

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF SMITHLAND HYDROELECTRIC)	
PARTNERS, LTD. AND CANNELTON)	CASE NO. 2000-543
HYDROELECTRIC PROJECT, LTD.)	
FOR DECLARATORY ORDER)	

O R D E R

The Commission has before it the application of Smithland Hydroelectric Partners, Ltd. (“Smithland”) and Cannelton Hydroelectric Project, Ltd. (“Cannelton”) requesting a formal determination that Smithland and Cannelton will not be utilities subject to regulation under KRS Chapter 278 as a result of constructing hydroelectric generating power plants 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 neither Smithland nor Cannelton will be a utility subject to Commission jurisdiction.

Smithland is a limited partnership organized under the laws of Kentucky and headquartered in Gatlinburg, Tennessee. Smithland has one general partner, AJS Hydro Corporation (“AJS Hydro”), and one limited partner, DJL Corporation (“DJL”). Both AJS and DJL are Kentucky corporations. Cannelton is a limited partnership which is organized under the laws of Tennessee, qualified to do business in Kentucky, and also headquartered in Gatlinburg, Tennessee. Cannelton has one general partner, W.V. Hydro, Inc., and one limited partner, Clover Development Corporation, Inc., both of

which are Tennessee corporations. No regulated utility owns an interest in either Smithland or Cannelton.

Smithland proposes to build, own, and operate a hydroelectric generating plant in Livingston County, Kentucky. The hydroelectric facility will consist of five turbine generator modules installed in the gate bays of Smithland Dam on the Ohio River. The project is anticipated to generate 83 megawatts of electricity and will be electrically interconnected at 161 KV with either the Tennessee Valley Authority or Louisville Gas and Electric Company. Smithland will have a capital cost of \$85 million and should be in service by June 2005.

Cannelton proposes to build, own, and operate a hydroelectric facility at the Cannelton Dam in Hancock County, Kentucky. The project will also consist of five turbine generator modules, slightly smaller in size than those proposed by Smithland. The projected output is 80 megawatts of electricity and the electrical interconnection will be at 138 KV with Louisville Gas and Electric Company. Cannelton also represents a capital investment of \$85 million and is projected to enter commercial operation by the end of 2005.

Both Smithland and Cannelton currently hold licenses issued by the Federal Energy Regulatory Commission ("FERC") authorizing the construction of hydroelectric facilities. In addition, both have been licensed by FERC as exempt wholesale generators ("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 two hydroelectric facilities will be sold to Cinergy Services, Inc., a non-utility subsidiary of Cinergy Corp., or to other power marketers. Neither Smithland

nor Cannelton intends to directly enter into contracts to sell power at wholesale to any utility in Kentucky.

The facilities are being developed to take advantage of existing water flows to generate electricity without producing any pollution. The projects will enhance the reliability of the electric grid in the areas of their respective interconnections and should operate year-round based on available water flows.

The rates, terms, and conditions of sale established by Smithland and Cannelton 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, 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 Smithland and Cannelton are persons that intend to own, control, and operate facilities for the generation of electricity for compensation for uses, including lights and power. Thus, the critical factor in determining the Applicants' status as utilities under KRS Chapter 278 is whether their generation and sales of electricity will be "to or for the public."

The Commission previously reviewed and analyzed this same issue in Case No. 99-058.¹ 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

¹ Case No. 99-058, In Re: Petition of Calvert City Power I, L.L.C. For Declaratory Order.

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 Smithland and Cannelton.

Here, neither Smithland nor Cannelton have 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 Applicants have no intent directly or indirectly to serve an indefinite public, to dedicate or hold their respective 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 Smithland and Cannelton will be sold to power marketers who will resell the power at wholesale to marketers, brokers, or utilities pursuant to FERC rate schedules.

In addition, neither Smithland nor Cannelton will qualify as retail electric suppliers as that term is defined by KRS 278.010(4), since neither possesses a certified territory as established by the Territorial Boundary Act, KRS 278.016-278.018. Consequently, neither Smithland nor Cannelton will have a legal right to provide retail electric service directly to any consumer for ultimate consumption.

In conclusion, the Commission finds that Smithland and Cannelton will not be utilities 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 hydroelectric facilities.

IT IS THEREFORE ORDERED that the request of Smithland and Cannelton for a Declaratory Order is granted. Smithland and Cannelton will not be utilities or retail

electric suppliers 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 hydroelectric facilities as described in their application.

Done at Frankfort, Kentucky, this 9th day of March, 2001.

By the Commission

ATTEST:


Executive Director