ENGROSSED HOUSE
BILL NO. 2278

By: Morgan (Danny) of the House

and

Crutchfield of the Senate

An Act relating to public utilities; amending 17 O.S. 2001, Sections 191.1, 191.2, 191.3, and 191.5, which relate to acquisition, control, and merger of public utilities; modifying certain definitions; adding certain definitions; adding holding companies to procedures for acquisition, control, or merger of certain domestic public utilities; modifying certain information required to be filed with the Corporation Commission; deleting certain information required to be filed with the Commission; requiring schedule of certain assets to be filed with the Commission; adding limited liability companies to types of entities required to file information; modifying the authority of the Commission to approve a merger or acquisition; adding certain conditions which the Commission shall consider for a merger or acquisition; changing number of days required for public hearings; allowing the Commission to continue hearings; modifying grounds for Commission order; establishing conditions to be considered by the Commission for operation of a public utility on an integrated basis; establishing conditions to be considered by the Commission for determining level of engagement in providing utility services; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 17 O.S. 2001, Section 191.1, is amended to read as follows:

Section 191.1 As used in this act:

1. "Acquiring party" means a person and all affiliates thereof by whom or on whose behalf a merger or other acquisition of control referred to in Section 191.2 of this title is to be effected;

2. "Affiliate" means a person who directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified, including any

corporation created at the direction of the person specified for purposes of corporate reorganization;

3. "Commission" means the Oklahoma Corporation Commission;

4. "Control" (including the terms "controlling", "controlled by", and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise, unless such power is the result of an official position with, or corporate office held in, such person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing ten percent (10%) or more of the aggregate number of the voting securities of any other person. This presumption may be rebutted by a showing that control does not exist in fact. The Commission may determine, after furnishing all persons in interest notice and opportunity to be heard and making specific findings of fact to support such determination, that control exists in fact, notwithstanding the absence of a presumption to that effect;

5. "Domestic public utility" means a person doing business in the state, ~~including any other person controlling such a domestic public utility,~~ any substantial portion of the revenues of which, either directly or indirectly, are derived from the business of providing utility service in this state, except that such term does not include agencies, authorities or instrumentalities of the United States or a state or political subdivision of a state;

6. <u>"Foreign public utility" means a person that is not a domestic public utility that is engaged in the production, transmission, delivery, or furnishing of heat, light, power, or natural gas to the public in another state of the United States or in the District of Columbia, and whose rates for the furnishing of heat, light, power, or natural gas to the public in another state or</u>

the District of Columbia are subject to the approval of an agency of such other state or the District of Columbia;

7. “Holding company” means any of the following:

a. any person which, in any chain or successive ownership, directly or indirectly, as a beneficial owner, owns, controls or holds ten percent (10%) or more of the outstanding voting securities of a domestic public utility, with the unconditional power to vote such securities, or

b. any person which the Commission determines, after investigation and hearing, directly or indirectly, exercises, alone or under any arrangement or understanding with one or more persons, such a controlling interest over the management or policies of a domestic public utility as to make it necessary or appropriate in the public interest or for the protection of the consumers or investors of the utility that such person be subject to this act;

8. "Issuer" means any person who issues or proposes to issue any security;

9. “Nonutility company” means a person that is not a holding company, a domestic public utility, or a foreign public utility;

~~7.~~ 10. "Person" means an individual, a corporation, a partnership, an association, a limited liability company, a joint stock company, a trust, an unincorporated organization, any similar entity or any combination of the foregoing acting in concert, but shall not include any securities broker performing no more than the usual and customary broker's function;

~~8.~~ 11. "Tender offer" means the acquisition of, or offer to acquire, pursuant to a tender offer or request or invitation for tenders, any voting security of a domestic public utility or holding company, if after acquisition thereof the acquiring party would,

directly or indirectly, be a record or beneficial owner of more than ten percent (10%) of the aggregate number of the issued and outstanding voting securities of such domestic public utility or holding company. "Tender offer" does not mean:

a. bids made by a dealer for his own account in the ordinary course of his business of buying and selling such security, or

b. any other offer to acquire a voting security, or the acquisition of such voting security pursuant to such offer, for the sole account of the acquiring party, from not more than fifty persons, in good faith and not for the purpose of avoiding this act;

12. "Total utility assets of an acquiring party" means the sum of:

a. the total assets of each domestic public utility that is an affiliate of the acquiring party,

b. the total assets of each foreign public utility that is an affiliate of the acquiring party, and

c. the portion, if any, of the total assets of the acquiring party, without regard to its affiliates or subsidiaries and without regard to its investments in its affiliates or subsidiaries, owned directly by the acquiring party and used in the business of being a domestic public utility or a foreign public utility;

13. "Total nonutility assets of the acquiring party" means the sum of:

a. the total assets of each nonutility company that is an affiliate of the acquiring party, and

b. the portion, if any, of the total assets of the acquiring party, without regard to its affiliates or subsidiaries and without regard to its investments in its affiliates or subsidiaries, owned directly by the

acquiring party and not used in the business of being a domestic public utility or a foreign public utility;

~~9.~~ 14. "Utility service" means the transmission or distribution of combustible hydrocarbon natural or synthetic natural gas by a person subject to Section 152 of this title for sale to the public or the production, transmission, delivery or furnishing of electric current by a person subject to Section 181 et seq. of this title for sale to the public for light, heat or power; and

~~10.~~ 15. "Voting security" means any stock or indenture of any class presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company, or any stock or indenture of any class issued under or pursuant to any trust, agreement or arrangement whereby a trustee or trustees or agent or agents for the owner or holder of such stock or indenture are presently entitled to vote in the direction or management of the company.

SECTION 2. AMENDATORY 17 O.S. 2001, Section 191.2, is amended to read as follows:

Section 191.2 No person, other than the issuer of the securities of the domestic public utility or an affiliate of such an issuer, shall make a tender offer for, request or invite tenders of, or enter into any agreement to exchange, seek to acquire, or acquire, in the open market or otherwise, any voting security of a domestic public utility regulated by the Corporation Commission or any holding company controlling such domestic public utility if, after the consummation of such action, such person would, directly or indirectly, or by conversion or by exercise of any right to acquire, be in control of such domestic public utility or holding company, and no person shall merge with or otherwise acquire control of a domestic public utility or holding company unless the acquiring party is an affiliate of such domestic public utility or holding company or unless, at the time any such offer, request or invitation

is made or any such merger is consummated, or prior to the acquisition of such securities if no offer or agreement is involved, such person has filed with the Commission and has sent to such domestic public utility or holding company, a statement containing the information required by Section ~~3~~ 191.3 of this ~~act~~ title and such offer, request, invitation, merger or acquisition has been approved by the Commission in the manner prescribed in Section ~~5~~ 191.5 of this ~~act~~ title. The Commission may modify the aforementioned procedures to the extent necessary to conform to the requirements of Regulation 14D under the Securities Exchange Act of 1934, 15 U.S.C. Sections 78a-78jj, as amended.

SECTION 3. AMENDATORY 17 O.S. 2001, Section 191.3, is amended to read as follows:

Section 191.3 A. The statement to be filed with the Corporation Commission as required by Section ~~2~~ 191.2 of this ~~act~~ title shall be made under oath or affirmation and shall contain the following information:

1. The name and address of each acquiring party and all affiliates thereof; and

a. if such acquiring party is an individual, his principal occupation and all offices and positions held during the past five (5) years, and any conviction of crimes other than minor traffic violations during the past ten (10) years, or

b. if such acquiring party is not an individual, a report of the nature of its business and its affiliates' operations during the past five (5) years or for such lesser period as such acquiring party and any predecessors thereof shall have been in existence; an informative description of the business intended to be done by such acquiring party and its subsidiaries; and a list of all individuals who are or who have been

selected to become directors or officers of such acquiring party, or who perform or will perform functions appropriate or similar to such positions. Such list shall include for each such individual the information required by subparagraph a of paragraph 1 of this subsection;

2. The source, nature and amount of the consideration used or to be used in effecting the merger or other acquisition of control, a detailed description of any transaction wherein funds were or are to be obtained for any such purpose, and the identity of persons furnishing such consideration; provided, however, that where a source of such consideration is a loan made in the lender's ordinary course of business, the identity of the lender shall remain confidential, if the person filing such statement so requests;

3. Audited financial ~~information~~ statements in a form acceptable to the Commission as to the financial condition of an acquiring party for the preceding three (3) fiscal years of each such acquiring party, or for such lesser period as such acquiring party and any predecessors thereof shall have been in existence, and similar unaudited information as of a date not ~~earlier~~ later than one hundred thirty-five (135) days prior to the filing of the statement;

4. Any plans or proposals which an acquiring party may have to liquidate such public utility or holding company, to sell its assets, or a substantial part thereof, or merge or consolidate it with any person, or to make any other material change in its investment policy, business or corporate structure, or management. If any change is contemplated in the investment policy, or business or corporate structure, such contemplated changes and the rationale therefor shall be explained in detail. If any changes in the management of the domestic public utility or ~~person controlling the domestic public utility~~ holding company are contemplated, the

acquiring party shall provide a resume of the qualifications and the names and addresses of the individuals who have been selected or are being considered to replace the then current management personnel of the domestic public utility or ~~the person controlling the domestic public utility~~ holding company;

5. The number of shares of any voting security of the domestic public utility or holding company which each acquiring party proposes to acquire, and the terms of the offer, request, invitation, agreement or acquisition referred to in Section ~~2~~ 191.2 of this ~~act~~ title;

6. The amount of each class of any voting security of the domestic public utility or holding company which is beneficially owned or concerning which there is a right to acquire beneficial ownership by each acquiring party;

7. A full description of any contracts, arrangements or understandings with respect to any voting security of the domestic public utility or holding company in which any acquiring party is involved, including but not limited to transfer of any securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss or guarantees of profits, division of losses or profits or the giving or withholding of proxies. Such description shall identify the persons with whom such contracts, arrangements or understandings have been entered into;

8. A description of the purchase of any voting security of the domestic public utility or holding company during the twelve (12) calendar months preceding the filing of the statement, by any acquiring party, including the dates of purchase, names of the purchasers, and consideration paid or agreed to be paid therefor;

9. Copies of all tender offers for, requests for, advertisements for, invitations for tenders of, exchange offers for, and agreements to acquire or exchange any voting securities of the

domestic public utility or holding company and, if distributed, of additional soliciting material relating thereto; ~~and~~

10. A schedule, derived from the financial information provided pursuant to paragraph 3 of this subsection, showing separately, as of a date within one hundred thirty-five (135) days of filing the statement, the amount of the total utility assets of the acquiring party and the amount of the total nonutility assets of the acquiring party; and

11. Such additional information as the Commission may by rule or regulation prescribe as necessary or appropriate for the protection of ratepayers of the domestic public utility or in the public interest.

B. If a person required to file the statement referred to in Section ~~2~~ 191.2 of this ~~act~~ title is a partnership, limited partnership, limited liability company, syndicate or other group, the Commission may require that the information called for in paragraphs 1 through ~~10~~ 11 of subsection A of this section shall be given with respect to each partner of such partnership or limited partnership, each member of such limited liability company, syndicate or group and each person who controls such partner or member. If any such partner, member, person or acquiring party is a corporation or if a person required to file the statement referred to in Section ~~2~~ 191.2 of this ~~act~~ title is a corporation, the Commission may require that the information called for by paragraphs 1 through ~~10~~ 11 of subsection A of this section be given with respect to such corporation, each officer and director of such corporation, and each person who is directly or indirectly the beneficial owner of more than ten percent (10%) of the outstanding voting securities of such corporation and each affiliate of such corporation.

C. If any material change occurs in the facts set forth in the statement filed with the Commission and sent to such domestic public

utility or holding company pursuant to this act, an amendment setting forth such change, together with copies of all documents and other material relevant to such change, shall be filed with the Commission and sent by the person filing the statement to the domestic public utility or holding company within two (2) business days after such person learns of such change.

SECTION 4. AMENDATORY 17 O.S. 2001, Section 191.5, is amended to read as follows:

Section 191.5 A. The Corporation Commission shall approve any merger or other acquisition of control referred to in Section ~~2~~ 191.2 of this ~~act~~ title upon such terms and conditions as it deems necessary or appropriate in the public interest unless, after a public hearing thereon, it finds that one or more of the following conditions exist or will exist if such merger or other acquisition of control is consummated, in which event it shall disapprove such merger or acquisition of control and the same shall not be consummated:

1. The acquisition of control would adversely affect the contractual obligations of the domestic public utility or of any person controlling such domestic public utility, or its ability or commitment to continue to render the same level of service to its customers that the domestic public utility is currently rendering;

2. The effect of the merger or other acquisition of control would be substantially to lessen competition in the furnishing of public utility service in this state;

3. The financial condition of any acquiring party is such as might jeopardize the financial stability of the domestic public utility or any person controlling such domestic public utility or otherwise prejudice the interest of the domestic public utility's customers;

4. The plans or proposals which an acquiring party has to liquidate the public utility or any such controlling person, sell

its assets, or a substantial part thereof, or consolidate or merge it with any person, or to make any other material change in its investment policy, business or corporate structure or management, would be detrimental to the customers of the domestic public utility and not in the public interest; ~~or~~

5. The competence, experience and integrity of those persons who would control the operation of the domestic public utility are such that it would not be in the interest of its customers and the public to permit the merger or other acquisition of control;

6. After giving effect to the merger or other acquisition of control of a domestic public utility whose utility service includes the furnishing of electric current, such domestic public utility would not be operated, in the judgment of the Commission, on an integrated basis with the domestic public utilities and foreign public utilities affiliated with the acquiring party and, if the acquiring party is a domestic public utility or foreign public utility, with the acquiring party; or

7. Prior to giving effect to the merger or other acquisition of control of a domestic public utility whose utility service includes the furnishing of electric current, the acquiring party is not substantially engaged in the business of providing utility service.

B. The public hearing referred to in subsection A of this section shall be commenced within ~~thirty (30)~~ sixty (60) days after the statement required by Section ~~2~~ 191.2 of this ~~act~~ title is filed. The place, date and time for such public hearing shall be set by the Commission and notice thereof shall be given by the Commission to the person filing the statement and to the domestic public utility at least twenty (20) days prior to the date of the public hearing. Notice of the public hearing shall be given by the person filing the statement to such other persons and in such manner as may be directed by the Commission at least fifteen (15) days prior to such public hearing. The domestic public utility shall

give notice to its customers as provided in Section ~~6~~ 191.6 of this ~~act~~ title. The public hearing referred to in subsection A of this section shall be concluded within ~~thirty (30)~~ sixty (60) days after the commencement of such hearing unless it is necessary, for good cause shown or in the judgment of the Commission, to continue such hearing for sixty (60) days. The Commission shall make a determination on the factors specified in subsection A of this section within ~~thirty (30)~~ sixty (60) days after the conclusion of such hearing, and any merger or other acquisition of control within the purview of this section shall be deemed approved as filed unless the Commission has, within ~~thirty (30)~~ sixty (60) days after the conclusion of such hearing, entered its order approving the merger or other acquisition upon such terms and conditions as it deems necessary or appropriate in the public interest or disapproving the merger or other acquisition of control.

C. In determining whether a domestic public utility whose utility service includes furnishing electric current would be operated on an integrated basis under paragraph 6 of subsection A of this section, the Commission shall consider such factors as physical interconnection to the acquiring party or its affiliates and the ability to be economically operated with the acquiring party and its affiliates as a single coordinated system not so large as to impair the advantages of localized management, efficient operation and the effectiveness of regulation.

D. In determining whether an acquiring party is or is not substantially engaged in providing utility service under paragraph 7 of subsection A of this section, an acquiring party shall be deemed to not be substantially engaged in the business of providing utility service if, based on the information included in the schedule filed pursuant to paragraph 10 of subsection A of Section 191.3 of this title, the amount of the total nonutility assets of the acquiring

party exceeds the amount of the total utility assets of the acquiring party.

SECTION 5. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Passed the House of Representatives the 4th day of March, 2004.

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Presiding Officer of the House of Representatives

Passed the Senate the ____ day of _____, 2004.

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Presiding Officer of the Senate