

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 KENTUCKY, INC., DIAMOND ACQUISITION CORPORATION, AND PROGRESS ENERGY, INC. FOR APPROVAL OF THE INDIRECT TRANSFER OF CONTROL OF DUKE ENERGY KENTUCKY, INC.)))))))))))	CASE NO. 2011-00124
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O R D E R

On April 21, 2011, Stand Energy Corporation (“Stand Energy”) filed a motion for authority to participate as a full intervenor in this case, which is a review of a Joint Application for approval of the indirect transfer of control of Duke Energy Kentucky, Inc. (“Duke Kentucky”). The Joint Application was filed by Duke Energy Corporation (“Duke Energy”), Cinergy Corp., Duke Energy Ohio, Inc. (“Duke Ohio”), Duke Kentucky, Diamond Acquisition Corporation, and Progress Energy, Inc. (“Progress Energy”) (collectively “Joint Applicants”).

Stand Energy describes itself as a Kentucky corporation, whose office is in Cincinnati, Ohio, that privately markets natural gas to public and private customers in 12 states behind 30 local distribution companies, including Duke Ohio and Duke Kentucky. It also holds a wholesale electric power marketing license issued by the Federal Energy Regulatory Commission and indicates that it has over 25 years’ experience in federal and state regulatory proceedings involving natural gas and electricity issues. Stand Energy’s motion first expresses a concern, on behalf of itself and its customers behind

Duke Kentucky, that the Joint Application indicates that Duke Kentucky “is planning to file for rate increases with the Kentucky PSC, for both electric and gas customers within months,” and that doing so would be inconsistent with “the fact that merger requests usually must show savings to the ratepayers to gain approval of regulators.”¹ Next, Stand Energy references an entity known as Duke Energy Retail Sales, LLC (“Duke Retail”), a Duke Energy affiliate that sells natural gas in areas of Ohio, including the Duke Ohio service territory. Stand Energy states that if Duke Retail is going to be allowed to sell natural gas in Kentucky, Duke Energy should be required to propose as part of this case a gas program that benefits Kentuckians, not just Duke Energy; that adequate measures be adopted to prevent Duke Retail from being subsidized by Duke Energy or by its assets or ratepayers funds; and that rules be adopted to prohibit the sharing of market services, transportation assets, or gas storage fields between Duke Retail and Duke Energy.

On April 27, 2011, the Joint Applicants filed a response in opposition to Stand Energy’s motion to intervene. They claim that the motion fails to articulate the specific interest sought to be represented in this case and fails to show how Stand Energy’s experience and knowledge will assist the Commission in deliberating this case. The response also claims that the motion contains factual inaccuracies since nothing in the Joint Application indicates that Duke Kentucky is planning to file a gas rate case, that Stand Energy has no interest in Duke Kentucky’s electric rates, and that any issues related to rates should be addressed in a rate case, not a merger case.

¹ Stand Energy’s Motion at 2-3.

Further, the Joint Applicants assert that there is no statutory requirement to demonstrate merger savings as a condition precedent for approval of a merger, only a requirement to show public benefits, which may take many forms other than immediate reductions in rates. Finally, the Joint Applicants state that Duke Retail provides competitive retail electric and gas service in Ohio, as does Stand Energy, under the jurisdiction of the Public Utilities Commission of Ohio and in accordance with an affiliate code of conduct; that Duke Retail does not offer services in Kentucky; and that Stand Energy's request to intervene is a self-serving effort to gain an improper competitive advantage and would unduly complicate and disrupt this case.

Based on the motion to intervene and being otherwise sufficiently advised, the Commission finds that the only person who has a statutory right to intervene in a Commission case is the Attorney General, pursuant to KRS 278.367.150(8)(b). Intervention by all others is permissive and is within the sound discretion of the Commission.²

In the recent unreported case of *EnviroPower, LLC v. Public Service Commission of Kentucky*, No. 2005-CA-001792-MR, 2007 WL 289328 (Ky. App. Feb. 2, 2007), the Court of Appeals ruled that "the PSC retains the power in its discretion to grant or deny a motion for intervention," but that this discretion is not unlimited. The Court then enumerated the limits on the Commission's discretion in ruling on motions for intervention: one arising under statute; the other arising under regulation. The statutory limitation, KRS 278.040(2), requires that "the person seeking intervention must have an

² *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1996).

interest in the 'rates' or 'service' of a utility, since those are the only two subjects under the jurisdiction of the PSC."³

The regulatory limitation is set forth in 807 KAR 5:001, Section 3(8), which requires a person to demonstrate either (1) a special interest in the proceeding which is not otherwise adequately represented in the case, or (2) that intervention is likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

In analyzing the pending motion to intervene, we find that Stand Energy does not receive electric or natural gas service from Duke Kentucky and is not a customer of Duke Kentucky. Rather, Stand Energy is a competitive supplier of retail electric and natural gas service in other states. With respect to electric service in Kentucky, KRS 278.016 to 278.018 prohibits any person from supplying competitive electric service. Thus, Stand Energy lacks the necessary interest in the electric rates or electric service of Duke Kentucky sufficient to justify intervention.

With respect to gas service in Kentucky, supplying competitive natural gas is not prohibited per se, but may be authorized by the Commission. In fact, the Commission has authorized some classes of customers to obtain competitive supplies of natural gas through the transportation programs of local distribution companies. Thus, the only interest that Stand Energy arguably has in the natural gas rates and service of Duke Kentucky is as a competitor, and even that interest is too remote to justify intervention here. There is nothing in the Joint Application, including the voluminous exhibits and prepared testimony, to suggest that Duke Kentucky is now

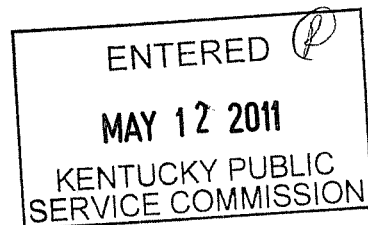
³ 2007 WL 289328, at 3.

requesting, or will at some definitive time in the future request, authority to establish a fully competitive natural gas market within its service area or for Duke Retail to sell natural gas in Kentucky.

The Commission further finds that an investigation of expanding retail natural gas competition in Kentucky markets was recently concluded in Administrative Case No. 2010-00146,⁴ a case in which Stand Energy was granted intervention and fully participated. The Commission's decision in that investigation was to not mandate competitive retail natural gas programs in Kentucky without additional statutory authority and consumer protections. Consequently, the Commission will not revisit those issues in this merger case, and Stand Energy's status as a competitive supplier of natural gas does not justify its intervention in this case.

IT IS THEREFORE ORDERED that Stand Energy's motion to intervene is denied.

By the Commission



ATTEST.



Executive Director

⁴ Administrative Case No. 2010-00146, An Investigation of Natural Gas Retail Competition Programs (Ky. PSC Dec. 28, 2010).

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