

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT APPLICATION OF DUKE ENERGY)	
CORPORATION, CINERGY CORP., DUKE)	
ENERGY OHIO, INC., DUKE ENERGY)	CASE NO.
KENTUCKY, INC., DIAMOND ACQUISITION)	2011-00124
CORPORATION, AND PROGRESS ENERGY,)	
INC. FOR APPROVAL OF THE INDIRECT)	
TRANSFER OF CONTROL OF DUKE ENERGY)	
KENTUCKY, INC.)	

O R D E R

On November 14, 2011, Duke Energy Corporation (“Duke”), Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation, and Progress Energy, Inc. (“Progress”) (collectively “Joint Applicants”) and the Attorney General’s Office of Rate Intervention (“AG”) filed a joint petition for rehearing of the Commission’s October 26, 2011 letter which granted in part and denied in part the Joint Applicants’ request for confidential protection of certain responses to information requests. More specifically, the Commission is being requested to rehear and reconsider that portion of the letter that denied confidential protection to the Joint Applicants’ responses to the following information requests:

1. AG No. 41, which requested minutes of meetings of company management with shareholders and the board of directors;

2. AG No. 48, which requested reports of economies of scale or scope, with costs detailed;
3. AG No. 52, which requested a discussion of the projected costs to achieve the merger;
4. AG No. 54, which requested internal calculations of allocations;
5. AG No. 55, which requested internal calculations of allocations relating to both regulated and non-regulated companies;
6. AG No. 57, which requested copies of due diligence reports relating to the merger;
7. AG No. 64, which requested copies of presentations and financial analysis relating to the merger;
8. AG No. 67, which requested the Hart-Scott-Rodino (“HSR”) Act filing made with the United States Justice Department; and
9. Staff No. 32, which requested calculations and estimates of merger-related savings, synergies, or cost reductions.

The Joint Applicants requested confidentiality of their responses under KRS 61.878(1)(c) stating that the information in their responses is confidential or proprietary information and, if openly disclosed, would permit an unfair commercial advantage to their competitors. In addition, confidentiality of the HSR filing was requested on the basis that 15 USC Section 18a specifically exempts that filing from the federal Freedom of Information Act, and thus it is entitled to confidentiality under KRS 61.878(1)(k) as a disclosure prohibited by federal law.

The Commission's October 26, 2011 letter stated that the information responses did not meet the criteria for confidentiality in their entirety and that the responses should be redacted to exclude only the information regarding non-regulated activities that is not public information. The petition for rehearing describes the information responses as highly confidential documents that contain the Joint Applicants' business strategies for considering, negotiating, and entering into the merger, as well as Duke's planned business strategy for cost management post-merger. The petition sets forth numerous claims as to why the entirety of the information responses should be granted confidentiality, including a detailed discussion of the legislative history of the HSR Act, and argues that absent a grant of confidentiality, utilities may refuse to provide a copy of the HSR filing in subsequent merger cases.

Based on the petition for rehearing and being otherwise sufficiently advised, the Commission has reviewed in detail the Joint Applicants' petition for confidentiality, the information responses sought to be treated as confidential, and our procedures for requesting confidential treatment of any material filed here. The Commission's confidentiality regulation, 807 KAR 5:001, Section 7, requires the filing of a petition which sets forth the specific grounds under the Kentucky Open Records Act, KRS 61.870 et seq., for granting confidential treatment, along with one copy of the material which identifies by underscoring, highlighting with transparent ink, or other reasonable means only those portions which unless deleted would disclose confidential material.

The Joint Applicants did file the requisite petition setting forth the grounds for granting confidentiality, along with one copy of the responses to AG Nos. 52, 54, and 55 that identifies the portions which unless deleted would disclose confidential material.

However, the responses to AG Nos. 41, 48, 57, 64, 67, and Staff No. 32 all reference the 4000 plus page HSR filing which was filed without identifying the portions which unless deleted would disclose confidential material. The HSR filing consists of numerous documents, some of which are publicly available, such as a signed copy of the merger agreement which is the subject of this case. Other publicly available documents included in the HSR filing are copies of state statutes and regulations, newspaper articles, press and media releases, stock rating agency reports, and stock analysts' reports. Thus, the Commission's October 26, 2011 letter denied confidentiality due to the overly broad nature of the Joint Applicants' request for confidentiality.


The Commission has now further considered the legislative history of the HSR Act and the provisions of KRS 61.878(1)(k), and we find good cause to grant the petition and to afford confidential protection to the information responses referenced above, including the HSR filing. All of the information sought in those requests were confidential in nature and not publicly available. In future merger cases, the Commission will closely review petitions for confidentiality to ensure that publicly available documents are not granted confidentiality simply because they are filed along with confidential documents, such as in the HSR filing. Finally, the Commission notes that in any case filed at this agency, the applicant has the burden of proof and any refusal to file relevant information may result in the denial of its application, as well as sanctions under KRS 278.990.

IT IS THEREFORE ORDERED that the petition for rehearing is granted and confidentiality is granted to the Joint Applicants' responses to AG Nos. 41, 48, 52, 54, 55, 57, 64, 67, and Staff No. 32.

By the Commission

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KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

Case No. 2011-00124

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