline operated by Texas Gas Transmission Company. The Grane Creek facility will be electrically interconnected with Big Rivers Electric Corporation.

The Grane Creek facility represents a capital investment of approximately \$140 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 power marketers. Grane Creek has no intent to directly enter into contracts to sell power at wholesale to any utility in Kentucky.

The facility is being developed to serve peak power needs in the region and is designed to enhance the reliability of the electric grid in the area of Henderson County, Kentucky. Grane Creek is not designed to supply base-load power and will not compete directly with coal-fired power plants.

The rates, terms, and conditions of sale established by Grane Creek 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 and service to the public; and indeed, the principal 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 Applicant 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 Grane Creek 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 Grane Creek.

Here, Grane Creek has no 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 as available to the public as a class, or to serve any utilities or end-users in Kentucky. All of the generation of Grane Creek will be sold to a power marketer who will resell the power at wholesale to marketers, brokers, or utilities pursuant to FERC rate schedules.

In addition, Grane Creek 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, Grane Creek will have no legal right to provide retail electric service directly to any consumer for ultimate consumption.

In conclusion, the Commission finds that Grane Creek 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 gas-fired peaking power plant. However,

notwithstanding the absence of jurisdiction over the construction and operation of this electric generating facility, the Commission may have jurisdiction over any gas pipeline constructed, owned, or operated by Grane Creek. 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 Grane Creek for a Declaratory Order is granted. Grane Creek 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 facility as described in its application.

Done at Frankfort, Kentucky, this 25th day of April, 2000.

By the Commission

ATTEST:


Executive Director