

CASE

NUMBER:

99-386

HISTORY INDEX FOR CASE: 1999-386 AS OF : 06/28/01
RIVERSIDE GENERATING COMPANY, LLC AND BLUEGRASS GENERATION COMPANY
Initial Operations

IN THE MATTER OF THE PETITION OF RIVERSIDE GENERATING
COMPANY, L.L.C. AND BLUEGRASS GENERATION COMPANY, L.L.C. FOR
DECLARATORY ORDER

SEQ NBR	ENTRY DATE	REMARKS
0001	09/14/1999	Application.
0002	09/20/1999	Acknowledgement letter.
0003	10/14/1999	Order directing applicants to file affidavit of a senior officer by 10/25/99.
M0001	10/21/1999	RICK BOWEN RIVERSIDE GENERATING CO-AFFIDAVIT
0004	12/21/1999	Final Order; neither Riverside nor Bluegrass will be a utility.
M0002	05/30/2001	DAVID BROWN-REQ FOR INFORMAL CONFERENCE
M0003	06/22/2001	DAVID BROWN DYNEGY INC-LETTER CONCERNING REQ FOR INFORMAL CONFERENCE

RECEIVED
JUN 22 2001
PUBLIC SERVICE
COMMISSION

400 West Market Street
Suite 1800
Louisville, KY 40202-3352
(502) 587-3400
(502) 587-6391 Fax
www.stites.com

June 20, 2001

David C. Brown
(502) 681-0421
dbrown@stites.com

Mr. Thomas M. Dorman
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

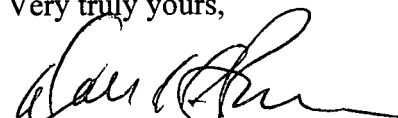
RE: Dynege, Inc.
PSC Case No. 99-386 (Closed)

Dear Mr. Dorman:

By letter dated May 29, 2001, I requested an informal conference with the Staff to update interested members on the progress of construction at the Dynege generating facilities in Oldham County and Lawrence County, Kentucky. Mr. Raff and I discussed various dates, but due to scheduling difficulties and other developments we mutually agreed that it would be preferable not to attempt to schedule a conference at this time.

I will stay in touch with Mr. Raff during the summer to see if it would be mutually beneficial to schedule an informal conference at a later date.

Very truly yours,


David C. Brown

DCB:rdh

cc: Richard Raff, Esq.

DY010:00DY2:186828:LOUISVILLE
062001



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. 1999-386
RIVERSIDE GENERATING COMPANY, LLC BLUEGRASS GENERATION COMPANY

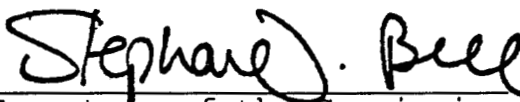
I, Stephanie Bell, Secretary of the Public Service Commission, hereby certify that the enclosed attested copy of the Commission's Order in the above case was served upon the following by U.S. Mail on December 21, 1999.

Parties of Record:

Mr. Rick A. Bowen
Executive Vice President
Riverside Generating Company, LLC
Bluegrass Generation Company, LLC
1000 Louisiana Street
Suite 5800
Houston, TX. 77002 5006

Honorable David C. Brown
Attorney at Law
Stites & Harbison
1800 Aegon Center
Louisville, KY. 40202

Honorable William T. Gorton
Attorney at Law
Stites & Harbison
250 West Main Street, Suite 2300
Lexington, KY. 40507


Secretary of the Commission

SB/hv
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE PETITION OF RIVERSIDE GENERATING)	
COMPANY, L.L.C. AND BLUEGRASS)	CASE NO.
GENERATING COMPANY, L.L.C. FOR)	99-386
DECLARATORY ORDER)	

O R D E R

The Commission has before it the application of Riverside Generating Company, L.L.C. ("Riverside") and Bluegrass Generating Company, L.L.C. ("Bluegrass") (collectively "Applicants") requesting a formal determination that neither entity will 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 operating electric generating facilities.

Riverside and Bluegrass are limited liability companies which are indirectly wholly owned by Dynegy Power Corp., a wholly owned subsidiary of Dynegy, Inc. Both Dynegy Power Corp. and Dynegy, Inc. are Delaware Corporations headquartered in Houston, Texas.

Riverside proposes to construct and operate three natural gas-fired combustion turbines having a total electric generating capacity of 510 MW. The Riverside facilities will be located in Lawrence County, Kentucky, and are estimated to be in operation by June 2001. The source of gas supply for these facilities will be an interstate gas transmission pipeline operated by Tennessee Gas Pipeline Company. The Riverside

facilities will be electrically interconnected with the American Electric Power Company transmission system at its Baker Substation, less than a mile south of the Riverside site.

The Bluegrass facilities will consist of two natural gas-fired combustion turbines with a total electric generating capacity of 340 MW. The facilities will be located in Oldham County, Kentucky. Natural gas will be supplied from an interstate pipeline owned by Texas Gas Transmission. The Bluegrass facilities will be electrically interconnected with Louisville Gas and Electric Company transmission facilities which traverse the plant site.

Each facility represents a capital investment in excess of \$100 million dollars and each 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 each facility will be sold to an affiliate energy marketer. Neither Riverside nor Bluegrass intends directly to enter into contracts to sell power at wholesale to utilities.

The rates, terms, and conditions of sale established by Riverside and Bluegrass 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 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, § 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 Applicants 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 Riverside and Bluegrass 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 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 Riverside and Bluegrass.

Here, neither of the Applicants nor any of their affiliates 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 to directly or indirectly serve an indefinite public, to dedicate or hold their generation out to the public as a class, or to serve any utilities or end-users in Kentucky. All of the generation of Riverside and Bluegrass will be sold to an affiliated power marketer who will resell the power at wholesale to marketers, brokers or utilities pursuant to FERC rate schedules.

In addition, neither of the Applicants will qualify as a retail electric supplier, as that term is defined by KRS 278.010(4), since neither possess a certified territory as established by the Territorial Boundary Act, KRS 278.016-278.018. Consequently,

neither of the Applicants will have a right to provide retail electric service directly to any consumer for ultimate consumption.

In conclusion, the Commission finds that neither Riverside nor Bluegrass will 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 generating facilities. However, notwithstanding the absence of jurisdiction over the construction and operation of these electric generating units, the Commission may have jurisdiction over any gas pipeline constructed or operated by Riverside or Bluegrass. 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 Riverside and Bluegrass for a Declaratory Order is granted. Neither Riverside nor Bluegrass will be a utility or a retail electric supplier as defined by KRS 278.010(3)(a) and 278.010(4), and neither will be subject to the certification requirements of KRS 278.020(1) and 278.025.

Done at Frankfort, Kentucky, this 21st day of December, 1999.

By the Commission

ATTEST:


Executive Director

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED
OCT 21 1999
PUBLIC SERVICE
COMMISSION

In the Matter of:

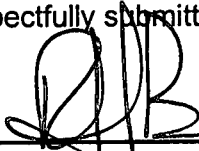
THE PETITION OF RIVERSIDE GENERATING) CASE NO. 99-386
COMPANY, L.L.C. AND BLUEGRASS)
GENERATION COMPANY, L.L.C. FOR)
DECLARATORY ORDER)

AFFIDAVIT

After first being sworn in, Rick A. Bowen ("Deponent") states as follows:


1. My name is Rick A. Bowen. My business address is 1000 Louisiana Street, Suite 5800, Houston, Texas 77002.
2. I am Executive Vice President, Riverside Generating Company, L.L.C., Executive Vice President, Bluegrass Generation Company, L.L.C., and in addition, I am Executive Vice President, Dynegy Power Corp.
3. I have reviewed the Petition of Riverside Generating Company, L.L.C. and Bluegrass Generation Company, L.L.C. for Declaratory Order filed with the Kentucky Public Service Commission on September 14, 1999 in Case No. 99-386, 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,



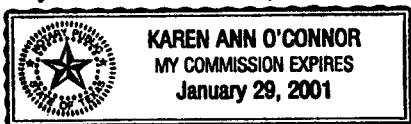
STATE OF TEXAS)
) SS:
COUNTY OF HARRIS)

The foregoing instrument was acknowledged before me by Rick A. Bowen this 19th day of October, 1999.



Notary Public

My Commission Expires:





COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

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

October 14, 1999

Riverside Generating Company, LLC
Bluegrass Generation Company, LLC
1000 Louisiana Street
Suite 5800
Houston, TX. 77002 5006

Honorable David C. Brown
Attorney at Law
Stites & Harbison
1800 Aegon Center
Louisville, KY. 40202

Honorable William T. Gorton
Attorney at Law
Stites & Harbison
250 West Main Street, Suite 2300
Lexington, KY. 40507

RE: Case No. 99-386

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

Sincerely,

Stephanie Bell

Stephanie Bell
Secretary of the Commission

SB/hv
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE PETITION OF RIVERSIDE GENERATING)	
COMPANY, L.L.C. AND BLUEGRASS)	CASE NO.
GENERATING COMPANY, L.L.C. FOR)	99-386
DECLARATORY ORDER)	

O R D E R

The Commission, on its own motion, HEREBY ORDERS that Riverside Generating Company L.L.C. and Bluegrass Generating Company L.L.C. shall file, within 10 days of the date of this Order, an original and six copies of an affidavit of a senior executive officer of each applicant affirming the truth of the facts set forth in the joint application.

Done at Frankfort, Kentucky, this 14th day of October, 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

September 20, 1999

Riverside Generating Company, LLC
Bluegrass Generation Company, LLC
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Houston, TX. 77002 5006

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Honorable William T. Gorton
Attorney at Law
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Lexington, KY. 40507

RE: Case No. 99-386
RIVERSIDE GENERATING COMPANY, LLC BLUEGRASS GENERATION COMPANY
(Initial Operations)

This letter is to acknowledge receipt of initial application in the above case. The application was date-stamped received September 14, 1999 and has been assigned Case No. 99-386. 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,
Stephanie Bell

Stephanie Bell
Secretary of the Commission

SB/jc

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

SEP 14 1999

PUBLIC SERVICE
COMMISSION

In the Matter of:

PETITION OF
RIVERSIDE GENERATING COMPANY, L.L.C.

AND

BLUEGRASS GENERATION COMPANY, L.L.C.
FOR DECLARATORY ORDER

CASE NO. QA-386

Riverside Generating Company, L.L.C. ("Riverside") and Bluegrass Generation Company, L.L.C. ("Bluegrass"), by counsel, submit this joint Petition requesting a Declaratory Order that the electric generating facilities each Applicant will construct and operate, as hereafter described, will not constitute a "utility" within the meaning of KRS Chapter 278 and that therefore the Applicants will not be subject to the jurisdiction of the Kentucky Public Service Commission and the certification requirements of KRS 278.020(1) and KRS 278.025.

Riverside and Bluegrass are limited liabilities companies indirectly wholly owned by Dynegy Power Corp., a Delaware corporation ("Dynegy Power"), which is a wholly owned subsidiary of Dynegy, Inc., a Delaware corporation ("Dynegy"). The headquarters of Dynegy and Dynegy Power are located at 1000 Louisiana Street, Suite 5800, Houston, Texas.

The Kentucky facilities to be constructed by Riverside and Bluegrass will be natural gas-fired generating units functionally identical to the facilities of Calvert City Power that are the subject of the Commission's order dated July 6, 1999 (The Petition of Calvert City Power, L.L.C. for Declaratory Order, Case No. 99-058). The facilities will make no retail sales but

rather will sell exclusively into the wholesale power market at times when it is economic to do so.

On the grounds set forth below, Applicants request the Kentucky Public Service Commission to issue a declaratory order finding that their proposed facilities are not "utilities" under Kentucky law and will not be subject to regulation by the Commission.

DESCRIPTION OF FACILITIES AND BUSINESS

Applicants propose to construct and operate natural gas-fired electric generating stations in Lawrence County (Riverside) and Oldham County (Bluegrass). The Riverside station will be a natural gas-fired power plant having 3 combustion turbines with a total generating capacity of 510 megawatts (nominal). The commercial operation date for Riverside is estimated to be June, 2001. The natural gas for Riverside will be supplied via the Tennessee Gas Pipeline Company which operates an interstate gas transmission pipeline approximately 6 miles north of the Riverside site. The Riverside plant will be interconnected with the AEP transmission system at or near the Baker Substation, located less than a mile south of the site.

Similarly, the Bluegrass station to be built in the Oldham County Business Park will be a natural gas-fired power plant which, as presently designed, will consist of two combustion turbines with a total generating capacity of 340 megawatts (nominal). The Bluegrass plant can be interconnected with the 345 kv transmission facilities of LG&E Energy which traverses the plant site. Natural gas fuel will be supplied from a connection with the Texas Gas Transmission interstate pipeline which is located at the plant site.

Each facility would represent a capital investment in Kentucky of more than \$100 million.

The Riverside and Bluegrass facilities will be federally-licensed exempt wholesale generators ("EWG's"). The electric output of each Applicant will be sold into the wholesale market. Neither Applicant will have retail customers, nor will it make retail sales in Kentucky or elsewhere. Each Applicant will have a power purchase agreement with a wholesale electric energy marketing affiliate, Dynegy Power Marketing, Inc. Neither Applicant has entered into or has existing plans to enter into wholesale contracts with utilities.

The Applicants will be subject to a variety of state and federal laws and regulations intended to protect the public and the environment. FERC will have jurisdiction over its wholesale power sales with respect to rates, terms and conditions of sale. In addition, the construction and operation of the plants will be subject to oversight and regulation by local authorities, the Kentucky Natural Resources and Environmental Protection Cabinet and the United States Environmental Protection Agency. Other agencies will also review aspects of the project, including its effects on historic resources, wetlands, endangered or threatened species, if applicable. See Appendix A.

In the new competitive environment for power generation and the emerging field of energy marketing by new specialized categories of independent power generators, the facilities of Applicants will play a limited, but important role. They are not designed to supply base load power and therefore will not compete in the retail market with coal-fired plants fueled by Kentucky coal. The Applicants will provide additional power during peak periods when the demand for power is at its highest; recently, demand has been rising to the point of matching or exceeding existing available supplies. As an additional supplier of power, the facilities will tend to enhance the reliability of energy supply in Kentucky, thereby benefiting Kentucky jurisdictional utilities and their customers.

LEGAL ANALYSIS

1. Riverside and Bluegrass will not be utilities under Kentucky law

KRS Chapter 278 authorizes the Commission to regulate “utilities.” KRS 278.040.

Kentucky law defines a “utility” 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 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;

In 1989, the Commission recognized that the majority of cases from other states hold that service “to or for the public” is provided only when one “holds himself as out as willing to serve all who apply up to the capacity of his facilities.” In the matter of Electric Energy, Case No. 89-232 at page 2 (citing North Carolina ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 148 S.E. 100, 109 (N.C. 1966)).

Most recently, the Commission considered the Calvert City Power petition and held that a gas fired generator licensed by FERC as an EWG and selling only into the wholesale market was not a utility under Kentucky law. In the Matter of the Petition of Calvert City Power I, LLC, for Declaratory Order, Case No. 99-058, (Order dated July 6, 1999) the Commission noted that

[t]here 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.”

Order at 3 (quoting 27A Am. Jur. 2d Energy and Power Sources § 195).

The Commission then determined that whether an entity is a "utility" that is providing service "to or for the public" as defined by KRS 278.013(3)(a) would depend on the "facts and circumstances on a case-by-case basis." Based on the facts and circumstances of Calvert City Power's proposal, the Commission found that Calvert City Power was not a "utility" and therefore not subject to PSC regulation. The facts and circumstances of this Petition present no material difference from the salient findings in the Calvert City Power order:

- (a) The Applicants intend to construct gas-fired combustion turbines to provide electric power "during peak hours when generating capacity is at its highest demand." Order at 2.
- (b) "The sale of electricity from the facilities will be subject to regulation by the FERC with respect to rates, terms and conditions of sale." Id.
- (c) The Applicants intend to sell their respective output to an affiliated wholesale marketer. Id. at 5.
- (d) Neither Applicant will sell power to Kentucky consumers for ultimate consumption, i.e., to end-users." Id.
- (e) Neither Applicant has "existing contracts to sell power to Kentucky-jurisdictional utilities." Id.
- (f) Neither Applicant has "an existing expectation that any such contract will be entered." Id.
- (g) Neither Applicant has an "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." Id.

The pivotal issue, now decided by the Calvert City Power order, is that a generating plant selling into the wholesale market, but not to end-users, is not selling "to or for the public." The Commission concluded that 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 [sic]

the power at wholesale to marketers, brokers, or utilities pursuant to FERC rate schedules.

Id. at page 5.

The facts and circumstances of this petition are indistinguishable from the facts and circumstances of Calvert City Power, and therefore Riverside and Bluegrass will not be “utilities” subject to the jurisdiction of the Public Service Commission.

2. **Riverside and Bluegrass will not be retail electric suppliers subject to the Kentucky certified territory statutes.**

KRS 278.016-278.018 divides the Commonwealth into geographic service areas for the orderly development of “retail electric service” by “retail electric suppliers.” KRS 278.010(4) defines “retail electric supplier” as “any person, firm, corporation, association, or cooperative corporation, excluding municipal corporations, engaged in the furnishing of retail electric service.” KRS 278.010(7) states 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.*” (Emphasis added). Because the Applicants will be providing wholesale electric energy to other electric suppliers for resale, rather than to any consumer for ultimate consumption, they are not retail electric suppliers and are not subject to the certified territory statutes.

3. **Riverside and Bluegrass are not required to obtain a certificate of public convenience and necessity or a certificate of environmental compatibility.**

Because the Applicants are not utilities and will not be “providing utility service to or for the public,” or “furnishing to the public any of the services enumerated in KRS 278.010,” they are not required to obtain a certificate of convenience and necessity. KRS 278.020(1). Cumberland Valley Rural Elec. Coop. Corp. v. Public Serv. Comm’n, Ky. App., 433 S.W.2d 103

(1968) (private corporation that, at its own expense, constructed a transmission line to obtain electric service for its facilities was not required to obtain a certificate because it did not construct the line to serve the public and did not intend to serve the public).

This analysis is consistent with the Commission's decision in the matter of Electric Energy. Electric Energy had been serving a single federal installation in Kentucky before the enactment of certified territories for electric utilities. Despite its ownership of Kentucky transmission facilities, the Commission determined that Electric Energy was 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.) Accordingly, the Commission had no jurisdiction, and Electric Energy was not required to apply for a certificate of public convenience and necessity. This conclusion has now been re-confirmed by the Calvert City Power order.

Further, the Applicants are not required to obtain a certificate of environmental compatibility under KRS 278.025. KRS 278.025(1) requires such a certificate before "construction of any facility to be used for the generation of electricity to or for the public for compensation. . . ." (Emphasis added.). As discussed above and as re-confirmed by the Calvert City Power order, the Applicants will not construct facilities to provide service to or for the public, and the statute is not applicable. See Calvert City Power order at 6-7.

Despite the absence of a requirement for a certificate of environmental compatibility, Applicants will be subject to numerous and varied regulatory requirements for protection of human health and the environment. The very factors which KRS 278.025(3) requires the

Commission to consider concerning environmental compatibility¹ shall be reviewed by the Natural Resources and Environmental Protection Cabinet (NREPC) in the context of permit review, with an opportunity for public review and comment. Thus, although the Applicants will not be subject to the environmental compatibility provisions as specified in KRS 278.025, those requirements will be addressed by the NREPC. The public will be further protected by the enforcement of regulations regarding endangered species, wetlands, cultural and archaeological resources, handling of toxic chemicals and groundwater protection.

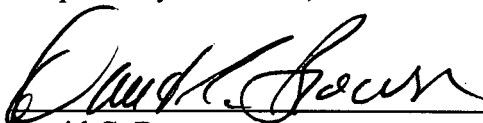
¹ Description of the proposed project; the effects of air pollutants from the proposed facility on public health and welfare, the effects of the proposed facility on the waters of the Commonwealth, the treatment, handling and disposal of solid waste from the proposed facility, noise pollution, if any, and other adverse environmental effects which cannot be avoided.

CONCLUSION

For the reasons set forth above, Riverside Generating Company, L.L.C. and Bluegrass Generation Company, L.L.C. respectfully request the Kentucky Public Service Commission to issue a declaratory order finding:

1. That the Lawrence County facility constructed and operated by Riverside Generating Company, L.L.C. and the Oldham County facility constructed and operated by Bluegrass Generation Company, L.L.C. are not "utilities" as defined in KRS 278.010(3) and are therefore not subject to the jurisdiction of the Commission.;
2. That the Applicants are not "retail electric suppliers" as defined in KRS 278.010(4) and KRS 278.016-.018;
3. That the Applicants are not required to obtain certificates of public convenience and necessity pursuant to KRS 278.020 or certificates of environmental compatibility pursuant to KRS 278.025 for the construction of the Oldham County and Lawrence County facilities

Respectfully submitted,



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William T. Gorton III
Stites & Harbison
250 West Main Street, Suite 2300
Lexington, KY 40507
Telephone: 606-226-2300
Fax: 606-253-9144

COUNSEL FOR APPLICANTS

APPENDIX A
Environmental Statutes and Regulations

Extensive federal and state statutes and regulations address each of the elements for review under KRS 278.025(3)(b) related to the Certificate of Environmental Compatibility:

1. Effects of air pollutants from the proposed facilities.

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 quality 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 a public hearing.

A New Source Construction and Operation permit (401 KAR 50:035) requires "Synthetic Minor" sources to quantify emission rates from the proposed facility, demonstrate and certify compliance with applicable regulations, demonstrate compliance with emission limitations through compliance monitoring and tests, and identify all emission sources, even those that qualify as "insignificant activities". The Cabinet's permitting process includes notice to the public of the application and an opportunity for a public hearing.

Title V Operating Permit (CAA §502 [42 U.S.C. §7661a]; 401 KAR 50:035) is required for facilities which emit greater than 100 tons per year of a regulated criteria pollutant and 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 notice to public and opportunity for public comment.

New Source Performance Standards (CAA § 111 [42 U.S.C. § 7411]; 40 CFR 60, Subparts Da and Gg; 401 KAR 59:016 and 60:330) include standards of performance specific to stationary gas turbines, including emission standards, monitoring, reporting, recordkeeping and test requirements.

Phase II Acid Rain Permit (CAA Title IV; 40 CFR Part 72) requires generating facilities with greater than 25 MW(e) to appoint a Designated Representative, monitor and report emissions of nitrogen oxides, sulfur dioxide and oxygen or carbon dioxide, as well as hold sulfur allowances. Public notice of the Designated Representative is part of the permit process. The permit process includes notice to the public and an opportunity for a public hearing.

Hazardous Air Pollutant Standards (CAA § 112 [42 U.S.C. § 7412]; 40 CFR Parts 60 and 63; 401 KAR 57 and 63), National Emission Standards for Hazardous Air Pollutants (NESHAPS) 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 63) are applicable to all sources of pollutants.

Recordkeeping, Inspections, and Monitoring (CAA § 114 [42 U.S.C. § 7414]; 401 KAR 50) rules by the USEPA and the Cabinet require facilities 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 facilities on waters of the Commonwealth.

Kentucky Pollutant Discharge Elimination System (KPDES) Permit (Clean Water Act § 402; 401 KAR 5) is required if there is to be a discharge of pollutants or stormwater from the facility. The permit process

includes a 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.

Floodplain Construction Permit (401 KRS 151.250; 401 KAR 4:060) is required prior to construction or deposit in certain flood-prone areas. The applicant must give public notice to the public and potentially affected landowners.

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

Disposal of waste at any site or facility that is not permitted by the Cabinet is prohibited by KRS 224.40-100. Since the proposed facilities do not intend to dispose of waste on-site, the facilities must dispose of any 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 32) require that facilities which generate more than 100 kilograms of hazardous waste per month must obtain an EPA identification number and must comply with requirements for packaging, storing, and labeling the waste, training of employees, as well as filing an annual report with the Cabinet. Such facilities must properly manifest the waste which is 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 attorneys in the enforcement of this 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 action may be required to obtain an incidental-take permit if its actions may result in harm to a species. An incidental-take permit is subject to public review and comment.

Wetlands (Clean Water Act §§ 401, 404) [33 U.S.C. §§ 1341, 1344]; KRS 224.16-050. A permit from the U.S. Army Corps of Engineers is required for construction in the jurisdictional waters of the United States. 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 affects less than 200 linear feet of streams or 1 acre of wetlands; projects which have greater impact must obtain an individual certification.

National Historic Preservation Act (16 U.S.C. § 470) requires Federal agencies to take into account the effects of federal and federally-assisted actions on historic properties before issuing a permit or license. If potentially affected historic resources exist, the agencies are required to consult with the State Historic Preservation Officer and any interested parties. This consultation process may include public comment periods or hearings.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of this Petition for Declaratory Order has been delivered to the Office of Rate Intervention, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601, by first class mail, this the 13th day of September, 1999.


David C. Brown