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March 14, 2011

Mark David Goss, Esquire
Frost Brown Todd
250 West Main Street, Suite 2800
Lexington, KY 40507-1749

PSC STAFF OPINION 2011-003

Via Electronic and U.S. Mail

Re: Duke Energy Corporation/Progress Energy, Inc. Merger

Dear Mr. Goss:

On March 8, 2011, we electronically received your letter, on behalf of Duke Energy Corporation ("Duke Energy") and a number of its subsidiaries, requesting a staff legal opinion on an issue relating to the announced merger of Duke Energy and Progress Energy, Inc. ("Progress Energy"). A copy of your letter is attached hereto.

The facts as set forth in your letter are that Duke Energy, through a number of subsidiaries, owns Duke Kentucky, which is a utility as defined in KRS 278.020(3) and is subject to the jurisdiction of this Commission. The terms of the merger agreement provide that the shareholders of Progress Energy are to receive shares of Duke Energy's common stock and, upon completion of the merger, the shareholders of Progress Energy will own 37 percent of Duke Energy's common stock. In addition, the merger provides for a change in the composition of Duke Energy's Board of Directors. Duke Energy's current Board, which consists of 11 members, will be expanded to 18 members, with 11 designated by Duke Energy and 7 designated by Progress Energy. Your letter acknowledges that this merger will result in a transfer of indirect control of Duke Kentucky, and that this transfer requires the approval of this Commission pursuant to KRS 278.020(5) and (6). You further state that neither the corporate structure nor the local operations of Duke Kentucky will be impacted by this merger.

The question presented in your letter is whether Duke Energy and its subsidiaries are the only necessary parties to an application for approval of the transfer of indirect control of Duke Kentucky, or whether Progress Energy is also a necessary party to that application.

There are two relevant statutory provisions that address the transfer of control of a Kentucky jurisdictional utility. One is KRS 278.020(5), which provides in pertinent part 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 commission.

The other is KRS 278.020(6), which provides in pertinent part that:

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.

Based on the wording KRS 278.020(6), Progress Energy is "an acquirer," and it is prohibited from acquiring indirect control of Duke Kentucky "without having first obtained the approval of the Commission." The only way that Progress Energy can obtain Commission approval of the acquisition of indirect control of Duke Kentucky is by Progress Energy filing with the Commission an application requesting approval of the acquisition of indirect control. While Duke Energy and its subsidiaries are necessary parties to such a transfer application, Progress Energy must apply as an applicant. Similarly, under the wording of KRS 278.020(5), Progress Energy must apply to the Commission for approval to acquire control of Duke Kentucky, and Duke Energy must apply to the Commission for approval to transfer control of Duke Kentucky to Progress Energy.

Further, in adjudicating an application for approval of a transfer of control under KRS 278.020(6), the Commission has broad authority to "grant any application under this subsection in whole or in part and with modification and upon terms and conditions as it deems necessary or appropriate." In prior cases involving transfers of major utilities, the Commission approved the transfers subject to certain terms and conditions imposed upon the parties to the transfers. The proper enforcement of such terms and conditions necessitates that all parties to the transaction be applicants in the case and be subject to the Commission's jurisdiction for purposes of the transfer.

While there is no statutory requirement that Progress Energy and Duke Energy file a joint application, it is reasonable to expect that separately filed applications would likely be consolidated to achieve administrative efficiency.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution.

Mark David Goss, Esquire
March 14, 2011
Page 3

Questions concerning this opinion should be directed to Richard Raff, Assistant General Counsel, at (502) 564-3940, Extension 263.

Sincerely,

Jeff Derouen
Executive Director

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Attachment