

CASE

NUMBER:

99-514

Duke Energy Marshall County LLC

Initial Operations

Regular

DECLARATORY ORDER

IN THE MATTER OF THE PETITION OF DUKE ENERGY MARSHALL COUNTY, LLC FOR A DECLARATORY ORDER

SEQ NBR	Date	Remarks
1	12/30/99	Application.
2	01/06/00	Acknowledgement letter.
3	(M) 02/18/00	REPORT ON STATUS OF DEMC PROJECT & REQ FOR ISSUE OF ORDER (KENDRICK RIGGS)
4	03/13/00	FINAL ORDER; GRANTS REQUEST FOR DECLARATORY ORDER



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION
211 SOWER BOULEVARD
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

CERTIFICATE OF SERVICE

RE: Case No. 1999-514
DUKE ENERGY MARSHALL COUNTY LLC

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 March 13, 2000.

Parties of Record:

Duke Energy Marshall County LLC
c/o Peter J. Ledig, Vice President
5400 Westheimer Court
Houston, TX. 77056 5310

Honorable Kendrick R. Riggs
& Honorable Maureen M. Carr
Attorneys at Law
Ogden Newell & Welch
1700 Citizens Plaza
500 West Jefferson Street
Louisville, KY. 40202

Stephanie J. Bell

Secretary of the Commission

SB/sa
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE PETITION OF DUKE ENERGY)
MARSHALL COUNTY, L.L.C. FOR A) CASE NO. 99-514
DECLARATORY ORDER)

O R D E R

The Commission has before it the application of Duke Energy Marshall County, L.L.C. ("Duke EMC") requesting a formal determination that it will not 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, owning, and operating electric generating facilities.

Duke EMC is a limited liability company which is directly wholly owned by Duke Energy North America, LLC, an indirectly wholly owned subsidiary of Duke Energy Corporation. The principal place of business of Duke Energy North America LLC is in Houston, Texas.

Duke EMC proposes to construct, own, and operate eight natural gas-fired, simple cycle combustion turbines having a total electric generating capacity of 640 MW. The Duke EMC facility will be located near Calvert City in Marshall County, Kentucky, and is 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 Texas Gas Transmission Company which is approximately three miles south of the proposed site. The Duke EMC facility will be electrically interconnected with the Tennessee Valley

Authority ("TVA") transmission system at its 161 KV Marshall County Substation which is adjacent to the Duke EMC proposed site. Alternatively, the facility may be electrically interconnected with two 161 KV lines which are owned by Big Rivers Electric Corporation and terminate at the TVA substation.

Duke EMC facility represents a capital investment of approximately \$200 million and 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 facility will be sold to one or more affiliate power marketers. Duke EMC has no intent to directly enter into contracts to sell power at wholesale to any utility in Kentucky.

The rates, terms, and conditions of sale established by Duke EMC 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 Duke EMC 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 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 Duke EMC.

Here, neither Duke EMC nor any of its affiliates has 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 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 utilities or end-users in Kentucky. All of the generation of Duke EMC 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, the Applicant 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, the Applicant will have no legal right to provide retail electric service directly to any consumer for ultimate consumption.

In conclusion, the Commission finds that Duke EMC 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 generating facility. 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, owned, or operated by Duke EMC. 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.

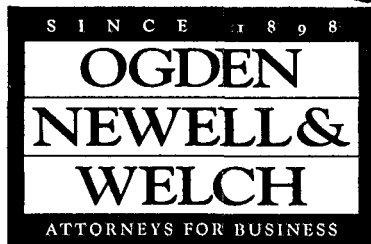
IT IS THEREFORE ORDERED that the request of Duke EMC for a Declaratory Order is granted. Duke EMC will not be a utility or a retail electric supplier as defined by KRS 278.010(3)(a) and 278.010(4), and will not be subject to the certification requirements of KRS 278.020(1) and 278.025, as a result of constructing, owning, or operating the facilities as described in its application.

Done at Frankfort, Kentucky, this 13th day of March, 2000.

By the Commission

ATTEST:


Executive Director



1700 CITIZENS PLAZA
500 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202-2874
(502) 582-1601
FAX (502) 581-9564

RECEIVED

FEB 18 2000

KENDRICK R. RIGGS

DIRECT DIAL (502) 560-4222
DIRECT FAX (502) 627-8722

PUBLIC SERVICE
COMMISSION

kriggs@ogdenlaw.com

February 17, 2000

VIA OVERNIGHT MAIL

Mr. Martin J. Huelsmann, Jr.
Executive Director
Public Service Commission
211 Sower Blvd.
Frankfort, Kentucky 40601

RE: The Petition of Duke Energy Marshall County, LLC for a Declaratory Order
Case No. 99-514

Dear Mr. Huelsmann:

On December 30, 1999, I filed a Petition for Declaratory Order on behalf of Duke Energy Marshall County, LLC ("DEMC"), a subsidiary of Duke Energy North America, LLC ("DENA"). The Petition asked the Commission to determine -- in accordance with KRS Chapter 278 and recent Commission decisions -- that a natural gas-fired electric generating station DEMC proposes to construct, own, and operate in Marshall County, Kentucky will not be a "utility" or "retail electric supplier" under Chapter 278, and will not be subject to the certification requirements of KRS 278.020 and 278.025.

I am writing now to report on the status of the DEMC project and to request, respectfully but urgently, that the Commission issue an Order in this matter no later than **March 10, 2000**, so that the project may be considered by DENA's Board of Directors at their meeting on March 16, 2000. The Commission's decision in this case is critical to DENA's directors' business judgment to approve the investment in this facility so that it may be operational by June 1, 2001.

Since the beginning of January 2000, the site for DEMC's facility has been expanded by optioning additional property. In addition, three water wells have been drilled, a temporary construction road has been built from the state highway onto the property, and plans have been made to begin clearing the site next week to facilitate full-scale construction.

Mr. Martin J. Huelsmann, Jr.
February 17, 2000
Page 2

Additionally, DENA is in the process of establishing a mutually-agreeable interconnection arrangement with the Tennessee Valley Authority ("TVA") for DEMC to deliver electric output into TVA's 161 kV Marshall County Substation. The proposed interconnection arrangement in this case is materially different than the one proposed in The Petition of Calvert City Power I, LLC for Declaratory Order (Case No. 99-058). That is so because Calvert City planned to interconnect with the 500 kV TVA transmission system, whereas DEMC is proposing to interconnect with the 161 kV lines from TVA's Marshall County Substation. For this reason, DENA has received assurances from TVA and expects that an agreement for the proposed interconnection will be reached soon.

Upon establishing that arrangement and receiving the Order requested from the Commission, DENA will begin construction immediately so that the DEMC facility will be operational by June 1, 2001.

As explained in DEMC's Petition for Declaratory Order, the proposed facility represents a capital investment of approximately \$200 million in Kentucky. Additionally, the facility will enhance the reliability of electric power in Marshall County and benefit all utilities operating in western Kentucky by increasing reliability and peaking power supplies without competing directly with existing coal-fired base-load generating plants.

At this time, DENA is considering and evaluating a number of merchant power projects in North America, including DEMC's Marshall County project. DENA's Board of Directors will meet on March 16, 2000, to review the potential projects to determine which should proceed based on each project's overall viability. Receipt of an Order in the above-referenced matter would allow DENA's Board of Directors to determine that the DEMC project should indeed proceed in Marshall County, Kentucky in accordance with a construction schedule that will permit the facility to be operational by June 1, 2001.

Please feel free to contact me with any questions you may have. Thank you for your assistance in this matter.

Sincerely yours,


Kendrick R. Riggs

Mr. Martin J. Huelsmann, Jr.
February 17, 2000
Page 3

cc: Office of the Attorney General
Brent Bailey, Esq.
Paul Lesner



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

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

January 6, 2000

Duke Energy Marshall County LLC
c/o Peter J. Ledig, Vice President
5400 Westheimer Court
Houston, TX. 77056 5310

Honorable Kendrick R. Riggs
& Honorable Maureen M. Carr
Attorneys at Law
Ogden Newell & Welch
1700 Citizens Plaza
500 West Jefferson Street
Louisville, KY. 40202

RE: Case No. 1999-514
DUKE ENERGY MARSHALL COUNTY LLC
(Initial Operations) FOR DECLARATORY ORDER

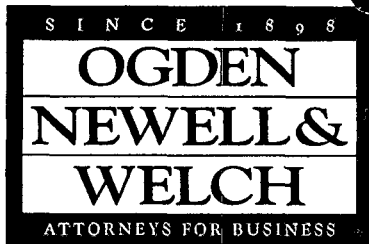
This letter is to acknowledge receipt of initial application in the above case. The application was date-stamped received December 30, 1999 and has been assigned Case No. 1999-514. In all future correspondence or filings in connection with this case, please reference the above case number.

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

Sincerely,

Stephanie J. Bell
Stephanie Bell
Secretary of the Commission

SB/jc



1700 CITIZENS PLAZA
500 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202-2874
(502) 582-1601
FAX: (502) 581-9564

December 30, 1999

KENDRICK R. RIGGS

DIRECT DIAL (502) 560-4222
DIRECT FAX (502) 627-8722

kriggs@ogdenlaw.com

RECEIVED

DEC 30 1999

PUBLIC SERVICE
COMMISSION

CASE 99-514

Ms. Helen C. Helton, Executive Director
Public Service Commission
730 Schenkel Lane
Frankfort, KY 40601

RE: Petition of Duke Energy Marshall County, LLC for a Declaratory Order

Dear Ms. Helton:

Enclosed please find the original and ten (10) copies of the Petition of Duke Energy Marshall County, LLC ("DEMC") for a Declaratory Order. Three additional copies of the Petition are enclosed, and I ask that you please file-stamp them and return them to me with our firm's messenger.

The Petition asks the Commission to determine that a natural gas-fired electric generating station DEMC proposes to construct, own, and operate in Marshall County, Kentucky will not be a "utility" or "retail electric supplier" under KRS Chapter 278, and that, as a non-jurisdictional entity, DEMC need not obtain a Certificate of Convenience and Necessity or a Certificate of Environmental Compatibility in connection with the proposed facility.

DEMC plans to begin commercial operations at the facility in June 2001. So it may adhere to its development and planning schedule, DEMC respectfully requests that the Commission issue the requested Declaratory Order as soon as possible within sixty days of this filing, or no later than February 29, 2000.

Please feel free to contact me with any questions you may have. Thank you for your assistance in this matter.

Sincerely yours,

Kendrick R. Riggs

Enclosures

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

DEC 30 1999

PUBLIC SERVICE
COMMISSION

In the Matter of:

THE PETITION OF)
DUKE ENERGY MARSHALL COUNTY, LLC)
FOR A DECLARATORY ORDER)

CASE NO. 09-514

* * * * *

INTRODUCTION

Duke Energy Marshall County, LLC ("DEMC") respectfully requests that the Commission issue an Order declaring that DEMC's construction, ownership, and operation of a natural gas-fired electric generating station in Marshall County, Kentucky, (hereinafter "the proposed Facility") will not render DEMC a "utility" or a "retail electric supplier" subject to regulation under KRS Chapter 278, and that DEMC will not be subject to the certification requirements of KRS 278.020 and KRS 278.025 in connection with the construction, ownership, and operation of the proposed Facility.

STATEMENT OF FACTS

DEMC is a limited liability company that is organized and exists under Delaware law, and was authorized to do business in Kentucky on November 12, 1999. DEMC is a direct, wholly-owned subsidiary of Duke Energy North America, LLC, itself an indirect, wholly-owned subsidiary of Duke Energy Corporation, a publicly-traded major energy services company. Duke Energy North America LLC's principal place of business is 5400 Westheimer Court, Houston, TX 77056-5310.

DEMC proposes to construct, own, and operate a natural gas-fired electric generating station near Calvert City, Kentucky. The proposed Facility will consist of

eight simple cycle combustion turbine units with a total generating capacity of approximately 640 MW. Fuel for the proposed Facility will be provided through a direct connection to a Texas Gas Transmission Company pipeline located approximately three miles south of DEMC's site. The proposed Facility will deliver electric output into the Tennessee Valley Authority's 161 kV Marshall County Substation located on property adjacent to DEMC's site. DEMC also may choose to tie directly into two 161 kV transmission lines owned by Big Rivers Electric Corporation that traverse the site and terminate at the TVA Substation.

All electricity generated by the proposed Facility will be sold on the wholesale market. It is anticipated that such electricity will be sold through one or more power purchase agreements with Duke Energy Merchants, LLC and/or Duke Energy Trading & Marketing, LLC -- power marketers affiliated with DEMC. Although no power sale contracts exist at this time between DEMC and either affiliated power marketer for the sale of the output of the proposed plant, it is anticipated that such contracts will be executed before commercial operations begin at the proposed Facility. DEMC has no existing contracts to sell electricity at wholesale for one year or longer to any utility regulated by the Commission and no existing plans or expectations to enter into such contracts. DEMC will file an application with the Federal Energy Regulatory Commission ("FERC") for a determination that it is an "exempt wholesale generator" with respect to the proposed Facility under the Public Utility Holding Company Act of 1935. See 15 U.S.C. 79z-5(a)(1). As an exempt wholesale generator, DEMC will be prohibited from making and has no present intention to make retail sales (*i.e.*, sales to end-users for ultimate consumption) in Kentucky or elsewhere. DEMC also will be an

“electric utility” within the meaning of the Federal Power Act. See 16 U.S.C. 796(22). As such, DEMC will be subject to FERC jurisdiction in selling electricity generated by the proposed Facility and will apply for FERC authorization to sell such electricity at market-based rates.

It is anticipated that DEMC’s combustion turbines will operate only during peak hours and, therefore, power generated by the proposed Facility will not compete directly with existing coal-fired base-load generating plants in Kentucky. Instead, DEMC’s combustion turbines will enhance the reliability of electric power in Marshall County and benefit all utilities operating in western Kentucky by increasing reliability and peaking power supplies. It is anticipated that gas for use in the proposed Facility will be purchased from a gas marketer affiliated with DEMC.

The proposed Facility represents a capital investment of approximately \$200 million in Kentucky, and is scheduled to be completed in time for the summer peak season that will begin June 1, 2001. This timeline requires that all permitting be obtained and construction be started by June 2000, making time of the essence in the processing of this petition.

STATEMENT OF LAW

DEMC will not be a “utility” as defined in KRS 278.010(3) or a “retail electric supplier” as defined in KRS 278.010(4). DEMC also will not be required to obtain a Certificate of Convenience and Necessity pursuant to KRS 278.020 or a Certificate of Environmental Compatibility pursuant to KRS 278.025.

1. DEMC will not be a “utility” under Kentucky law.

Pursuant to KRS 278.040, the Commission is authorized to regulate “utilities” in Kentucky. A “utility” is defined in KRS 278.010(3) as “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) [t]he generation, production, transmission, or distribution of electricity to or for the public, for compensation, for lights, heat, power, or other uses” (emphasis added).

DEMC is not and does not intend to become a public utility under Kentucky law. While DEMC acknowledges it will own, control, operate, and manage a facility used to generate electricity for compensation, the electricity it generates will not be sold “to or for the public.”

A defining characteristic of the types of facilities subject to Commission jurisdiction is that they are prepared to serve or are engaged in serving the public. This has been explained 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 public¹

In 1989, the Commission held that a company did not need a Certificate of Convenience and Necessity to construct a power transmission line because “[o]nly a ‘utility’ can be made to comport with the Commission’s statutes and regulations,” and the

¹ See Case No. 99-058 (In the Matter of: The Petition of Calvert City Power I, L.L.C. for Declaratory Order) (Order, July 6, 1999, at 2-3) (quoting 64 Am.Jur.2d Public Utilities, Section 1).

company did not qualify as such because it did not “generate, produce, transmit, or distribute electricity to or for the public.”² The Commission explained that one offers service to the public “when he holds himself out as willing to serve all who apply up to the capacity of his facilities.”³

Recently, the Commission considered a petition filed by Calvert City Power I, LLC, a gas-fired generator licensed by FERC as an exempt wholesale generator with plans to sell only into the wholesale market. The Commission held Calvert City Power, I was not a “utility” under Kentucky law and stated:

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.”⁴

The Commission has made clear, then, that an important consideration in a case like this is whether a company has a present intent to generate power to or for any end-user. In its Calvert City Power I decision, the Commission held that a generating plant that sells electricity into the wholesale market but not to end-users is not a “utility” selling electricity “to or for the public.” The Commission explained:

Here, neither Calvert City nor any of its affiliates have existing contracts to sell power to Kentucky-jurisdictional utilities or to

² See Case No. 89-232 (In the Matter of: The Application of Electric Energy, Inc. for a Certificate of Convenience and Necessity to Construct a Power Transmission Line) (Order, November 1, 1989, at 1).

³ Id. at 2 (citing North Carolina ex rel. Utilities Comm’n v. Carolina Tel. & Tel. Co., 148 S.E. 100, 109 (N.C. 1966)).

⁴ See Order, Case No. 99-058, at 3 (quoting 27A Am.Jur.2d Energy and Power Sources, Section 195).

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.⁵

The Commission thus held that Calvert City Power did not constitute a "utility" for purposes of Chapter 278, and therefore would not be subject to the Commission's regulation.

The proposed Facility will be identical functionally to Calvert City Power I's facility. As was the case with Calvert City Power I:

- DEMC intends to construct the proposed Facility to provide electricity during peak hours;
- DEMC intends to sell all output from the proposed Facility to an affiliated wholesale marketer;
- DEMC has no intent to serve -- directly or indirectly -- an indefinite public; to dedicate or hold its generation out to the public as a class; or to serve any end-users in Kentucky;
- DEMC has no existing contracts to sell power to Kentucky-jurisdictional utilities and no expectation it will enter into any such contract; and
- FERC will license DEMC as an exempt wholesale generator, and will regulate the rates, terms, and conditions of the sale of electricity from the proposed Facility.

For the reasons set forth above, and for the reasons the Commission determined Calvert City Power I would not be a "utility" for purposes of Chapter 278, DEMC will not be a "utility" according to the terms of KRS 278.010(3).

⁵ Id. at 5.

2. DEMC will not be a “retail electric supplier” subject to Kentucky’s certified territory statutes.

The Territorial Boundary Act (KRS 278.016-018) provides that only “retail electric suppliers” providing “retail electric service” may sell electricity directly to the consuming public in Kentucky. A “retail electric supplier” is “any person, firm, corporation, association, or cooperative corporation, excluding municipal corporations, engaged in the furnishing of retail electric service.” KRS 278.010(4). And “retail electric service” is “electric service furnished to a consumer for ultimate consumption, but . . . not . . . wholesale electric energy furnished by an electric supplier to another electric supplier for resale.” KRS 278.010(7).

DEMC will not be a “retail electric supplier” for purposes of Kentucky’s Certified Territory Act. DEMC has no certified territory in Kentucky, and has no present intent to provide retail electric service to consumers for ultimate consumption. Instead, and in accordance with the law, DEMC intends to provide only wholesale electric energy to other electric suppliers for resale. This analysis is consistent with the Commission’s decisions in Case Nos. 89-232 and 99-058. In the first, the Commission held that a company was exempt from Commission regulation – even though it owned a transmission facility in Kentucky – because it had no certified territory and did not “generate, produce, transmit, or distribute electricity to or for the public.”⁶ In the second, the Commission confirmed that Calvert City Power I did not qualify as a “retail electric supplier” under KRS 278.016-018. The Commission explained that Calvert City Power I is not able to sell electricity directly to the consuming public in Kentucky because it has

⁶ See Order, Case No. 89-232, at 1 (emphasis in the original).

no certified territory in Kentucky, and thus no right to provide retail electric service to consumers for ultimate consumption.⁷

3. DEMC is not required to obtain a Certificate of Convenience and Necessity or a Certificate of Environmental Compatibility in connection with the construction and operation of the proposed Facility.

In Kentucky, no person, partnership, or corporation may provide utility service to or for the public or construct any plant, equipment, property, or facility to furnish any service enumerated in KRS 278.010 without first obtaining from the Commission a certificate showing that “public convenience and necessity require the service or construction.” KRS 278.020(1). As explained above, DEMC has no intention of providing utility service to or for the public. DEMC therefore need not obtain a Certificate of Convenience and Necessity under KRS 278.020(1).

Also in Kentucky, no person, partnership, or corporation may construct any facility to be used to generate electricity to or for the public for compensation without obtaining a Certificate of Environmental Compatibility from the Commission. KRS 278.025. Since the proposed Facility will not provide electricity to or for the public, DEMC need not obtain a Certificate of Environmental Compatibility under KRS 278.025.

The Commission has made it clear that KRS 278.020(1) and KRS 278.025 apply only to generating facilities to be used to supply electricity to or for the public. In Cumberland Valley Rural Elec. Coop. Corp. v. Public Serv. Comm’n, Ky. App., 433 S.W.2d 103, 104 (1968), the Commission held that a private corporation that constructs a transmission line at its own expense to obtain electric service is not required to obtain a Certificate of Convenience and Necessity where it does not construct the line to serve the

⁷ See Order, Case No. 99-058, at 6.

public or with an intent to serve the public. Similarly, in Case No. 89-232, the Commission held that an electric company need not apply for a Certificate of Convenience and Necessity because it had no certified territory in Kentucky and did not “generate, produce, transmit, or distribute electricity to or for the public.”⁸ And, most recently, in Case No. 99-058, the Commission held that, because Calvert City Power I would be neither a “utility” nor a “retail electric supplier,” and would not be a facility to be used to generate electricity “to or for the public for compensation,” it would not be required to obtain a Certificate of Convenience and Necessity or a Certificate of Environmental Compatibility.⁹

It is important to note that, even if DEMC is not required to obtain a Certificate of Environmental Compatibility, various federal and state agencies will conduct extensive pre-construction and operational reviews of the proposed Facility. Specifically, DEMC will be subjected to stringent review by the federal Environmental Protection Agency and the Kentucky Natural Resources and Environmental Protection Cabinet.¹⁰ The Cabinet’s review and oversight will include the elements that would be addressed if DEMC were required to apply for a Certificate of Environmental Compatibility from the Commission. In addition, the U.S. Fish and Wildlife Service will enforce Endangered Species Act requirements, the U.S. Army Corps of Engineers will enforce wetlands requirements, and the Kentucky Heritage Council and Office of State Archeology will ensure the proposed Facility does not harm state cultural or archeological resources. A detailed list of the

⁸ See Order, Case No. 89-232, at 1 (emphasis in the original).

⁹ See Order, Case No. 99-058, at 6-7.

¹⁰ DEMC filed its Marshall County Generating Station PSD Permit/Construction Permit Application with the Cabinet’s Division of Air Quality on December 7, 1999. In the filing, DEMC noted it was applying for a Prevention of Significant Deterioration (“PSD”) permit; a Phase II Acid Rain permit; a Title V permit; and a state construction permit.

reviews that DEMC presently anticipates the proposed Facility will undergo is set forth in Appendix A to this Petition. Much of the review DEMC will undergo will be subject to the opportunity for public hearings, and there will be continuing oversight of the proposed Facility so long as it is operational.

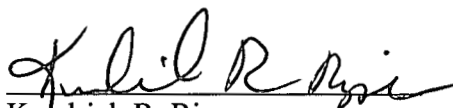
CONCLUSION

For the reasons set forth above, Duke Energy Marshall County, LLC respectfully asks the Kentucky Public Service Commission to issue a declaratory order finding:

- (1) that the proposed Facility will not be a "utility" as defined in KRS 278.010(3)(a) and will not be regulated as such by the Commission;
- (2) that Duke Energy Marshall County, LLC will not be a "retail electric supplier" as defined in KRS 278.010(4) and KRS 278.016-018; and
- (3) that Duke Energy Marshall County, LLC will not be required to obtain a Certificate of Convenience and Necessity pursuant to KRS 278.020 or a Certificate of Environmental Compatibility pursuant to KRS 278.025 with respect to the proposed Facility.

Because the proposed Facility is designed to be available for the summer peak season beginning in June 2001, DEMC respectfully requests that the Commission issue an Order with respect to this Petition at its earliest opportunity, but no later than sixty (60) days after its filing, or February 29, 2000.

Respectfully submitted,



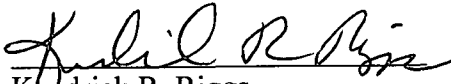
Kendrick R. Riggs
Maureen M. Carr
Ogden Newell & Welch
1700 Citizens Plaza
500 West Jefferson Street
Louisville, KY 40202
Telephone: (502) 582-1601

Brent Bailey, Esq.
Vice President and General Counsel
Duke Energy North America, LLC
5400 Westheimer Court
Houston, TX 77056-5310

COUNSEL FOR
DUKE ENERGY MARSHALL COUNTY, LLC

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Petition for a Declaratory Order has been sent to the Office of Rate Intervention, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601, by first-class mail, this the 30th day of December, 1999.


Kendrick R. Riggs

174169.03

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE PETITION OF)
DUKE ENERGY MARSHALL COUNTY, LLC)
FOR A DECLARATORY ORDER)

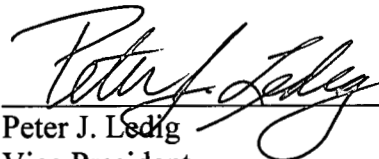
CASE NO. _____

AFFIDAVIT

Having been duly sworn, Mr. Peter J. Ledig states as follows:

1. My name is Peter J. Ledig. My business address is 5400 Westheimer Court, Houston, TX 77056-5310.
2. I am Vice President of Duke Energy Marshall County, LLC.
3. I reviewed the Petition of Duke Energy Marshall County, LLC for a Declaratory Order that will be filed with the Kentucky Public Service Commission on December 30, 1999.
4. To the best of my knowledge, information, and belief, all facts stated in the Petition are true and accurate.

Respectfully submitted,

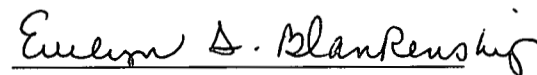


 Peter J. Ledig
 Vice President,
 Duke Energy Marshall County, LLC

STATE OF TEXAS)
)
 COUNTY OF HARRIS)

SS:

The foregoing instrument was acknowledged before me by Peter J. Ledig on this 29th day of December, 1999.



 Evelyn S. Blankenship
 Notary Public

My Commission expires: 10/24/00



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. § 502; 42 U.S.C. § 766[a]]; 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, Subpart GG; 401 KAR 59:016 and 60:330) include standards of performance specific to stationary gas turbines, including emission standards, monitoring, reporting, record-keeping 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 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 preconstruction review and public notice with an opportunity for a hearing.

3. 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.