

CASE

NUMBER:

99-058

INDEX FOR CASE: 99-058
CALVERT CITY POWER I, L.L.C.
Initial Operations
FOR DECLARATORY ORDER (CP is subsidiary of ENRON CORPORATION)

IN THE MATTER OF THE PETITION OF CALVERT CITY POWER I,
L.L.C. FOR DECLARATORY ORDER

SEQ NBR	ENTRY DATE	REMARKS
0001	02/11/99	Application.
0002	02/16/99	Acknowledgement letter.
0003	04/08/99	Data Request Order; response due 4/16
M0001	04/14/99	KENT HATFIELD CALVERT CITY POWER-RESPONSE TO PSC ORDER OF APRIL 8,99
0004	07/06/99	Final Order granting Declaratory Order; Calvery City not to be a utility.



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

CERTIFICATE OF SERVICE

RE: Case No. 99-058
CALVERT CITY POWER I, L.L.C.

I, Stephanie Bell, Secretary of the Public Service Commission, hereby certify that the enclosed attested copy of the Commission's Order in the above case was served upon the following by U.S. Mail on July 6, 1999.

Parties of Record:

Honorable C. Kent Hatfield
Attorney at Law
Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, KY. 40202 3410

Stephanie Bell
Secretary of the Commission

SB/rlm
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE PETITION OF CALVERT CITY POWER I,)
L.L.C. FOR DECLARATORY ORDER) CASE NO. 99-058

O R D E R

The Commission has before it the application of Calvert City Power I, L.L.C. ("Calvert City Power") requesting a formal determination that Calvert City Power will not be a utility subject to regulation under KRS Chapter 278 as a result of constructing a gas-fired combustion turbine and then selling the electric power produced by its operation. Based on an analysis of the specific facts and applicable law as discussed herein, the Commission finds that Calvert City Power will not be a utility subject to Commission jurisdiction.

Calvert City Power is a limited liability company, organized under the laws of Delaware, headquartered in Houston, Texas, and qualified to do business in the Commonwealth of Kentucky. Calvert City Power is a wholly-owned subsidiary of Enron Capital & Trade Resources Corporation which is a wholly-owned subsidiary of Enron Corporation. Calvert City Power proposes to construct and operate a natural gas-fired power plant consisting of several simple cycle combustion turbine units, totaling approximately 500 MW of generating capacity. The power plant represents a capital investment of approximately \$150 million and will be located near Calvert City, Kentucky. Scheduled for completion by June 1, 2000, the power plant will be interconnected with a Tennessee Valley Authority 500 KV transmission facility. Fuel for

the combustion turbines will be provided by a direct connection at the project site to a Texas gas transmission company pipeline.

Calvert City Power states that all of the electricity generated from this power plant will be sold at wholesale to affiliated power marketers. Calvert City Power will be licensed as an exempt wholesale generator by the Federal Energy Regulatory Commission ("FERC"). There will be no retail customers and no retail sales, i.e., sales to end-users for ultimate consumption. Calvert City Power has no existing contracts to sell power at wholesale to a utility regulated by the Commission and has no existing plans to enter into such contracts.

Calvert City Power further states that its combustion turbines are designed to operate only during peak hours when generating capacity is at its highest demand. The power generated by this project is not expected to compete directly with any existing coal-fired base load generating plants in Kentucky. The combustion turbines are designed to enhance the reliability of electric power in the area of Marshall County, Kentucky, and to benefit all utilities operating in Western Kentucky through increases in reliability and the supply of peaking power.

The construction and operation of the proposed power plant will be subject to the environmental regulations of the federal Environmental Protection Agency and the Kentucky Natural Resources and Environmental Protection Cabinet. The sale of electricity from the project will be subject to regulation by the FERC with respect to the rates, terms, and conditions of sale.

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, Section 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 Calvert City Power 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). In its application, Calvert City Power acknowledges that it is a person that intends to own, control, and operate facilities for the generation of electricity for compensation for uses including lights and power. However, Calvert City Power specifically denies that its generation and sales of electricity will be "to or for the public." Thus, determining whether Calvert City Power is a utility as defined by KRS 278.010(3)(a) involves an analysis of the phrase "to or for the public."

Calvert City Power cited and discussed numerous decisions from other jurisdictions which hold that service to one or a limited number of customers does not make the service provider a public utility. However, not every jurisdiction has adopted this view. Florida, for example, has held that service to only one customer can qualify the service provider as a public utility. See PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988).

Calvert City Power also cited Austin v. City of Louisa, Ky., 264 S.W.2d 662 (1954), to support its exemption under KRS Chapter 278. In that case, Kentucky's highest court ruled that the owners of a water line, who allowed twenty other property owners to tap on and share maintenance expenses, were not operating a public utility. The decision, however, was not based on the phrase "to or for the public" or the number of customers served, but on the fact that sharing expenses did not constitute the element of compensation necessary to be a utility under KRS 278.010(3).

In a 1987 decision applicable to gas utilities, the Commission addressed the issue of how many customers would have to be served for such service to be deemed "to or for the public." In concluding an exhaustive investigation of the impacts of federal policy on Kentucky's gas industry and the emerging issue of utility bypass, the Commission stated that:

In summary, any utility selling gas to the public, whether it has historically been considered as producer, transporter, LDC, or otherwise, is subject to full rate-base and facilities regulation. The Commission considers the public to be one or more end-users.

(emphasis added) Administrative Case No. 297,¹ Order dated May 19, 1987, p. 20. Unfortunately, that Order contained no discussion or analysis of legal precedents or any other foundation to support the conclusion reached. Consequently, we cannot accept that conclusion as binding precedent for all cases. Rather, it should be considered along with other relevant decisions and applied to the facts and circumstances on a case-by-case basis.

Here, neither Calvert City nor any of its affiliates have existing contracts to sell power to Kentucky-jurisdictional utilities or to Kentucky consumers for ultimate consumption, i.e., end-users. In addition, neither Calvert City nor its affiliates have an existing expectation that any such contract will be entered. Therefore, Calvert City Power 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 end-users in Kentucky. Rather, all its generation will be sold to an affiliated power marketer who will, in turn, resale the power at wholesale to marketers, brokers, or utilities pursuant to FERC rate schedules.

In fact, even if Calvert City Power wanted to sell electricity directly to the consuming public in Kentucky it could not legally do so without violating the electric territorial boundary act, KRS 278.016-278.018. Those statutory provisions, enacted in 1972, were designed to encourage the orderly development of retail electric service, which is electric service furnished to a consumer for ultimate consumption, while avoiding wasteful duplication of materials and natural resources. Under the act, each

¹ Administrative Case No. 297, An Investigation of the Impact of Federal Policy on Natural Gas to Kentucky Consumers and Suppliers.

regulated utility providing retail electric service in 1972 was granted an exclusive service territory and was prohibited from serving any consumer not within its certified territory. Since neither Calvert City Power nor any of its affiliates possess any certified territory in Kentucky, they have no right to provide retail electric service to any consumers for ultimate consumption.

Thus, Calvert City Power can only legally sell its generation to marketers, brokers, or other utilities for resale. This analysis is consistent with the Commission's decision, almost a decade ago, declaring Electric Energy, Inc. to be non-jurisdictional.² Electric Energy, Inc., which owned generating facilities in Joppa, Illinois and transmission facilities in Kentucky, had been serving one federal installation in Kentucky since long before the enactment of certified territories for electric utilities. Despite the ownership of the in-state transmission facilities, the utility was determined to be exempt from regulation because it had no certified territory and "it does not generate, produce, transmit, or distribute electricity to or for the public." (emphasis in the original).

Based on the analysis herein, Calvert City Power will not be a utility subject to our regulatory jurisdiction. Having reached this decision, Calvert City Power need not obtain a certificate of public convenience and necessity, under KRS 278.020(1), to construct generating facilities, or a certificate of environmental compatibility, under KRS 278.025. Both of these certificate statutes apply only to the construction of generating facilities that are to be used "to or for the public." Having determined that Calvert City

² Case No. 89-232, The Application of Electric Energy, Inc. for a Certificate of Convenience and Necessity to Construct a Power Transmission Line, Order dated November 1, 1989.

Power has no present intent to generate power to or for any end-user in Kentucky, it is exempt from the aforementioned certificate statutes.

IT IS THEREFORE ORDERED that Calvert City's request for a Declaratory Order is granted. On the basis of the facts and precedents cited herein, Calvert City Power will not be a utility as defined by KRS 278.010(3)(a) and will not be subject to the certificate requirements of KRS 278.020(1) and KRS 278.025.

Done at Frankfort, Kentucky, this 6th day of July, 1999.

By the Commission

ATTEST:


Executive Director

MIDDLETON & REUTLINGER

founded in 1854

2500 BROWN & WILLIAMSON TOWER

LOUISVILLE, KENTUCKY 40202-3410

502.584.1135

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812.282.1132

April 14, 1999

*ALSO ADMITTED INDIANA
**LICENSED TO PRACTICE BEFORE
U.S. PATENT & TRADEMARK OFFICE

RECEIVED
APR 14 1999
PUBLIC SERVICE
COMMISSION

Ms. Helen C. Helton
Executive Director
Kentucky Public Service Commission
P.O. Box 615
730 Schenkel Lane
Frankfort, KY 40601

99-058

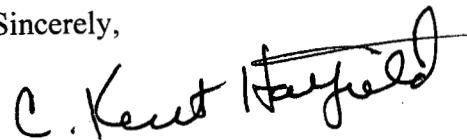
RE: Petition of Calvert City Power I, L.L.C. for Declaratory Order

Dear Ms. Helton:

Enclosed are the original and six (6) copies of the Response of Calvert City Power I, L.L.C. to the Commission's Order. I have also enclosed one additional copy of this Response and ask that you indicate its receipt by your office by placing your file stamp on it and returning it to me by way of our firm's messenger.

Thank you for your assistance in this matter.

Sincerely,



C. Kent Hatfield
Counsel for Calvert City Power I, L.L.C.

CKH/jms

enclosures

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

APR 14 1999

PUBLIC SERVICE
COMMISSION

In the Matter of:

THE PETITION OF CALVERT CITY POWER I,) CASE NO. 99-058
L.L.C. FOR DECLARATORY ORDER)

**RESPONSE OF CALVERT CITY POWER I, L.L.C.
TO THE COMMISSION'S ORDER**

Calvert City Power I, L.L.C. ("Calvert City Power") submits herewith its Response to the April 8, 1999 Order of the Kentucky Public Service Commission ("Commission") with respect to Calvert City's Petition for Declaratory Order.

REQUEST NO. 1: Provide a copy of the power sale contract whereby Calvert City Power will sell 100 percent of its output to Enron Power Marketing, Inc.

RESPONSE: At this time, there is no power sale contract between Calvert City Power and Enron Power Marketing, Inc. ("EPMI") for the sale of the output of the proposed plant. It is anticipated that such a contract will be executed prior to the commercial operation of the proposed generating plant. This contract will be filed of record with the Federal Energy Regulatory Commission. Ben F. Jacoby, Director, Enron Capital and Trade Resources Corp. is available to respond to questions on this item of information.

REQUEST NO. 2: Does Calvert City Power, EPMI or any other affiliated entity have a contract, or an expectation to enter into a contract, for the sale of electricity for one year or longer to a utility providing service in Kentucky? If yes, explain in detail.

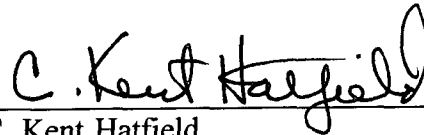
RESPONSE: At this time, neither Calvert City Power, EPMI, nor any of its affiliates has a contract or an expectation to enter into a contract for the sale of electricity for one year or longer to any Kentucky-jurisdictional utility. EPMI will sell the power from the proposed generating plant on the wholesale market pursuant to FERC-regulated transactions. The Kentucky-jurisdictional utilities which are subject to this Commission's jurisdiction, however, are within the class of potential purchasers which conceivably could purchase such power at wholesale. EPMI cannot rule out the possibility of such a transaction occurring in the future, although no such transaction

has been or is expected to be arranged at this time. Ben F. Jacoby, Director, Enron Capital and Trade Resources Corp. is available to respond to questions on this item of information.

REQUEST NO. 3: File an affidavit from an officer of Calvert City Power verifying the accuracy of the facts set forth in the Petition for Declaratory Order.

RESPONSE: See affidavit attached.

Respectfully submitted,

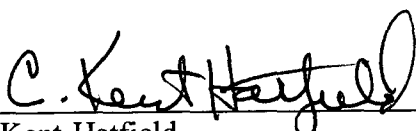


C. Kent Hatfield
MIDDLETON & REUTLINGER
2500 Brown & Williamson Tower
Louisville, Kentucky 40202
(502) 584-1135

COUNSEL FOR CALVERT CITY
POWER I, L.L.C.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the within pleading has been served on the Office of Rate Intervention, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601, this 14th day of April, 1999 by deposit in the U.S. Mail, first-class, prepaid.



C. Kent Hatfield

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED
APR 14 1999
PUBLIC SERVICE
COMMISSION

In the Matter of:

THE PETITION OF CALVERT CITY POWER I,) CASE NO. 99-058
L.L.C. FOR DECLARATORY ORDER)

AFFIDAVIT

After first being sworn, David Delainey ("Deponent") states as follows:

1. My name is David Delainey. My business address is 1400 Smith Street, Houston, Texas 77002.
2. I am Managing Director, Calvert City Power I, L.L.C., and in addition, am Managing Director, Enron Capital and Trade Resources Corp.
3. I have reviewed the Petition of Calvert City I, L.L.C. for Declaratory Order filed with the Kentucky Public Service Commission on February 11, 1999 in Case No. 99-058, specifically including the facts stated therein.
4. To the best of my knowledge, information, and belief, all facts stated in the Petition are true and accurate.

Respectfully submitted,

David Delainey

STATE OF TEXAS)
) SS:
COUNTY OF Harris)

The foregoing instrument was acknowledged before me by David Delainey this 13th day of April, 1999.

Fannette Perry
Notary Public

My Commission Expires: Nov. 22, 1999

C:\Docs\RESPONSE.CCP





COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

April 8, 1999

Honorable C. Kent Hatfield
Attorney at Law
Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, KY. 40202 3410

RE: Case No. 99-058

We enclose one attested copy of the Commission's Order in
the above case.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie J. Bell".

Stephanie Bell
Secretary of the Commission

SB/sa
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE PETITION OF CALVERT CITY POWER I,) CASE NO. 99-058
L.L.C. FOR DECLARATORY ORDER)

O R D E R

IT IS ORDERED that Calvert City Power I, L.L.C. ("Calvert City Power") shall file the original and 6 copies of the following information with the Commission with a copy to all parties of record no later than April 16, 1999. Calvert City Power shall furnish with each response the name of the witness who will be available to respond to questions concerning each item of information requested should a public hearing be scheduled.

1. Provide a copy of the power sale contract whereby Calvert City Power will sell 100 percent of its output to Enron Power Marketing, Inc.
2. Does Calvert City Power, Enron Power Marketing or any other affiliated entity have a contract, or an expectation to enter into a contract, for the sale of electricity for one year or longer to a utility providing service in Kentucky? If yes, explain in detail.
3. File an affidavit from an officer of Calvert City Power verifying the accuracy of the facts set forth in the Petition for Declaratory Order.

Done at Frankfort, Kentucky, this 8th day of April, 1999.

By the Commission

ATTEST:


Executive Director



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

February 16, 1999

Honorable C. Kent Hatfield
Attorney at Law
Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, KY. 40202 3410

RE: Case No. 99-058
CALVERT CITY POWER I, L.L.C.
(Initial Operations) FOR DECLARATORY ORDER

This letter is to acknowledge receipt of initial application in the above case. The application was date-stamped received February 11, 1999 and has been assigned Case No. 99-058. In all future correspondence or filings in connection with this case, please reference the above case number.

If you need further assistance, please contact my staff at 502/564-3940.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Bell".

Stephanie Bell
Secretary of the Commission

SB/jc

MIDDLETON & REUTLINGER

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FILED

FEB 11 1999

PUBLIC SERVICE
COMMISSION

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CHARLES G. MIDDLETON, JR. (1916-1988)
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*ALSO ADMITTED INDIANA
**LICENSED TO PRACTICE BEFORE
U.S. PATENT & TRADEMARK OFFICE

February 11, 1999

Ms. Helen C. Helton
Executive Director
Kentucky Public Service Commission
P.O. Box 615
730 Schenkel Lane
Frankfort, KY 40601

Case
99-058

RE: Petition of Calvert City Power I, L.L.C. for Declaratory Order

Dear Ms. Helton:

Enclosed are the original and ten (10) copies of the Petition of Calvert City Power I, L.L.C. for Declaratory Order. I have also enclosed one additional copy of this Petition and ask that you indicate its receipt by your office by placing your file stamp on it and returning it to me by way of our firm's messenger.

In this Petition, Calvert City Power I, L.L.C. ("CP") seeks the Commission's determination that a proposed generating project in Western Kentucky which will be devoted exclusively to the wholesale power market and licensed by the Federal Energy Regulatory Commission as an exempt wholesale generator ("EWG"), is not a "utility" or a "retail electric supplier" under KRS Chapter 278 and will not be regulated as such by the Commission. In addition, CP asks the Commission to determine that as a non-jurisdictional entity, CP need not obtain a Certificate of Public Convenience and Necessity or a Certificate of Environmental Compatibility prior to constructing the proposed generating plant. CP submits that Kentucky law clearly and firmly establishes that the proposed project is not subject to Commission jurisdiction.

The expected commercial operation date for the proposed plant is June, 2000. The regulatory status of this proposed project must be determined as a threshold matter prior to

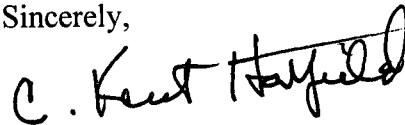
Ms.Helen C. Helton
February 11, 1999
Page 2

completion of other complex and involved permitting requirements. To enable CP to complete its financing and other regulatory approvals in a timely manner prior to the commencement of construction later this year, CP requests the Commission's issuance of the Declaratory Order as soon as is reasonably possible within a 60-day period.

Should the Commission or Commission's staff have any question about the Petition submitted herein, please feel free to contact me at any time.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in cursive script that reads "C. Kent Hatfield". The signature is written in dark ink and is positioned above the typed name.

C. Kent Hatfield
Counsel for Calvert City Power I, L.L.C.

CKH/jms

enclosures

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

FILED
FEB 11 1999
PUBLIC SERVICE
COMMISSION

In the Matter of:

**PETITION OF
CALVERT CITY POWER I, L.L.C.
FOR DECLARATORY ORDER**

)
) **CASE NO. 99-058**
)
)

Calvert City Power I, L.L.C. ("CP"), by counsel, submits herewith this Petition for Declaratory Order with respect to a proposed gas-fired simple-cycle Peaking Power Plant to be located in Marshall County, Kentucky, approximately five (5) miles south of Calvert City.

This proposed Peaking Power Plant will be licensed by the Federal Energy Regulatory Commission ("FERC") as an exempt wholesale generator ("EWG") and devoted exclusively to the wholesale power market. It will have no retail sales or operations in Kentucky or elsewhere. On the grounds set forth below, CP requests the Kentucky Public Service Commission ("Commission") to find that CP and its proposed project will not be regulated as a utility and to grant the specific relief sought herein.

INTRODUCTION

CP is a limited liability company organized under the laws of Delaware, with headquarters at 1400 Smith Street, Houston, Texas. CP is qualified to do business in the Commonwealth of Kentucky. CP is a wholly-owned subsidiary of Enron Capital & Trade Resources Corporation, which is a wholly-owned subsidiary of Enron Corporation (collectively "Enron").

DESCRIPTION OF PROJECT

CP proposes to construct and operate a natural gas-fired, simple cycle, peaking power plant near Calvert City, Kentucky. The plant will consist of several simple cycle combustion turbine units, totaling approximately 500 megawatts of generating capacity. These proposed facilities represent a direct capital investment in Kentucky of approximately \$150 million. The project is proposed to be ready for commercial operation by June 1, 2000 in time to meet the summer peak demand for power. The electric output of the project will be delivered onto the 500 kv transmission system of the Tennessee Valley Authority ("TVA") and the project will receive its natural gas fuel through a direct connection at the project site to Texas Gas Transmission Company.

CP is designed to serve the wholesale power market and will be a federally-licensed exempt wholesale generator ("EWG"). The entire electric output of the project will be sold at wholesale to Enron Power Marketing, Inc. ("EPMI"), another Enron affiliate. CP will have no retail customers and make no retail sales, in Kentucky or elsewhere. CP's wholesale power sales are subject to regulation by the FERC. CP will make no sales to Kentucky jurisdictional utilities, although it is conceivable that such a utility could buy power at wholesale from EPMI pursuant to FERC jurisdictional transactions. No such arrangements are planned, however, at this time. CP will have no franchises, no service territory, and will not be a retail electric supplier under KRS 278.016-278.018.

CP will be subject, however, to review by various state and federal agencies with respect to its operations and construction of the project. In addition to FERC regulation of its wholesale power sales, CP's construction and operation of the project will be subject to

regulation by the U.S. Environmental Protection Agency and the Commonwealth's Natural Resources and Environmental Protection Cabinet with respect to environmental emissions, discharges, reporting and permitting, and various other federal and state agencies with respect to other aspects of the project, as described in Appendix A.

CP is designed to serve the critical need for peaking power. It will utilize advanced gas turbine technology for rapid ignition and ramp up during peak hours (primarily hot summer days). CP is not designed to supply base-load power and will not compete directly with generation from coal-fired plants fueled by Kentucky-produced coal. CP is designed to enhance the reliability of the electric grid in the Marshall County area. Greater grid reliability and increased peak power supply will benefit utilities operating in western Kentucky and throughout that portion of the TVA service area.

RELIEF REQUESTED

CP requests the Commission to issue a declaratory order with respect to its jurisdictional status, as well as its construction and operation of the project. Specifically, CP requests the Commission find and declare as follows:

1. that CP is not a public utility, and specifically, is not a "utility" under KRS 278.010(3), and that CP will not be regulated as a utility by the Commission;
2. that CP is not a retail electric supplier under KRS 278.010(4) and 278.016-278-018;
3. that CP does not need a certificate of public convenience and necessity with respect to the proposed generating plant facilities under KRS 278.020;
4. that CP does not need a certificate of environmental compatibility under KRS 278.025.

As previously discussed, the proposed facilities are designed to be available for the summer peak season, beginning June, 2000. To allow adequate time for the completion of

financing as well as construction of the plant facilities, CP requests the Commission issue its order at its earliest opportunity within 60 days after the filing of this petition.

1. **CP IS NOT A UTILITY UNDER KENTUCKY LAW.**

The Commission's jurisdiction extends to **utilities** as defined in KRS Chapter 278.

"The public service commission shall regulate utilities. . ." KRS 278.040(1). "The jurisdiction of the Commission shall extend to all utilities in this state." KRS 278.040(2). CP is not, and does not intend to become a public utility under the laws of the Commonwealth of Kentucky. Kentucky law defines a "utility," in KRS 278.010(3) as follows:

"Utility" means any 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; (emphasis added).

CP is a private corporation which by contract is required to sell all of its generated electricity to a single customer. The Commission has held that a corporation which transmits power to a single customer "does not generate, produce, transmit, or distribute electricity to or for the public," and, therefore, is not a utility subject to the Commission's statutes and regulations. In re Electric Energy, Inc., Case No. 89-232 (1989) (emphasis in original).

In the Electric Energy Order, the Commission acknowledged that the great majority of cases from across the country hold that service "to or for the public" is provided only when one "holds himself out as willing to serve all who apply up to the capacity of his facilities." Id. at 2, citing North Carolina ex rel. Utilities Comm'n. v. Carolina Tel & Tel Co., 148 S.E. 100, 109 (N.C. 1966). The Commission's determination that service to one customer is

private and not service "to or for the public" corresponds with the definition of a "public utility" set forth in Corpus Juris Secundum, which is cited extensively throughout the country:

The term "public utility" implies a public use, carrying with it the duty to serve the public and treat all persons alike, and it precludes the idea of service which is private in its nature and is not to be obtained by the public.

The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

73B C.J.S. Public Utilities §§ 2, 3 (1983); Accord, 64 AM. JUR. 2d Public Utilities § 1 (1972).

That CP is not a public utility is further supported by case law. For example, In re Wind Power Pacific Investors-III, 686 P.2d 831, 834 (Hawaii, 1984), the Court applied the test set out in 73B C.J.S. Public Utilities § 3, for determining whether an entity was a "public utility," and held that Wind Power Pacific Investors-III was not a public utility even though it sold all of its generated power to one company which in turn sold its excess to Hawaii Electric Light Co., a utility supplying energy directly to consumers.

Similarly, in Wilhite v. Public Serv. Comm'n. of W. Va., 149 S.E.2d 273 (W. Va. 1966), the Court held that Wilhite-McGahee Pipeline, Inc. which provided gas service to two large industrial companies under contract was not a public utility. According to the Court, the evidence showed that Wilhite intended to serve and was serving only two customers under contracts. The Court went on to state that a dedication to serve the public is never presumed without evidence of unequivocal intention. Id., citing Allen v. R.R. Comm'n. of the State of California, 175 P. 466, cert. denied, 249 U.S. 601 (1919). The Court further added:

The mere fact that a product which is usually dispensed by or sold by a utility to the public is being furnished does not make every person, firm, or corporation selling such product a public utility. If such product is sold under private contract and the seller does not hold himself out to sell such product to the public or render some service to the public he is not a public utility.

Id. at 282.

CP cannot be considered a public utility simply because it will be generating and selling electricity. Dickinson v. Maine Public Serv. Co., 223 A.2d 435, 438 (Maine 1966) (generating and selling electricity alone does not make an entity a public utility. An entity must be devoted to the public use before it will be subject to regulation.)

CP will not be devoted to public use, but rather will sell its generated power under private arrangement to a single entity. Under such circumstances, CP is not a public utility. See, e.g., Austin v. City of Louisa, Ky., 264 S.W. 2d 662, 664 (1954) (owner of private, non-profit water line which had twenty customers, but did not hold itself out to serve all members of the public is not a public utility); Mississippi State Tax Comm'n. v. Moselle Fuel Co., 568 So.2d 720, 724 (1990) (pipeline company serving single or handful of private customers under contract is not a public utility); Holder v. Miss. Fuel Co., 317 So.2d 891, 892 (1975) (company that sells gas to only one customer, Mississippi Power Company, which then supplies energy to consumers, is not a public utility); Medic-Call, Inc. v. Public Serv. Comm'n. of Utah, 470 P.2d 258 (Utah 1970) (beeper service available only to physician group not a public utility); Ambridge v. Public Serv. Comm'n., 165 A 47 (Pa. 1933) (furnishing of water to single customer not a public utility); Hinds County Water Co. v. Scanlon, 132 So. 567, 571 (Miss. 1931) (corporation not organized for purpose of supplying water to the public generally, but rather organized to supply its stockholders and those having

contractual relationships with it, is not a public utility.); Humbird Lumber Co. v. Public Util. Comm'n., 228 P. 271 (Idaho 1924) (private sale to one corporation will not render company a public utility).

Most recently, the Supreme Court of Pennsylvania held that a joint venture which produces, transports and sells natural gas to a single customer under contract does not furnish service "to or for the public." Bethlehem Steel Corp. v. Pennsylvania PUC, 713 A.2d 1110 (Pa. 1998). Justice Nigro explained in his concurring opinion why the joint venture, Bessie 8's, service was private in nature:

[T]he only one who can demand utility service from Bessie 8 is Bethlehem Steel -- the entity with a contractual relationship with Bessie 8. Unlike in Waltman, Bessie 8's facilities were designed and constructed to serve a select entity. Bessie 8's service is not available to the public at large and Bessie 8 is thus not a public utility subject to regulation.

Id. at 1115.

CP's service also is not available to the public at large. It is under contract to provide wholesale electric energy to a single entity pursuant to transactions subject to regulation by the FERC, and non-jurisdictional to the Commission.

Nor is there any policy reason to regulate CP as a utility. With no franchise, no certified territory, no retail customers, and no jurisdictional rate base, there is no captive group of rate payers from which CP may recover the capital costs of the project. CP's shareholders are fully, and solely at risk for the recovery of their investment and any return thereon, and any such return must be earned in the competitive wholesale market for power. There is, therefore, no policy reason for this Commission to regulate CP.

2. **CP IS NOT SUBJECT TO THE KENTUCKY CERTIFIED TERRITORY STATUTES.**

In addition, because CP only will be furnishing wholesale electric energy, it is expressly excluded from Kentucky's certified territory statutes. (KRS 278.016 - 287.018), which apply to "retail electric suppliers;" i.e., those engaged in the furnishing of retail electric service. KRS 278.010(4) provides that "retail electric service means electric service furnished to a consumer for ultimate consumption, but does not include wholesale electric energy furnished by an electric supplier to another electric supplier for resale." Therefore, CP is excluded from the definition of "retail electric supplier," as well as from the definition of "utility," and accordingly, is not subject to the jurisdiction and regulation of the Commission.

3. **A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY IS NOT REQUIRED.**

Since CP will not construct its generating plant facilities to serve the public and is not subject to the Commission's jurisdiction and regulation, CP is not required to obtain a certificate of public convenience and necessity under KRS 278.020(1). Only those facilities to be constructed for furnishing services "to the public" are required to be the subject of a certificate of public convenience and necessity under KRS 278.020(1). The requirement of a certificate of public convenience and necessity is designed to prevent a utility from building unnecessary facilities and charging the public the cost of those facilities through its rates.

Duerson v. East Kentucky Power Coop., Inc., Ky. App., 843 S.W. 2d 340, 342 (1992).

Because CP will not be providing service to or collecting rates from the public, requiring it to obtain a certificate of public convenience and necessity would serve no valid purpose.

Cumberland Valley Rural Elec. Coop. Corp. v. PSC of Kentucky, Ky., 433 S.W. 2d 103, 104 (1968) (private company which constructed transmission line at its own expense and for its own use was not required to obtain a certificate of public convenience and necessity because it did not construct the line to serve the public and it does not intend to serve the public.)

As the Commission explained in Electric Energy, Inc., supra, "[o]nly a "utility" can be made to comport with the Commission's statutes and regulations." In the Electric Energy Order, the Commission concluded that because Electric Energy, Inc. did not generate, produce, transmit, or distribute electricity to or for the public, the Commission did not have jurisdiction over it and Electric Energy, Inc. did not have to apply for a certificate of public convenience and necessity to construct a power transmission line. The certificate of public convenience and necessity requirement of KRS 278.020(1), therefore, is inapplicable to CP.

4. **A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY IS NOT REQUIRED.**

Similarly, it is also unnecessary for the Commission to require a certificate of environmental compatibility as provided by KRS 278.025. Under KRS 278.025, the Commission considers any adverse environmental factors presented by a facility that generates electricity "to or for the public." Since, as discussed above, the CP facilities will not be constructed to provide services "to or for the public," there is no statutory requirement applicable to CP which requires issuance of such a certificate.

It is important to note that although there is no statutory requirement for a certificate of environmental compatibility in this case, various federal and state agencies will conduct extensive pre-construction and operational reviews of the CP facilities. For example, the

Natural Resources and Environmental Protection Cabinet (the "Cabinet") will conduct an extensive and comprehensive review of the proposed facility's impact on the environment. In fact, the scope of the Cabinet's review will be no different whether or not such a certificate is required. Moreover, much of the Cabinet's preconstruction review of the project will be subject to the opportunity for public hearings. In addition to the Cabinet's significant preconstruction review, the Cabinet will have a continuing oversight role as long as the facility is in operation.

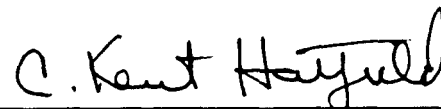
Included in the Cabinet's preconstruction review and oversight responsibilities are each of the elements listed in KRS 278.025(3)(b) for the Cabinet's report to the Commission for purposes of a certificate of environmental compatibility had CP been found to be jurisdictional: (1) the effects of air pollutants from the proposed facility on public health and welfare; (2) the effects of the proposed facility on the waters of the Commonwealth; (3) the treatment, handling, and disposal of solid waste from the proposed facility; and (4) noise pollution and other adverse impacts. These comprehensive requirements relating to air quality, water quality, waste, and noise control provide the Cabinet with the authority to assure that the CP facilities will be protective of public health and the environment.

In addition, the CP facilities will be subject to a federal agency review which is at least as stringent as that applicable on the state level. The Cabinet will enforce its own or U.S. EPA standards relating to clean air, clean water, hazardous air pollutants, open burning, fugitive emissions, opacity, hazardous waste, and noise pollution. Furthermore, the U.S. Fish and Wildlife Service will enforce Endangered Species Act requirements, and the U.S. Army Corps of Engineers will enforce wetlands requirements applicable to the CP facilities.

Finally, the Kentucky Heritage Council and the Office of State Archeology will act to ensure that the CP facilities do not adversely impact state cultural and archeological resources. None of CP's responsibilities in these areas, and none of the federal and state agency oversight and enforcement will be affected by the Commission's lack of jurisdiction to require a certificate of environmental compatibility for the CP facilities. A more detailed listing of these requirements is set forth in Appendix A, attached hereto.

WHEREFORE, CP requests the Commission grant its petition for declaratory order specifying the relief requested herein.

Respectfully submitted,

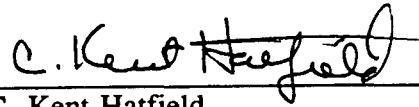


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CERTIFICATE OF SERVICE

It is hereby certified that copy of the within Petition for Declaratory Order has been transmitted this 11th of February, 1999 to the Office of Rate Intervention, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601, by first-class mail.



C. Kent Hatfield

APPENDIX A

Extensive federal and state statutes and regulations address each of the elements for review under KRS 278.025(3)(b) as follows:

1. The effects of air pollutants from the proposed facility.
 - Prevention of Significant Deterioration Permit (Clean Air Act (CAA) § 165 [42 U.S.C. § 7475 (1998)]; 401 KAR 51:017), which requires extensive preconstruction analysis by the Cabinet. The applicant must demonstrate that: the facility will utilize the best available control technologies for criteria pollutants; the facility will not cause or contribute to a violation of an ambient air standard or increment; and the facility will not adversely impact a Class I (park or wilderness) area. The Cabinet's permitting process includes notice to the public of the application and an opportunity for hearing.
 - Title V Operating Permit (CAA § 502 [42 U.S.C. § 7661a]; 401 KAR 50:035), which identifies all applicable air quality requirements for the facility and requires a certification by a responsible official of the applicant that the facility is in compliance with all requirements. Provides for notice to public and opportunity for comment.
 - New Source Performance Standards (CAA § 111 [42 U.S.C. § 7411], 40 C.F.R. Part 60, Subparts Da and Gg; 401 KAR 59:016 and 60:330), include standards of performance specific to electric utility steam generating units and stationary gas turbines, which the Cabinet is authorized to implement and enforce.
 - Hazardous Air Pollutant Standards (CAA § 112 [42 U.S.C. § 7412], 40 C.F.R. Parts 61 and 63; 401 KAR Chapters 57 and 63). National Emission Standards for Hazardous Air Pollutants (NESHAP) and maximum available control technology (MACT) standards promulgated by the U.S. Environmental Protection Agency (USEPA) and adopted by the Cabinet will apply to the facility as they are adopted.
 - General Standards of Performance (401 KAR Chapter 63) are applicable to all sources of pollutants and include such standards as the prohibition on open burning, the prohibition on certain fugitive emissions, and opacity limitations on flares.
 - Recordkeeping, Inspections, and Monitoring (CAA § 114 [42 U.S.C. § 7414]; 401 KAR Chapter 50) are required by federal and state regulations. Facilities may be required by USEPA and the Cabinet to establish and maintain records, submit reports, install monitoring equipment, sample emissions, and implement audit procedures and practices in order to ensure compliance with standards.

2. The effects of the proposed facility on the waters of the Commonwealth.

- Kentucky Pollution Discharge Elimination System Permit (Clean Water Act § 402; 401 KAR Chapter 5) is required if there is to be a discharge of pollutants or stormwater from the facility. The permit process includes pre-discharge review by the Cabinet and notice to the public with an opportunity for a hearing. The KPDES permit specifies effluent limitations and monitoring and reporting requirements.

3. The treatment, handling, and disposal of solid waste from the proposed facility.

- Disposal of waste at any site or facility that is not permitted by the Cabinet is prohibited by KRS 224.40-100. Therefore, a facility must obtain a permit if it intends to dispose of waste on-site or it must dispose of the waste at a permitted off-site facility. Applications for solid waste permits are subject to extensive pre-construction review and public notice with an opportunity for a hearing.
- Requirements for Generators of Hazardous Wastes (401 KAR Chapter 32). A facility that generates more than 100 kilograms of hazardous waste per month must obtain an EPA identification number and must comply with requirements for packaging, labeling, and storing the waste, training of employees, as well as filing an annual report with the Cabinet. A facility that generates any amount of hazardous waste must manifest wastes shipped off-site for disposal.

4. Noise pollution and other adverse impacts.

- KRS 224.30-050 prohibits the emission beyond the boundaries of a property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity. The Cabinet shares jurisdiction with all other law enforcement agencies, county attorneys, and Commonwealth's attorneys in the enforcement of the prohibition.
- Endangered Species Act (16 U.S.C. § 1531) prohibits actions which jeopardize endangered or threatened species. The U.S. Fish and Wildlife Service must be consulted by any Federal agency which determines that an action that it is about to take, including the issuance of a permit, will potentially impact an endangered or threatened species or its critical habitat. Furthermore, a non-Federal actor may be required to obtain an incidental-take permit if its actions will result in harm to a species; the issuance of incidental-take permits is subject to public review and comment.
- Wetlands (Clean Water Act, §§ 401, 404; KRS 224.16-050). A permit from the Army Corps of Engineers is required for construction affecting streams or

wetlands. Construction affecting less than 500 linear feet of streams or 3 acres of wetlands may be conducted under a nationwide permit, but Water Quality Certification by the Kentucky Division of Water is required. The Kentucky Division of Water has issued a General Certification for projects conducted under the applicable nationwide permit which affect less than 200 linear feet of streams or 1 acre of wetlands; projects which have a greater impact must obtain an individual certification.

- National Historic Preservation Act (16 U.S.C. § 470) requires Federal agencies in conjunction with the Kentucky Heritage Council and the Office of State Archeology to evaluate the effect of projects on historic resources before issuing a permit or license. If potentially affected historical resources exist, the agencies are required to consult with the state and any interested parties; this consultation process may include public comment periods or hearings.