

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF KENERGY)	
CORP. FOR AUTHORIZATION OF CHANGES IN)	CASE NO.
SERVICE TERRITORY WITH OWENSBORO)	2023-00150
MUNICIPAL UTILITIES)	

ORDER

On May 9, 2023, Kenergy Corp. (Kenergy) filed an application, pursuant to KRS 278.018(6), 807 KAR 5:001 Section 14, and 807 KAR 5:001, Section 22, for approval of changes to its certified territory in accordance with an agreement Kenergy entered into with the City Utility Commission of the city of Owensboro d/b/a Owensboro Municipal Utilities (OMU). No requests to intervene have been received. This matter is now before the Commission for a decision on the merits.

BACKGROUND

Kenergy is a rural electric cooperative and a utility as defined by KRS 278.010(3)(a).¹ Kenergy provides electric service to customers in fourteen counties in the Commonwealth of Kentucky and serves approximately 59,064 consumers.² OMU is a municipally owned electric system that serves customers in the city of Owensboro, Kentucky.

¹ Application, at 2.

² *Annual Report of Kenergy to the Public Service Commission for the Year Ending December 31, 2022* (2022 Annual Report) at 32.

Kenergy and OMU entered into a Territorial Agreement on November 19, 2015, establishing the territorial boundaries within which each party would provide electric service to customers.³ Big Rivers Electric Corporation (BREC), which is the generation and transmission cooperative that supplies Kenergy with wholesale electricity, has acquired real property in western Owensboro and desires to construct an operations center at the site.⁴ Kenergy seeks to serve BREC's proposed operations center, but while the site is near the current boundary line, it is within OMU's territorial boundary as established by the Territorial Agreement.⁵

Kenergy and OMU have agreed to amend the Territorial Agreement to allow Kenergy to serve the BREC facility and allow OMU to serve part of Kenergy's current territory. Pursuant to the amendment, Kenergy would give up two pieces of territory near the territorial boundary and would add the site owned by BREC to its territory.⁶ Kenergy indicated that the territories being exchanged are roughly the same size and that no current customers will be affected by the proposed change in the territorial boundary line.⁷

LEGAL STANDARD

In order to encourage the orderly development of retail electric service, avoid wasteful duplication of distribution facilities and unnecessary encumbering of the landscape, prevent the waste of materials and natural resources, and minimize disputes between retail electric suppliers, Kentucky's legislature enacted the Certified Territory Act,

³ Application, Exhibit 1, First Amendment to Territorial Agreement.

⁴ Application at 3.

⁵ Application, Exhibit 1, First Amendment to Territorial Agreement.

⁶ Application, Exhibit B.

⁷ Application, Exhibit 1, Territorial Change Information.

KRS 278.016 through KRS 278.018, requiring the Commission to divide the state into geographical areas and establish certified territories within which each retail electric supplier is to provide retail electric service.⁸ Pursuant to KRS 278.018(1), any new electric-consuming facility located in an area which has not as yet been included in the certified territory of a retail electric supplier shall be served by the retail electric supplier with the closest distribution facilities.⁹ No retail electric service supplier may furnish retail electric service in the certified territory of another retail electric supplier.¹⁰

Pursuant to KRS 278.018(6), a retail electric supplier may contract with another retail electric supplier, subject to Commission approval, for the purpose of allocating consumers and certified territories.¹¹ KRS 278.018(6) requires the Commission to approve such a contract if it finds that the contract will promote the purposes of KRS 278.016 and will result in the provision of adequate and reasonable service to all areas and consumers affected by the contract.¹²

However, KRS 278.010(4) defines a retail electric supplier as excluding municipal corporations, stating that:

“Retail electric supplier” means any person, firm, corporation, association, or cooperative corporation, *excluding municipal corporations*, engaged in the furnishing of retail electric service.¹³ (Emphasis added).

⁸ KRS 278.016.

⁹ KRS 278.018(1).

¹⁰ KRS 278.016.

¹¹ KRS 278.018(6).

¹² KRS 278.018(6).

¹³ KRS 278.010(4).

For that reason, the Commission previously held that contracts establishing or changing territorial boundaries between retail electric suppliers and municipal utilities do not fall within KRS 278.018(6) or require approval of the Commission.¹⁴ The Commission has also declined to approve or deny such agreements pursuant to its implied regulatory powers, because it does not have jurisdiction over the retail service of municipal utilities, and therefore, would be unable to require a municipal utility to provide service pursuant to the agreement.¹⁵

DISCUSSION AND FINDINGS

OMU is a utility owned by a municipal corporation, and therefore, is not a retail electric supplier. KRS 278.018(6) does not require approval of the amendment to OMU and Kenergy's Territorial Agreement, because it is not a contract allocating certified territories on consumers between retail electric suppliers. Further, as in previous cases addressing this issue, the Commission declines to approve the agreement based on its implied regulatory powers, because the Commission does not have jurisdiction over the retail electric service of OMU. Thus, the Commission finds that Kenergy's application for approval of changes to its certified territory pursuant to KRS 278.018(6) should be denied.

¹⁴ Case No. 1992-00265, *Joint Application of Owen Electric Cooperative, Inc. and the City of Williamstown for Approval of a Retail Electric Service Area Agreement* (Ky. PSC Sept. 10, 1992), Order at 1-2; see also Case No. 1996-00243, *In the Matter of Application of Kentucky Utilities Company for Authorization of Changes in Service Territory with the Frankfort Electric and Water Plant Board, and the Clark, Farmers, Nolin, and Owen Electric Coop* (Ky. PSC Jan. 10, 1997), Order ("As the Frankfort Plant Board is a municipal agency, it is not a retail electric supplier as defined by the statute; therefore, KRS 278.017 does not apply to it. Similarly, the Commission has no jurisdiction over the boundary agreement between the Frankfort Plant Board and KU.")

¹⁵ Case No. 1992-00265, Sept. 10, 1992 Order at 3-4; see also *Grayson Rural Electric Corp. v. City of Vanceburg*, 4 S.W.3d 526, 529 (Ky. 1999) ("The Legislature has never chosen to authorize exclusive service rights or exclusive service areas for municipally owned electric utilities. Should the Legislature intend for a city to have exclusive rights, it will so provide as it has for KPSC-regulated utilities in the Territorial Law.").

The Commission notes that this Order should not be construed as a determination of the lawfulness or reasonableness of the proposed amendment to OMU and Kenergy's Territorial Agreement or either's ability to serve the areas in question. In fact, because the areas served by municipal utilities may overlap the territories of retail electric suppliers, territorial agreements between municipal utilities and retail electric suppliers may be useful in minimizing disputes and preventing litigation.¹⁶ Such agreements simply do not fall within the Commission's authority to approve or deny.

However, to ensure that the Commission has accurate information regarding the territory Kenergy is serving, the Commission finds that within 30 days of service of this Order Kenergy should file a site map for each area of change, with numbered coordinates in a latitude/longitude format indicating any and all changes to the territory it will serve pursuant to the amendment to its Territorial Agreement with OMU. The maps will be accepted for filing for informational purposes only.

IT IS THEREFORE ORDERED that:

1. Kenergy's application for approval of changes to its territory as agreed to with OMU is denied.
2. Within 30 days of service of this Order, Kenergy shall file, into the post-case correspondence file of this case, a site map for each area of change, with numbered coordinates in a latitude/longitude format indicating any and all changes to the territory it

¹⁶ See Case No. 1992-00265, Sept. 10, 1992 Order at 3-4; see also *Grayson Rural Electric Corp.*, 4 S.W.3d at 529-532 (discussing a situation in which the certified territory of a retail electric supplier overlapped the territory served by a municipal utility and resolving a dispute between the parties as to which utility had the right to serve).

will serve pursuant to the amendment to its Territorial Agreement with OMU. These maps shall be accepted for filing for informational purposes only.

3. This case is closed and removed from the Commissions docket.

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PUBLIC SERVICE COMMISSION

Hunt Bell

Chairman

Ally

Vice Chairman

Mary Pat Regan

Commissioner

ENTERED
SEP 27 2023 rcs
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