

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF KENTUCKY MOUNTAIN)
POWER, L.L.C. FOR A) CASE NO. 2001-007
DECLARATORY ORDER)

O R D E R

The Commission has before it the application of Kentucky Mountain Power, L.L.C. ("KMP"), requesting a formal determination that KMP will not be a utility subject to regulation under KRS Chapter 278 as a result of constructing, owning, and operating a coal-fired electric generating station 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 KMP will not be a utility subject to Commission jurisdiction.

KMP is a limited liability company, organized under the laws of the Commonwealth of Kentucky, with its principal office in Lexington, Kentucky. KMP is a wholly owned subsidiary of EnviroPower, L.L.C. ("EnviroPower"), a limited liability company organized and existing under the laws of the Commonwealth of Kentucky. Neither KMP nor EnviroPower is affiliated with an electric utility regulated by this Commission.

KMP proposes to construct, own and operate a coal-fired electric generating plant in Knott County, Kentucky near its boundary with Perry and Breathitt counties, Kentucky. The proposed plant will burn coal waste, utilizing a circulating fluidized-bed

technology, and is anticipated to have a generating capacity of approximately 525 MW of electricity. The generating plant will be electrically interconnected at 138 KV through the Hazard and Beaver Creek substations of American Electric Power. Construction of the plant is expected to take 3 years and the project will have a capital investment of approximately \$600 million.

The KMP 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 generating plant will be marketed by El Paso Energy Marketing Company, a Delaware corporation authorized to transact business within the Commonwealth of Kentucky. Neither KMP nor any affiliate has an existing contract, or the expectation of a contract, to sell power directly to a utility regulated by this Commission.

The rates, terms, and conditions of sale established by KMP 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 KMP 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. 99-058.¹ 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 a 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 KMP.

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

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

In conclusion, the Commission finds that KMP 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 coal-fired electric power plant, and no approval of financing under KRS 278.300 will be necessary.

IT IS THEREFORE ORDERED that the request of KMP for a Declaratory Order is granted. KMP 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, or the financing approvals of KRS 278.300, as a result of constructing, owning, or operating the coal-fired electric generating facility as described in its application.

Done at Frankfort, Kentucky, this 19th day of March, 2001.

By the Commission

ATTEST:


Executive Director