

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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| PETITION OF PG&E DISBURSED |) | |
| GENERATING COMPANY, LLC |) | CASE NO. 2000-469 |
| FOR DECLARATORY ORDER |) | |

O R D E R

The Commission has before it the application of PG&E Disbursed Generating Company, LLC (“PGE Generating”) requesting a formal determination that PGE Generating will not be a utility subject to regulation under KRS Chapter 278 as a result of constructing two natural gas-powered electric generating stations and then selling at wholesale the electric power produced. Based on an analysis of the specific facts and applicable law as discussed herein, the Commission finds that PGE Generating will not be a utility subject to Commission jurisdiction.

PGE Generating is a limited liability company, organized under the laws of Delaware, with its primary offices in Bethesda, Maryland. PGE Generating is a wholly owned subsidiary of PG&E National Group, Inc., which is a wholly owned subsidiary of PG&E Corporation. PGE Generating proposes to construct and operate two gas-fired power plants, each having from two to four combustion turbines ranging in size from 15 to 45 megawatts. One plant will be located at LaCenter, Ballard County, Kentucky; the other will be located near Summer Shade, Metcalfe County, Kentucky. The Ballard County facility will be connected to an interstate gas pipeline owned by Trunkline Gas Company and an electric transmission line owned and operated by either Big Rivers

Electric Corporation at 69 KV or Louisville Gas and Electric Company/Kentucky Utilities Company at 161 KV. The Metcalfe County facility will be fueled through a pipeline owned by Columbia Gulf Transmission Gas Company, while its transmission connection will be at 69 KV with either East Kentucky Power Cooperative, Inc., or Tennessee Valley Authority.

The PGE Generating facility 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 plants will be sold to a power marketer that is an affiliate of PGE Generating. PGE Generating has no intent to enter directly 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 Ballard and Metcalfe counties, Kentucky. PGE Generating 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 PGE Generating 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 PGE Generating 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 previously 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 PGE Generating.

Here, PGE Generating 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 directly or indirectly to 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 PGE Generating 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, PGE Generating 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, PGE

Generating will have no legal right to provide retail electric service directly to any consumer for ultimate consumption.

In conclusion, the Commission finds that PGE Generating 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 PGE Generating. 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 PGE Generating for a Declaratory Order is granted. PGE Generating 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 23rd day of January, 2001.

By the Commission

ATTEST:


Executive Director