

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