

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF DUKE ENERGY KENTUCKY,)	CASE NO.
INC. FOR DECLARATORY ORDER)	2015-00413

ORDER

On December 11, 2015, Duke Energy Kentucky, Inc. ("Duke Kentucky") filed with the Commission an application ("Application") requesting a Declaratory Order that Commission approval of the proposed acquisition of Piedmont Natural Gas Company, Inc. ("Piedmont") by Duke Kentucky's indirect parent company, Duke Energy Corporation ("Duke Energy Corp."), is not required under KRS 278.020(5) or KRS 278.020(6).

There are no intervenors in this matter. One round of discovery was completed. An informal conference was held on February 2, 2016. On February 5, 2016, Duke Kentucky filed an acknowledgment of an agreement that it will make an informational filing reflecting the post-transaction organizational structure of its gas operations once the structure is finalized. Duke Kentucky also agreed that in future rate cases, it will not seek a higher rate or return on equity than would have been sought if the proposed acquisition had not occurred, which ensures that this transaction does not adversely impact Kentucky retail customers.¹ Also in its February 5, 2016 filing, Duke Kentucky

¹ This is consistent with a commitment Duke Kentucky made in Case No. 2011-00124, *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.* (Ky. PSC Oct. 28, 2011).

waived its right to a hearing, and the case was submitted to the Commission for a decision based on the existing administrative record.

OVERVIEW OF PROPOSED TRANSACTION

On October 24, 2015, Duke Energy Corp., Forest Subsidiary, Inc. ("Forest"), and Piedmont entered into an agreement that, once consummated, would result in Piedmont's being a direct, wholly owned subsidiary of Duke Energy Corp.² Duke Energy Corp., a Delaware corporation with its principal office in North Carolina, is the indirect parent of Duke Kentucky.³ Piedmont is a North Carolina corporation that furnishes natural gas services to customers in North Carolina, South Carolina, and Tennessee. Forest is a North Carolina corporation that is wholly owned by Duke Energy Corp. and was created solely to accomplish the transaction. Duke Energy Corp., Piedmont, and Forest do not conduct business or provide utility service in Kentucky.

Under the terms of the proposed transaction, Forest and Piedmont will merge, with Piedmont as the surviving corporate entity.⁴ Piedmont will retain its name, but will adopt Forest's articles of incorporation and bylaws, Piedmont's board of directors will be replaced with members of Forest's board, and Piedmont will operate as a business unit of Duke Energy Corp.⁵ All of the stock of pre-transaction Piedmont will be converted

² Application at numbered paragraph 6.e.

³ Duke Energy Corp. is the sole owner of Cinergy Corp., a Delaware corporation, which is the sole owner of Duke Energy Ohio, an Ohio corporation, which is the sole owner of Duke Kentucky.

⁴ Application at numbered paragraph 6.a.

⁵ *Id.* at numbered paragraphs 6.b.–c.

into cash, with the stock automatically cancelled.⁶ Forest's shares will be converted into shares of post-acquisition Piedmont.⁷ As a result of its ownership of all of Forest's shares, Duke Energy Corp. will own all shares of Piedmont once the transaction closes.⁸ The proposed transaction will result in the expansion of Duke Energy Corp.'s board of directors from 15 to 16 directors with the addition of one member of Piedmont's pre-transaction board of directors to Duke Energy Corp.'s board.⁹

Duke Energy Corp. will undergo organization changes that Duke Kentucky states will have no impact upon Duke Kentucky's corporate structure or local operations.¹⁰ Under the current organizational structure, James P. Henning, president of Duke Kentucky, has responsibility for day-to-day utility business operations, and Charles R. Whitlock, senior vice president of Midwest Delivery Operations, has responsibility for day-to-day operations of Duke Kentucky's natural gas delivery and electric distribution system.¹¹ Both Mr. Henning and Mr. Whitlock report directly to Douglas Esamann, executive vice president, Midwest and Florida Regions, who in turn reports directly to Lynn Good, Duke Energy Corp.'s president and CEO.¹² Post transaction, Mr. Henning will retain his corporate responsibilities, and Mr. Whitlock will retain his corporate

⁶ *Id.* at numbered paragraph 7.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at numbered paragraph 8.

¹⁰ *Id.* at numbered paragraph 9.

¹¹ Duke Kentucky's Response to Commission Staff's First Request for Information ("Staff's First Request"), Items 1.a.–b.

¹² *Id.* at Items 1.c.–d.

responsibilities regarding electric distribution.¹³ Mr. Esamann's natural gas operational responsibility will be transferred to Franklin H. Yoho, a former Piedmont executive, who will have executive oversight responsibility for all of Duke Energy Corp.'s natural gas operations, will be on the same organizational level as Mr. Esamann, and will report directly to Ms. Good.¹⁴ It has not been determined whether Mr. Whitlock or a new manager will be responsible for Midwest natural gas system operations, but that position will report directly to Mr. Yoho.¹⁵ As a result of the proposed personnel changes, at least one regional Duke Kentucky executive will maintain responsibility for Midwest natural gas operations, and Duke Kentucky personnel will continue supervising the day-to-day operation of Duke Kentucky's natural gas delivery system.¹⁶

DISCUSSION

In its Application, Duke Kentucky requests that the Commission enter an Order declaring that the acquisition of Piedmont by Duke Energy Corp. is not subject to the Commission's approval under either KRS 278.020(5) or KRS 278.020(6).

Approval Pursuant to KRS 278.020(5)

A determination whether Commission approval is required under KRS 278.020(5) is a two-part analysis: whether there is an acquisition or transfer of ownership, and whether there is an acquisition or transfer of control. KRS 278.020(5) provides that:

No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Application at numbered paragraph 9.

commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.

Duke Kentucky asserts that no approval is needed under KRS 278.020(5) because the proposed transaction will not result in the acquisition or transfer of ownership of Duke Kentucky or its indirect parent, Duke Energy Corp.¹⁷ Duke Kentucky states that the proposed transaction involves no stock swap or other conveyance of ownership of Duke Kentucky or Duke Energy Corp.¹⁸ Because Duke Energy Corp. is acquiring Piedmont in exchange for cash to Piedmont's owners, owners of pre-transaction Piedmont will have no direct or indirect ownership of Duke Kentucky or Duke Energy Corp.¹⁹ Duke Kentucky contends that because there is no change in ownership of Duke Kentucky or Duke Energy Corp., there is no acquisition or transfer of ownership, and thus no approval is needed under KRS 278.020(5).

Based upon the evidence of record, the Commission finds that that there will be no transfer of ownership of Duke Kentucky or Duke Energy Corp. Piedmont will no longer exist as an independent, investor-owned entity; Piedmont will be wholly owned by Duke Energy Corp. and will operate as a business unit of Duke Energy Corp. Piedmont's pre-transaction shareholders will not acquire any interest in Duke Energy Corp. Duke Energy Corp. will own all the outstanding stock of Piedmont once the transaction is consummated. Therefore, it is Piedmont, and not Duke Kentucky or Duke Energy Corp., that will be acquired.

¹⁷ *Id.* at numbered paragraph 21.

¹⁸ *Id.*

¹⁹ *Id.*

If there is no acquisition or transfer of ownership, the Commission must next determine whether the proposed transaction constitutes a transfer or acquisition of control over Duke Kentucky or Duke Energy Corp under KRS 278.020(5). For the purpose of KRS Chapter 278, "control" is defined as "the power to direct the management or policies of a person through ownership, by contract, or otherwise."²⁰

Duke Kentucky contends that control over Duke Kentucky and Duke Energy Corp. will not change as a result of the proposed transaction. Duke Kentucky affirms that control over Duke Kentucky ultimately rests with Duke Energy Corp. both before and after the proposed transaction.²¹ Neither Duke Energy Corp. nor its shareholders will transfer their power to direct the management and policies of Duke Kentucky as a result of the proposed transaction.²² Duke Kentucky will have an affiliated relationship with Piedmont after the acquisition. However, that affiliated relationship does not transfer control over Duke Kentucky; Piedmont's corporate ownership chain will differ from Duke Kentucky's, but both entities will be under common ownership and control of Duke Energy Corp.²³

Duke Kentucky also contends that the post-acquisition expansion of Duke Energy Corp.'s board of directors by one member and contemplated personnel changes do not constitute transfer of control. Duke Kentucky maintains that the lone new board member, as one of 16 members, will not acquire the power to direct the management or policies of Duke Energy Corp. or Duke Kentucky, and that Duke Energy Corp. and the

²⁰ KRS 278.010(19).

²¹ Application at numbered paragraph 24.

²² *Id.*

²³ *Id.*

members of the existing board are not transferring their control of Duke Kentucky to the new director.²⁴ Duke Kentucky asserts that employing certain former Piedmont employees is not a transfer of control under KRS 278.020(5) because those who are hired will become employees of Duke Energy Corp. entities and will be subject to the oversight of the corporation's existing leadership.²⁵ Duke Kentucky further asserts that adjustments to operational management do not transfer control, absent a significant change to a utility's local operations or to a parent company's CEO, board of directors, or shareholders.²⁶ Given that there will be no significant change to Duke Kentucky's local operations or to Duke Energy Corp.'s CEO, board of directors, or shareholders, Duke Kentucky argues that the contemplated personnel changes are adjustments to operational management and not a transfer of control.²⁷

Based upon the evidence of record, the Commission finds that the proposed acquisition will not effectuate a transfer of control of Duke Kentucky or Duke Energy Corp. under KRS 278.020(5). Duke Kentucky will not acquire a new direct or indirect parent as a result of the proposed transaction; it will remain subject to the control of Duke Energy Corp. The proposed expansion of the board of directors will not effectuate a transfer of control of Duke Kentucky or Duke Energy Corp. to Piedmont. This is especially so given that Piedmont's pre-transaction board of directors will be replaced after the transaction by Forest's board of directors, who, as directors of a wholly owned subsidiary of Duke Energy Corp. created to accomplish the transaction, would be

²⁴ *Id.* at numbered paragraph 25, and footnote 3 at 4.

²⁵ *Id.* at numbered paragraph 26.

²⁶ *Id.*

²⁷ *Id.*

subject to the control of Duke Energy Corp. The contemplated personnel adjustments will not effectuate a transfer of control of Duke Kentucky or Duke Energy Corp. to Piedmont given that the adjustments will not result in significant change to Duke Energy Corp.'s CEO, board of directors, or shareholders.

Because the proposed transaction is not an acquisition or transfer of ownership or of control, the Commission finds that Commission approval of the proposed transaction is not required under KRS 278.020(5).

Approval Pursuant to KRS 278.020(6)

Unlike a review under KRS 278.020(5), an analysis on whether Commission approval of a transaction is required under KRS 278.020(6) turns only on the acquisition of control. KRS 278.020(6) provides, in relevant part, as follows:

No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission. Any acquisition of control without prior authorization shall be void and of no effect. As used in this subsection, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a utility, whether through the ownership of voting securities, by effecting a change in the composition of the board of directors, by contract or otherwise. Control shall be presumed to exist if any individual or entity, directly or indirectly, owns ten percent (10%) or more of the voting securities of the utility.

Duke Kentucky asserts that the proposed transaction will not result in the acquisition of direct or indirect control of Duke Kentucky, and thus Commission approval is not needed under KRS 278.020(6). As a threshold matter, Duke Kentucky states that KRS 278.020(6) requires identification of the individual or entity acquiring control of a

jurisdictional utility, which in this case is Duke Kentucky.²⁸ As discussed in the above section, Duke Kentucky asserts that Piedmont cannot be considered an “acquirer” of Duke Kentucky because, post-transaction, Piedmont will cease to exist as an independent investor-owned corporation and will be a wholly owned subsidiary of Duke Energy Corp. subject to the oversight of Duke Energy Corp.’s CEO, board of directors, and shareholders.²⁹ Further, Piedmont shareholders will not obtain direct or indirect control of Duke Kentucky or Duke Energy Corp. through voting securities because Piedmont’s pre-transaction shareholders will receive cash only, and their shares will be automatically canceled once the transaction is accomplished.³⁰

Duke Kentucky contends that the expansion of Duke Energy Corp.’s board of directors by one seat does not constitute control under KRS 278.020(6). Duke Kentucky asserts that the new director, formerly a Piedmont director, cannot be considered an agent of Piedmont because, post-acquisition, Piedmont will not exist as a separate investor-owned entity following the transaction.³¹ Duke Kentucky explains that Duke Energy Corp. is adding the board member to “better reflect” the corporation, including Piedmont as a wholly owned subsidiary, following the transaction and not to acquire control over Duke Kentucky.³²

Similarly, Duke Kentucky contends that the contemplated retention of certain former Piedmont employees does not constitute control under KRS 278.020(6). As

²⁸ *Id.* at numbered paragraph 14.

²⁹ *Id.* at numbered paragraphs 14–15.

³⁰ *Id.* at numbered paragraph 15.

³¹ *Id.* at numbered paragraph 16, and footnote 12 at 8.

³² *Id.* at numbered paragraph 16.

discussed above, Duke Kentucky asserts that the former Piedmont employees will become employees of Duke Energy Corp.'s entities and, as such, subject to the oversight of Duke Energy Corp.'s CEO, board of directors, and shareholders. Duke Kentucky explains that retaining former Piedmont executives facilitates best practices for Duke Energy Corp.'s utility subsidiaries' expanded natural gas operations and that, since there will be no significant changes to Duke Energy Corp.'s CEO, board of directors, or shareholders, the contemplated personnel changes will not impact Duke Energy Corp.'s power to direct the management and policies of Duke Energy Kentucky.

Based upon the evidence of record, the Commission finds that the proposed transaction will not effectuate the acquisition of control over Duke Kentucky, and therefore Commission approval is not required under KRS 278.020(6). For the reasons discussed in the prior section, Duke Kentucky will remain subject to the control of Duke Energy Corp. once the transaction is consummated. Further, the proposed expansion of the board of directors and personnel adjustments without the transfer of voting securities to Piedmont's shareholders will not result in significant change to the oversight of Duke Kentucky by Duke Energy Corp.'s CEO, board of directors, and shareholders, and therefore will not effectuate a transfer of control of Duke Kentucky to Piedmont.

CONCLUSION

The Commission, having considered the record and being otherwise sufficiently advised, finds that Commission approval of the proposed transaction is not required under KRS 278.020(5) or KRS 278.020(6).

In its Application, Duke Kentucky also argues that requiring Commission approval of the proposed transaction under KRS 278.020(5) or KRS 278.020(6) is an unconstitutional impairment of interstate commerce under the Commerce Clause of the United States Constitution,³³ which prohibits state regulation that unduly burdens interstate commerce, and thus impedes free private trade. The Commission finds that, as the proposed transaction is not subject to KRS 278.020(5) or KRS 278.020(6), the question of whether Commission approval of the transaction is impermissible under the Commerce Clause is moot.

IT IS THEREFORE ORDERED that:

1. Duke Kentucky's Application for a declaratory Order that Commission approval of the proposed acquisition is not required under KRS 278.020(5) or KRS 278.020(6) is granted, subject to Duke Kentucky's written acknowledgment filed February 5, 2016, accepting and agreeing to be bound by Duke Kentucky's commitment not to seek a higher rate or return on equity than would have been sought if the proposed acquisition had not occurred.

2. Duke Kentucky shall make an informational filing reflecting its post-transaction organizational structure once the transaction has been consummated and the organizational structure finalized.

3. Any documents filed in the future pursuant to ordering paragraph 2 shall reference this case number and shall be retained in the utility's general correspondence file.

³³ U. S. Const. art. I, § 8, cl. 3.

By the Commission

ENTERED
MAR 07 2016
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Acting Executive Director *for*

Case No. 2015-00413

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