

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,<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> 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 6<sup>th</sup> day of July, 1999.

By the Commission

ATTEST:

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Executive Director