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November 14, 2011

Via Hand-Delivery

Mr. Jeffrey Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, Kentucky 40602-0615

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NOV 14 2011

PUBLIC SERVICE
COMMISSION

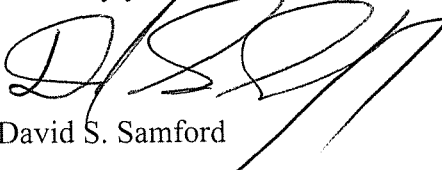
Re: In the Matter of: The Joint Application of Duke Energy Corporation, Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation, and Progress Energy, Inc., for Approval of the Indirect Transfer of Control of Duke Energy Kentucky, Inc. PSC Case No. 2011-00124

Dear Mr. Derouen:

Please find enclosed an original and ten (10) copies of the Petition for Rehearing of Staff Denial of May 10, 2011 Petition for Confidentiality. Please file these documents in the record and return a file-stamped copy to me.

Please do not hesitate to contact me if you have any questions.

Sincerely yours,


David S. Samford

Enclosures

cc: Dennis G. Howard, II
Larry Cook
Jennifer Hans

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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NOV 14 2011

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

THE JOINT APPLICATION OF DUKE ENERGY)
CORPORATION, CINERGY CORP., DUKE)
ENERGY OHIO, INC., DUKE ENERGY) CASE NO. 2011-00124
KENTUCKY, INC., DIAMOND ACQUISITION)
CORPORATION, AND PROGRESS ENERGY, INC.)
FOR APPROVAL OF THE INDIRECT TRANSFER)
OF CONTROL OF DUKE ENERGY KENTUCKY, INC.)

JOINT PETITION FOR REHEARING OF STAFF
DENIAL OF MAY 10, 2011 PETITION FOR CONFIDENTIALITY

Come now Duke Energy Corporation (“Duke”), Cinergy Corp. (“Cinergy”), Duke Energy Ohio, Inc. (“Duke Ohio”), Duke Energy Kentucky, Inc. (“Duke Kentucky”), Diamond Acquisition Corporation (“Diamond”) and Progress Energy, Inc. (“Progress”) (collectively, the “Joint Applicants”) and the Kentucky Attorney General, by and through his Office of Rate Intervention (“Attorney General”), by counsel, pursuant to KRS 278.400 and 807 KAR 5:001, Section 7, and do hereby respectfully request the Commission to grant rehearing, reconsider and overrule the letter opinion issued by Commission Staff (“Staff”) on October 26, 2011 (the “Staff Opinion”),¹ which denied portions of the Joint Applicants’ May 10, 2011 Petition for Confidential Treatment of Information (the “Petition”).² In support of said request for rehearing, the Joint Applicants and Attorney General respectfully state as follows:

¹ A copy of the October 26, 2011 Staff Opinion is attached hereto as Exhibit A.

² A copy of the May 10, 2011 Petition for Confidential Treatment of Information and the Confidentiality Agreement entered into between the Joint Applicants and the Attorney General are attached hereto collectively as Exhibit B.

I. Introduction

The Joint Applicants will be severely prejudiced and exposed to direct and indirect harm if the Staff Opinion stands and the Joint Applicants' confidential business information is disclosed to competitors and the public. The Staff Opinion fails to take into account the express provisions of the Kentucky Open Records Act that create exemptions to the disclosure of the information at issue herein. Likewise, the Staff Opinion is irreconcilable with prior precedent arising from identical circumstances as well as the actions of other jurisdictions. Accordingly, the Commission should grant rehearing, reverse and overrule the Staff Opinion.

II. Background

A. Procedural History

The Joint Applicants filed an application for the approval of the indirect transfer of control of Duke Kentucky on April 4, 2011. Shortly thereafter, Staff and the Attorney General propounded their first set of information requests to the Joint Applicants. Taking into account all of the subparts to questions included in the request, the Joint Applicants provided responses to 267 separate and discrete requests for information or documents. The Joint Applicants' production, which was tendered to the Commission and the Attorney General on May 10, 2011, included several thousand pages of information. The Joint Applicants' responses were tendered pursuant to a Confidentiality Agreement entered into with the Attorney General on May 10, 2011 which expressly provided for the confidential treatment of the Joint Applicants' confidential and proprietary information. While the Attorney General specifically reserved his right to later challenge any claim of confidentiality and propriety of the documents pursuant to paragraph 8 of

the Confidentiality Agreement, he elected not to do so as he agreed that the documents should be afforded confidentiality treatment.

Along with the responses to the first set of information requests, the Joint Applicants also filed the Petition which sought confidential treatment for certain information included in the responses that would permit an unfair commercial advantage to competitors of the Joint Applicants if it were disclosed, that is shielded from disclosure by operation of federal law or that is preliminary in nature. The presence of any one of these characteristics is sufficient for the information to satisfy the standard for being afforded confidential treatment under the Kentucky Open Records Act and Commission regulations. *See* KRS 61.878; 807 KAR 5:001, Section 7(2)(d).

B. Overview of the Items for Which Confidentiality Was Sought

The Joint Applicants sought confidential treatment for responses to eleven of the information requests propounded by Staff and the Attorney General. These requests included:

- 1) Attorney General Request 12, which requested analysis and analyst presentations of the debt associated with the North Carolina Lee Nuclear Station;
- 2) Attorney General Request 28, which requested Duke Energy Kentucky's most recent load forecast;
- 3) Attorney General Request 41, which requested minutes of meetings of company management with shareholders and the board of directors;
- 4) Attorney General Request 48, which requested reports of economies of scale or scope, with costs detailed;
- 5) Attorney General Request 52, which requested a discussion of the "costs to achieve" associated with the merger;
- 6) Attorney General Request 54, which requested internal calculations of allocations;

- 7) Attorney General Request 55, which requested internal calculations of allocations relating to both regulated and non-regulated companies;
- 8) Attorney General Request 57, which requested copies of due diligence reports relating to the merger;
- 9) Attorney General Request 64, which requested copies of presentations and financial analysis relating to the merger;
- 10) Attorney General Request 67, which was the companies' Hart-Scott-Rodino ("HSR") Act filing made with the United States Justice Department ("DOJ") in accordance with federal law; and
- 11) Staff Request 32, which requested merger-related reports and analyses.

On October, 26, 2011, Staff issued the Staff Opinion. The Staff Opinion states that the information relating to the Lee Nuclear Station debt analysis satisfied the criteria for confidential protection and therefore would be afforded confidential treatment. The Staff Opinion also found that Duke Energy Kentucky's load forecast should not be afforded confidential treatment as the information is filed as part of the company's integrated resource plan under 807 KAR 5:058, Section 7.³ With regard to the balance of the responses for which confidential treatment was sought, the Staff Opinion states:

Responses to Attorney General D.R. Nos. 41, 48, 52, 54, 55, 57, 64, 67 and PSC No. 32: These Responses do not meet the criteria for confidential protection in their entirety, and therefore are **DENIED**. The Responses should be redacted to exclude only the information regarding non-regulated activities that is not public information elsewhere. (emphasis in original).

³ Duke Kentucky filed its most recent integrated resource plan on July 1, 2011. The Joint Applicants do not dispute that load forecast information filed in the course of presenting an integrated resource plan is public information. At the time the load forecast was requested by the Attorney General in this proceeding, however, the load forecast was still preliminary in nature and therefore confidential. Without waiving its right to object to the future disclosure of preliminary load forecasts, Duke Kentucky now concedes that the request for confidential treatment of the load forecast in question is moot in light of its subsequent finalization and disclosure as part of the integrated resource plan proceeding.

This request for rehearing follows.⁴ If the Commission disagrees that rehearing should be granted, it should hold an evidentiary hearing to protect the due process rights of the Joint Applicants and supply the Commission with a complete record to enable it to reach a decision with regard to this matter. *See Utility Regulatory Commission v. Kentucky Water Service Company, Inc.*, 642 S.W.2d 591, 592-94 (Ky. App. 1982).

III. Argument

The Joint Applicants' and Attorney General's request for rehearing on the Staff's determination of confidentiality for Attorney General Requests 41, 48, 52, 54, 55, 57, 64 and 67 and Staff Request 32 (collectively, the "Disputed Responses") should be granted for many reasons. First, the Staff Opinion fails to articulate the rationale supporting its conclusion that the Disputed Responses "do not meet the criteria for confidential protection in their entirety." As such, it is an unreasonable, arbitrary and capricious decision. Second, the Staff Opinion is contrary to established federal law and Kentucky law, as well as ample administrative precedent, which hold that information such as that contained in the Disputed Responses should be afforded confidential treatment. Third, the Staff Opinion will have the undesirable effect of significantly complicating future transfer of control proceedings and, at a minimum, disrupting the free flow of information between applicants and intervenors. For each and all of these reasons, the Joint Applicants and Attorney General respectfully request the Commission to grant rehearing and reverse the Staff Opinion with respect to the Disputed Responses.

A. The Staff Opinion is Unreasonable, Arbitrary and Capricious

⁴ *Union Light, Heat & Power Co. v. Public Service Com'n*, 271 S.W.2d 361, 365-66 (Ky. 1954) ("An administrative agency unquestionably has the authority, just as has a court, to reconsider and change its orders during the time it retains control over any question under submission to it.").

Like all public agencies, the Commission may not act unreasonably, arbitrarily or capriciously. See KRS. 278.410(1); *Public Service Commission of Kentucky v. Dewitt Water District*, 720 S.W.2d 725, 728 (Ky. 1986); *Kentucky Power Co. v. Energy Regulatory Commission*, 623 S.W.2d 904, 907 (Ky. 1981). Part of an agency's charge, therefore, is to articulate within its decisions the basis for granting or denying the relief requested by an applicant. See *Louisville & N. R. Co. v. Com. ex rel. Kentucky R. R. Comm'n*, 314 S.W.2d 940, 943 (Ky. 1958) ("If an agency does not clearly disclose the grounds upon which its decision is based, a court will be usurped of its power of review over questions of law. An opinion of an administrative body should set forth the basic findings of fact. As Mr. Justice Cardozo once stated: 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'") (citations omitted); *Energy Regulatory Commission v. Kentucky Power Co.*, 605 S.W.2d 46, 49 (Ky. App. 1980) ("In order to sustain or reverse an order of the Commission it is necessary that there be a finding of specific evidentiary facts. Furthermore, it has been repeatedly held that where the validity of an order of an administrative body depends on a determination of fact, the absence of findings of basic evidentiary facts is fatal to such an order.") citing *Marshall County v. So. Central Bell Tel. Co.*, 519 S.W.2d 616 (Ky. 1975). While the foregoing authorities are addressed to administrative orders as opposed to opinions of Staff, there is no reason to doubt the applicability of these principles of law to all administrative actions.

With regard to the Disputed Responses, the Staff Opinion states only, "[t]hese responses do not meet the criteria for confidential protection in their entirety" and "the Responses should be redacted to exclude only the information regarding non-regulated activities that is not public information elsewhere." The Staff Opinion is insufficient to the extent that it fails to: identify

what information in particular qualifies for confidential treatment, if any;⁵ articulate why the remainder of the information is not entitled to confidential treatment; or describe what procedural step(s) will be taken to safeguard the information which “should be redacted” or by whom these steps may be taken.

Thus, the Joint Applicants are left in the untenable position of not knowing which portions of the Disputed Responses, if any, will be protected from public disclosure and are unable to directly respond to the concerns of Staff which led to the conclusion that the Petition should be denied since those concerns are not specifically articulated in the Staff Opinion. Moreover, the Staff Opinion does not provide for any further procedure to resolve the issues apparently concerning the Staff. Due process requires that the Joint Applicants have a reasonable opportunity to respond to the Staff’s concerns before its most closely guarded confidences are disclosed to the world. *See Utility Regulatory Com'n v. Kentucky Water Service Co., Inc.*, 642 S.W.2d 591, 593 (Ky. App. 1982) (“Indeed, the Due Process Clause forbids any agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.”) *quoting Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 287 (1974) (citations omitted). This is especially true to the extent that the Staff Opinion implies that a portion of the documents about to be publicly disclosed do in fact satisfy the criteria for being afforded confidential treatment. The denial of the Petition coupled with no adequate explanation or procedure for addressing the concerns leading to said denial – short of rehearing and litigation – is unreasonable, arbitrary and capricious.

⁵ While it is unclear which information contained in the Disputed Responses is entitled to confidential treatment, if any, one may surmise from the Staff Opinion that non-public information relating to the Joint Applicants’ non-regulated activities qualify as confidential. The specific documents containing this information, however, are not identified in the Staff Opinion.

B. The Staff Opinion Is Incorrect as a Matter of Law and Inconsistent with Precedent

At the heart of the Disputed Responses are the HSR materials filed by Duke and Progress in response to Attorney General Request 67,⁶ and the preliminary corporate allocation rates produced in response to Attorney General Request 54.⁷ Both of these items should be afforded confidential treatment as a matter of law and in light of administrative precedent from the Commission, Staff and other jurisdictions.

1. The HSR Materials and the Corporate Allocation Rates Should be Afforded Confidential Treatment Because they are Confidential and Proprietary Business Records and Their Disclosure Will Give Competitors an Unfair Commercial Advantage

In the Petition, the Joint Applicants specifically asserted that the HSR materials and corporate allocation rates were highly confidential and proprietary because they contained the companies' business strategies and analysis for considering, negotiating and entering into the merger transaction and that they also described Duke's planned business strategy regarding cost management within the company following the implementation of the merger. This is in accord with KRS 61.878(1)(c) which states that "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records" are exempt from public disclosure under the Kentucky Open Records Act.

The Kentucky Supreme Court has construed this portion of the statute to mean that an unfair commercial advantage arises simply from "the ability to ascertain the economic status of

⁶ The Joint Applicants' responses to Attorney General Requests 41, 48, 57 and 64, as well as Staff Request 32, all referred back to the HSR filing as being responsive.

⁷ The Joint Applicants' responses to Attorney General Requests 52 and 55, as well as Staff Request 32, all referred back to the corporate allocation rates as being responsive.

the entities without the hurdles systematically associated with acquisition of such information about privately owned organizations.” *Marine Management Service, Inc. v. Com. of Ky., Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995). Elsewhere it has held, “information concerning the inner workings of a corporation is ‘generally recognized as confidential or proprietary.’” *See Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995). Likewise, in *Marine Management*, the Supreme Court noted that the disputed information was disclosed to the Tourism Cabinet and the Auditor’s Office on a confidential basis. This and the fact that the information was not otherwise publicly available, led the Supreme Court to conclude, “[o]n these facts alone, the exemption [from public disclosure] clearly applies.” *Marine Management*, at 319.

In this case, the Disputed Responses clearly relate to the inner workings of the Joint Applicants, including their economic status and business plans and strategies. This is information that is plainly not available to the Joint Applicants’ competitors or others. Likewise, the information was disclosed to the Attorney General subject to the May 10, 2011 Confidentiality Agreement and to the Commission under seal and subject to the Petition. By denying the Joint Applicants’ Petition with regard to this information, the Staff Opinion has the effect of unfairly and unlawfully forcing the Joint Applicants to publicly reveal highly confidential information and proprietary data to competitors. This would be more than a “trivial unfair advantage,”⁸ but a breach of confidence akin to a coup of corporate espionage. The damage that will be inflicted upon the Joint Applicants when their direct competitors, market counterparties, commercial partners, adverse advocacy groups and others are given access to the

⁸ *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997) (“But if it is established that a document is confidential or proprietary, and that disclosure to competitors would give them substantially more than a trivial unfair advantage, the document should be protected from disclosure to those who are not parties to the proceeding.”) (abrogated on other grounds).

companies' most closely guarded strategies and data is incalculable and – most certainly – will have future detrimental impacts upon ratepayers throughout Duke's service territories.

2. The Staff Opinion Fails to Take into Account Prior Staff Opinions Granting Confidential Protection to HSR Materials and Corporate Allocation Rates

The information for which confidentiality was sought in the Petition is nearly identical to a petition filed on behalf of the applicants in the last merger case involving Duke Kentucky. In that case, the applicants filed a petition seeking confidential treatment of: 1) confidential coal pricing; 2) reports/engagement letters with outside advisors; 3) due diligence reports; 4) engagement letters with financial advisors to both Duke and Cinergy; 5) fairness opinions from outside financial advisors; 6) board of director meeting minutes; and 7) HSR materials.⁹ The petition was granted in an opinion from Staff on October 10, 2005 without reservation or qualification.¹⁰ A review of other dockets confirms that HSR materials – taken as a whole and viewed independently – have routinely been granted confidential protection by Staff.¹¹ With

⁹ See *In the Matter of: Joint Application of Duke Energy Corporation, Duke Energy Holding Corp., Deer Acquisition Corp., Cougar Acquisition Corp., Cinergy Corp., The Cincinnati Gas & Electric Company, and The Union Light, Heat and Power Company for Approval of a Transfer and Acquisition of Control* (the "Cinergy Merger"), Joint Applicants' Petition for Confidential Treatment of Information, pp. 1-2, Case No. 2005-00228 (Ky. P.S.C. Aug. 30, 2005). A copy of the petition is attached hereto for the Commission's reference as Exhibit C.

¹⁰ See *Cinergy Merger*, Staff Opinion (Ky. P.S.C. Oct. 10, 2005). A copy of the opinion is attached hereto for the Commission's reference as Exhibit D.

¹¹ See e.g. *In the Matter of: PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas and Electric Company and Kentucky Utilities Company ("PPL Merger")*, Staff Opinion, p. 1, Case No. 2010-00204 (Ky. P.S.C. Sep. 30, 2010) (granting confidential treatment to HSR filings as a whole). To the extent that it may be argued that individual elements of the HSR materials could be produced separately and independently, the Staff's opinions consistently find that such information is still confidential. See *id.* (granting confidentiality to minutes of merger meetings, due diligence reports, PPL presentations to investments bankers, copies of analysis, calculations, estimates or projections performed for the acquisition); *In the Matter of: The Joint Petition of Kentucky-American Water Company, Thames Water Aqua Holdings GMBH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., and American Water Works Company, Inc. for Approval of a Change in Control of Kentucky-American Water Company ("Kentucky-American Divestiture")*, Order, Case No. 2006-00197 (Ky. P.S.C. Aug. 29, 2006) (holding that reports from the joint applicants' financial advisors and all board of director minutes and information is confidential). Thus, there is ample precedent confirming that documents responsive to Attorney General Requests 41 (meeting minutes), 48 (economies of scale with costs detailed), 57 (due diligence reports) and 64 (financial analysis presentations), as well as Staff Request 32 (merger related reports), are entitled to confidential

regard to corporation allocation rates, on May 26, 2009, Duke Kentucky filed a petition for confidential treatment for corporate allocation percentages as part of a compliance filing in the *Cinergy Merger*.¹² In a staff opinion issued on October 23, 2009, Duke Kentucky's petition for confidential treatment was granted, again, without qualification or reservation.¹³

The Staff Opinion does not provide any explanation as to why the May 10, 2011 Petition, which was denied, may differ factually or legally from any of the four prior opinions and orders entered in the *Cinergy Merger*, the *Kentucky-American Divestiture* and the *PPL Merger*, which were granted. When an agency departs from its own precedent, it must articulate a basis for doing so. *See Com. ex rel. Conway v. Thompson*, 300 S.W.3d 152, 165-66 (Ky. 2009) (“To the contrary, an administrative agency...may depart from its earlier interpretation of the law, provided that the agency ‘explicitly and rationally justifi[es] such a change of position.’”). Moreover, even if the Kentucky Open Records Act was somehow thought to be ambiguous, the doctrine of contemporaneous construction precludes an administrative reversal from a long-standing interpretation of the statute. *See Revenue Cabinet v. Lazarus, Inc.*, 49 S.W.3d 172, 174 (Ky. 2001) (“The doctrine of contemporaneous construction precludes the use of internal policy changes by administrators to reverse and overturn long-standing interpretations that have, over time, become part and parcel of the fabric of the law being administered.”).

treatment due to their proprietary nature even if they were not included within the body of HSR materials. A copy of the *PPL Merger* staff opinion is attached hereto for the Commission's reference as Exhibit E and a copy of the *Kentucky-American Divestiture* order granting confidentiality is attached hereto as Exhibit F.

¹² *See Cinergy Merger*, Duke Energy Kentucky, Inc.'s Petition for Confidential Treatment of Information, Case No. 2005-00228 (Ky. P.S.C. May 26, 2009). A copy of the petition is attached hereto for the Commission's reference as Exhibit G.

¹³ *See Cinergy Merger*, Staff Opinion (Ky. P.S.C. Oct. 23, 2009). A copy of the opinion is attached hereto for the Commission's reference as Exhibit H.

3. HSR Materials Should Additionally be Afforded Confidential Treatment under Federal Law and, by Extension, Kentucky Law

HSR materials must be accorded confidential status regardless of their source, nature or content under federal law. The Staff Opinion's denial of confidential treatment for materials produced to the DOJ and Federal Trade Commission ("FTC") in compliance with those agencies' HSR antitrust review is contrary to established federal law (and Kentucky law, by extension) governing the dissemination of such information and is also inconsistent with the actions of other jurisdictions acting under similar circumstances which recognize the confidentiality protections afforded as a matter of law.

Congress included stringent nondisclosure and confidentiality protections in the HSR Act that specifically limit disclosure of HSR materials to "Congress or to any duly authorized committee or subcommittee of the Congress." 15 U.S.C. § 18a(h).¹⁴ Importantly, this broad statutory limitation on disclosure applies to the HSR filing as a whole and, thus – even if an individual document within the HSR filing is not otherwise privileged, proprietary or confidential – it still must be held in confidence as part of its HSR filing to the full extent required by the HSR Act.¹⁵ Moreover, the HSR Act specifically precludes third parties, including private litigants and the media, from obtaining HSR materials from the DOJ or FTC

¹⁴ In its entirety, the confidentiality portion of the statute reads:

Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of Title 5 [FOIA], and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

¹⁵ See e.g. 16 C.F.R. § 803.1(b) (stating that documents or other information voluntarily submitted as part of an HSR filing to assist the DOJ or FTC in its review of a merger will be considered to be part of the HSR filing).

pursuant to Freedom of Information Act requests,¹⁶ and state agencies are similarly not entitled to HSR materials, even if their prior approval is required for a transaction, unless they seek them directly from the parties and agree to specific nondisclosure and confidentiality protections.¹⁷ Third parties may only obtain HSR pre-merger review materials from the parties in litigation or in a state regulatory approval proceeding, and then only if the court or commission approves such discovery and the parties agree to appropriate nondisclosure and confidentiality protections.¹⁸

In enacting the HSR Act, Congress did not see fit to provide third parties with access to the highly confidential materials parties routinely provide to the DOJ and FTC for their pre-merger reviews, and for the Commission to provide competitors, the media or the public with access to the Joint Applicants' HSR materials violates the letter, spirit and intent of Congress. Virtually all HSR materials provided to DOJ and FTC for their merger reviews are transaction-, industry- and/or company-specific. While the Commission has a legitimate interest in, and a statutory mandate to investigate, the impact a merger may have within the Commonwealth, even

¹⁶ The DOJ's Antitrust Division Manual (<http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf>) is unequivocal in stating the high degree of confidentiality attaching to HSR materials:

HSR material is expressly exempted from disclosure under the FOIA. It may not be disclosed to state or foreign enforcement agencies or to third parties during depositions or interviews without the consent of the party producing the material. The Division has taken the position that it will not disclose HSR material to other federal agencies except the FTC itself. The confidentiality constraints apply not only to HSR information contained in HSR filings, second request responses and information provided voluntarily by the merger partners during an HSR investigation, but also to the fact that an HSR filing has been made, the fact that a second request has been issued, and the date the waiting period expires.

A copy of the pages in the Manual discussing confidentiality is attached hereto as Exhibit I.

¹⁷ *See id.* For instance, the National Association of Attorneys General and the Justice Department have established a protocol allowing for the sharing of HSR materials in limited circumstances and according to strict confidentiality agreements.

¹⁸ *See id.*

the inadvertent undermining of the DOJ's or FTC's antitrust law enforcement activities under the HSR Act would be improper.

In addition to the confidentiality afforded to HSR materials under federal law, the Kentucky Open Records Act also contains an express exemption from the rule favoring public disclosure for “all public records or information the disclosure of which is prohibited by federal law or regulation.” KRS 61.878(1)(k). Thus, Kentucky law extends the confidentiality protections afforded by the HSR Act itself.

Decisions from other jurisdictions also indicate that affording confidentiality to HSR materials is appropriate and necessary. The exact same HSR materials at issue herein were the subject of state proceedings in North Carolina and South Carolina. In both jurisdictions, regulators requested access to HSR materials. In neither jurisdiction, however, has there been any possibility that the HSR materials would ever be publicly disclosed as part of the proceeding. To the contrary, the staffs of both the North Carolina Utilities Commission and the South Carolina Public Service Commission willingly conducted *in camera* reviews of the HSR documents in the offices of Duke and Progress.¹⁹ Here, the Joint Applicants made the HSR materials available to the Staff and Attorney General through established pre-hearing discovery protocols as an accommodation and for their convenience. The Joint Applicants’ willingness to provide these materials in good faith and with a reasonable expectation of confidentiality should not now result in their improper release to business competitors and the public.

¹⁹ See also *In the Matter of Unutil Corporation and Northern Utilities, Inc.*, 94 N.H. P.U.C. 484, 2009 WL 3159574 (N.H.P.U.C. 2009) (“Additionally, regarding the request for confidential treatment of the Hart-Scott-Rodino filing...such filings are generally not subject to public disclosure pursuant to Federal law. It is normally appropriate to defer to the federal government's judgment with regard to the confidentiality of such information.”) (citations omitted).

4. The Staff Opinion Fails to Take into Account the Express Protections Against Disclosure Afforded to Preliminary Records, Such as the Corporate Allocation Rates, by the Kentucky Open Records Act

Even if the disclosure of the corporate allocation rates would not give competitors an unfair commercial advantage, the information should still be afforded confidentiality under KRS 61.878(1)(i) and (j) because the information was very plainly denoted as being preliminary in nature. For the same reason that preliminary public agency records are to be kept in confidence, the preliminary business strategy for allocating costs within the post-merger Duke are likewise confidential.

C. The Staff Opinion Will Have Adverse Unintended Consequences

Materials required to be included within an HSR filing with the U.S. Justice Department reveal the deliberative process of a company that is considering, negotiating and implementing a merger. They cut to the heart of a merger transaction and contain the most sensitive information about a given transaction that is likely to exist. A good argument could be made that, even in light of KRS 278.230, the confidentiality protections afforded to HSR materials under federal law are so broad that a utility has no legal obligation to provide the HSR filing made with the DOJ and FTC to the Commission. The Staff Opinion virtually guarantees that utilities will be compelled to take such an aggressive position with regard to requests for HSR materials in future transfer of control cases. Stated another way, the willingness of regulated utilities to voluntarily share HSR materials with the Commission and intervenors if there is no reasonable expectation that confidential treatment will continue to be afforded to such materials will be considerably less enthusiastic if the Staff Opinion is not reversed. Given that transfer of control cases under KRS 278.020(6) must be decided within 120 days, little is to be gained by utilities, intervenors or the Commission in such a circumstance.

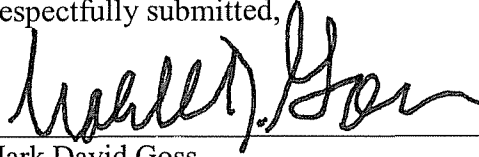
The urgency and significance of this issue is brought into focus by the fact that the Attorney General is taking the unprecedented step of joining the Joint Applicants in this Petition for Rehearing. The Attorney General's expertise in interpreting and applying the provisions of the Kentucky Open Records Act is a function of his role in administering the Act itself as expressed by statute. *See* KRS 61.880. As such, the Attorney General's concerns with the conclusions expressed in the Staff Opinion should carry significant weight and his opinion should be given appropriate deference. *See Com., ex rel. Stumbo v. Kentucky Public Service Comm'n*, 243 S.W.3d 374, 380 (Ky. App. 2007) ("However, while we ultimately review issues of law de novo, we afford deference to an administrative agency's interpretation of the statutes and regulations it is charged with implementing"). Without access to the HSR material early in a transfer of control proceeding, the Attorney General's ability to fully represent the interests of ratepayers will be materially hampered.

IV. Request for Relief

WHEREFORE, on the basis of the foregoing, the Joint Applicants' and Attorney General respectfully request the Commission to grant rehearing, reverse and overrule the October 26, 2011 Staff Opinion to the extent set forth herein and to grant confidential treatment to the Joint Applicants' May 10, 2011 responses to Attorney General information requests 41, 48, 52, 54, 55, 57, 64 and 67 and Staff information request 32. If the Commission is not inclined to grant this request on the basis of the facts and law presented herein, the Joint Applicants and the Attorney General request the Commission to hold an evidentiary hearing to protect the due process rights of the Joint Applicants and to supply the Commission with a complete record to enable it to reach a decision with regard to this matter. Until a final decision is reached, the Joint Applicants respectfully request the Commission to keep the information at issue herein confidential.

This 14th day of November 2011.

Respectfully submitted,



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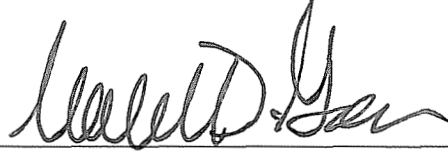
and



Hon. Jennifer B. Hans
Hon. Dennis G. Howard, II
Hon. Lawrence Cook
Assistant Attorneys General
Utility and Rate Intervention Division
P. O. Box 2000
Frankfort, Kentucky 40602-2000

CERTIFICATE OF SERVICE

No Certificate of Service is necessary in this instance due to the nature of the filing.



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Duke Energy Kentucky, Inc.
Diamond Acquisition Corporation
Progress Energy, Inc.*



Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

David L. Armstrong
Chairman

James W. Gardner
Vice Chairman

Charles R. Borders
Commissioner

October 26, 2011

Frost Brown Todd LLC
Attention: Mark David Goss
250 West Main Street, Suite 2800
Lexington, Kentucky 40507-1749

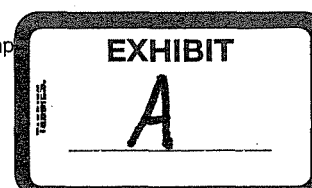
Re: Duke Energy Corporation ("Joint Applicants")
Petition for Confidential Treatment received 5/10/11
PSC Reference – Case No. 2011-00124

Dear Mr. Goss:

The Public Service Commission has received the Petition for Confidential Treatment you filed on May 10, 2011 on behalf of Duke Energy Corporation, Cinergy Corporation, Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation, and Progress Energy, Inc., (collectively "Joint Applicants") to protect certain information filed with the Commission as confidential pursuant to Section 7 of 807 KAR 5:001 and KRS 61.870. The information you seek to have treated as confidential is identified as the Joint Applicants' responses to the Commission's 1st Data Request and the Attorney General's 1st Data Request. The information is identified as (AG No. 12) – debt analysis of Lee Nuclear Station; (AG No. 28) – load forecast; (AG No. 41) – minutes of meetings; (AG No. 48) – reports\analysis of economics of scale and scope; (AG No. 52) – costs to achieve discussion; (AG No. 54) – internal allocations calculations; (AG No. 55) – internal allocation calculations regulated and non-regulated; (AG No. 57) – due diligence reports; (AG No. 64) – presentations and financial analysis; (AG No. 67) – Hart-Scott-Rodino filing; and (PSC No. 32) – merger-related reports\analysis.

Your justification for having the Commission handle this material as confidential is that the public disclosure of the information could result in an unfair commercial advantage to competitors.

Based on a review of the information and pursuant to KRS 61.878 and 807 KAR 5:001, Section 7, the Commission as follows:



- (1) **Response to Attorney General D.R. No. 12:** Debt analysis of Lee Nuclear Station meets the criteria for confidential protection and therefore confidentiality is **GRANTED**.
- (2) **Response to Attorney General D.R. No. 28:** Load forecast is publically filed as part of the Integrated Resource Plan under 807 KAR 5:058, Section 7, and therefore does not meet the criteria for confidential protection and is hereby **DENIED**.
- (3) **Responses to Attorney General D.R. Nos. 41, 48, 52, 54, 55, 57, 64, 67, and PSC No. 32:** These Responses do not meet the criteria for confidential protection in their entirety, and therefore are **DENIED**. The Responses should be redacted to exclude only the information regarding non-regulated activities that is not public information elsewhere.

The information listed above that has been granted confidential protection will be maintained as a nonpublic part of the Commission's file in this case. The procedure for usage of confidential materials during formal proceedings may be found at Section 7(8) of 807 KAR 5:001.

If the information becomes publicly available or no longer warrants confidential treatment, Duke Energy Corporation, Cinergy Corporation, Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation, and Progress Energy, Inc., (collectively "Joint Applicants") are required by Section 8(9)(a) of 807 KAR 5:001 to inform the Commission so that the information may be placed in the public record.

The information denied confidentiality will be withheld from public inspection for 20 days from the date of this letter. If you disagree with the Commission's decision, you may seek rehearing with the Commission within 20 days of the date of this letter under the provisions of KRS 278.400

Sincerely,



Jeff Derouen
Executive Director

kg/

cc: Parties of Record

COMMONWEALTH OF KENTUCKY

BEFORE THE
KENTUCKY PUBLIC SERVICE COMMISSION

RECEIVED

MAY 10 2011

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

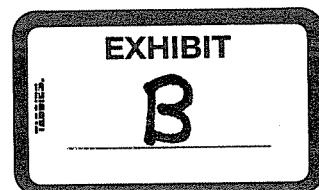
THE JOINT APPLICATION OF DUKE)
ENERGY CORPORATION, CENERGY)
CORP., DUKE ENERGY OHIO, INC.,)
DUKE ENERGY KENTUCKY, INC.,)
DIAMOND ACQUISITION CORPORATION,)
AND PROGRESS ENERGY, INC FOR)
APPROVAL OF THE INDIRECT)
TRANSFER OF CONTROL OF)
DUKE ENERGY KENTUCKY)

Case No. 2011-0124

JOINT APPLICANTS' PETITION
FOR CONFIDENTIAL TREATMENT OF INFORMATION

Duke Energy Corporation (Duke Energy), Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation, and Progress Energy, Inc., (collectively Joint Applicants), pursuant to 807 KAR 5:001, Section 7, respectfully request the Commission to grant confidentiality to, and protect from public disclosure, certain information provided by Joint Applicants in response to the Commission Staff's first set of discovery requests and the Attorney General's first set of information requests in this proceeding. In support, the Joint Applicants, individually and collectively, state:

1. Joint Applicants are filing responses to the initial information requests of the Commission Staff and the Attorney General on May 10, 2011. These responses contain the following Confidential Information:



- (a) Attorney General Request 12 - analysis and analyst presentations of the debt associated with North Carolina Lee Nuclear Station;
 - (b) Attorney General Request 28 - Duke Energy Kentucky's most recent load forecast;
 - (c) Attorney General Request 41 - board of director and meeting minutes;¹
 - (d) Attorney General Request 48 - reports/ analysis of economies of scale and scope;²
 - (e) Attorney General Request 52 - costs to achieve discussion;
-
- (f) Attorney General Request 54 - internal allocations calculations;
 - (g) Attorney General Request 55 - internal allocations calculations regulated and nonregulated companies;
 - (h) Attorney General Request 57 - due diligence reports;³
 - (i) Attorney General Request 64 - presentations and financial analysis;
 - (j) Attorney General Request 67 - Hart-Scott-Rodino filing;
 - (k) Staff Request 32- merger-related reports/analysis;

2. The Kentucky Open Records Act exempts from disclosure certain information, *inter alia* proprietary information and/or sensitive commercial information. KRS 61.878(1)(c). The information identified above is confidential or proprietary information and, if openly disclosed, would permit an unfair commercial advantage to competitors of the Joint Applicant(s) that disclosed the records.

3. Attorney General Request Number 12 asks in relevant part for information relating to Duke Energy's construction of its Lee Nuclear Station. This confidential

¹ The requested documents were also responsive to AG-DR-01-067. Rather than providing multiple copies of documents, Joint Applicants have provided its responses as part of AG-DR-01-067.

² *Id.*

³ *Id.*

information was created for Duke Energy as part of its ongoing analysis of the project and is neither jurisdictional to Kentucky nor does it involve Duke Energy Kentucky. The documents responsive to the request include internal documents that analyze the project, including timing of construction, assumptions regarding financing, and confidential presentations. Release of this proprietary and confidential information will harm Duke Energy and its customers in the Carolinas because it will give insight into Duke Energy's ~~proprietary and confidential analysis of the project and assumptions in obtaining~~ financing and put the company at a competitive disadvantage in the marketplace in negotiating contracts with outside vendors.

4. Attorney General Request Number 28 includes Duke Energy Kentucky's most recent draft of its future load forecast. This confidential forecast shows Duke Energy Kentucky's expected sales by customer class for the next twenty-five years. This information is highly sensitive and proprietary in that it is forward looking and shows Duke Energy Kentucky's own analysis and projections of its future sales and power needs. Duke Energy Kentucky would be at a competitive disadvantage in the marketplace for services or replacement power if it was required to disclose the Company's needs as part of this proceeding.

5. Attorney General Requests Numbers 41, 48, 52, 55, 57, 64 and Staff Request Number 32 seek meeting minutes, reports and analysis related to economies of scale and scope, analysis of costs to achieve, due diligence reports, and financial presentations and other reports/analysis, respectively, related to the negotiation and implementation of this merger transaction. Release of this information will harm the Joint Applicants. This information is highly confidential and proprietary in that it discusses the business analysis

and strategy of Duke Energy and Progress Energy related to considering, negotiating and entering into the transaction. Release of this information will place the Joint Applicants at competitive disadvantages in all jurisdictions as it will provide insight into the Joint Applicants' sensitive and confidential business strategies and hinder the Joint Applicants' efforts to obtain the desired synergies associated with the transaction. Additionally, a significant portion of this information was submitted as part of the Joint Applicants' Hart-Scott-Rodino filing pursuant to 15 U.S.C. Section 18a, which is considered

confidential and exempt from disclosure under the Freedom of Information Act, and is thus exempt from disclosure under the Kentucky Open Records Act pursuant to KRS 61.878(1)(k).

6. Attorney General Requests Numbers 52 and 54 includes Duke Energy's initial draft analysis regarding allocation of costs for the combined company after completion of the merger. This information is highly confidential and proprietary in that it is both preliminary in nature and describes Duke Energy's business strategy regarding cost management within the company following the implementation of the merger.

7. Attorney General Request Number 67 seeks the Joint Applicants' Hart-Scott-Rodino filing. As noted above, the Hart-Scott-Rodino filing contains confidential and proprietary commercial information related directly to issues of competition, and public disclosure of these materials would cause the Joint Applicants harm. Pursuant to 15 U.S.C. Section 18a (h), the entirety of a Hart-Scott Rodino filing is considered confidential, and is exempt from disclosure under the federal Freedom of Information Act. The Hart-Scott Rodino filing is also exempt from disclosure under the Kentucky Open Records Act, pursuant to KRS 61.878(1)(k), as a result. Furthermore, Joint

Applicants are providing the non-privileged portions of this filing under seal.⁴ This information has routinely been afforded confidential treatment by this Commission given its sensitive nature and protection under federal procedures,⁵ and such treatment should be provided again.

8. Disclosure of the individual factors contained in the aforementioned data requests would damage Joint Applicants' positions and business interests. This information reveals the business models the Joint Applicants used, the procedures followed and the factors/inputs considered - in entering into this transaction. If the Commission grants public access to the information requested, competitors and possible vendors and service providers could manipulate pricing for services to the detriment of Joint Applicants and their respective ratepayers.

9. The information for which Joint Applicants seek confidential treatment has not been publicly disclosed and is only known and available to those individuals employed by the Joint Applicants' respective companies who have a legitimate business reason to have access to the information.

10. Joint Applicants do not object to limited disclosure of the non-privileged confidential information described herein, pursuant to an acceptable protective agreement, to the Attorney General or other intervenors with a legitimate interest in reviewing the same for the purpose of participating in this case.

⁴ Information that is privileged and thus protected under the doctrines of attorney client privilege and attorney work product has been withheld. Documents that are only partially privileged are provided in redacted form.

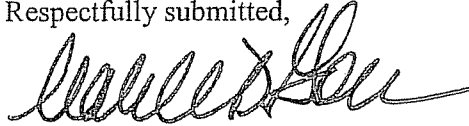
⁵ See e.g. *In Re. Joint Application of PPL Corporation et al., for Approval of an Acquisition of Ownership and Control Over Utilities*, Case No. 2010-204, (Letter Granting Confidential Protection)(September 30, 2010).

11. In accordance with the provisions of 807 KAR 5:001 Section 7, the Joint Applicants are filing one set of the Confidential Information under seal, in unredacted format, except for redacting privileged and confidential attorney-client communications. Joint Applicants agree to make the Confidential Information available to the Attorney General's office and any other non-competitive intervenor in this case upon the execution of an appropriate confidentiality agreement by such party or parties.

WHEREFORE, Joint Applicants respectfully request that the Commission grant confidentiality to, and protect from public disclosure, certain information filed herewith under seal as set forth herein.

This 10th day of May, 2011.

Respectfully submitted,



Mark David Goss
David S. Samford
Frost Brown Todd LLC
250 West Main Street, Suite 2800
Lexington, KY 40507-1749
(859) 231-0000 – Telephone
(859) 231-0011 – Facsimile

*Counsel for Joint Applicants,
Duke Energy Corporation
Cinergy Corporation
Duke Energy Ohio, Inc.
Duke Energy Kentucky, Inc.
Diamond Acquisition Corporation and
Progress Energy, Inc.*

- and -

Rocco D'Ascenzo
Amy B. Spiller
Duke Energy Business Services LLC
139 East Fourth Street
1301 Main
P. O. Box 960
Cincinnati, Ohio 45201-0960

*Counsel for Joint Applicants,
Duke Energy Corporation
Cinergy Corporation
Duke Energy Ohio, Inc.
Duke Energy Kentucky, Inc. and
Diamond Acquisition Corporation*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served via hand
delivery to the following party on this 10th day of May 2011:

Hon. Dennis Howard
Hon. Larry Cook
Office of the Attorney General
Utility Intervention and Rate Division
1024 Capital Center Drive
Frankfort, Kentucky 40601



*Counsel for Joint Applicants,
Duke Energy Corporation
Cinergy Corporation
Duke Energy Ohio, Inc.
Duke Energy Kentucky, Inc.
Diamond Acquisition Corporation and
Progress Energy, Inc.*

CONFIDENTIALITY AGREEMENT

IN THE MATTER OF:

THE JOINT APPLICATION OF DUKE ENERGY)	
CORPORATION, CINERGY CORP., DUKE)	
ENERGY OHIO, INC., DUKE ENERGY)	CASE NO. 2011-00124
KENTUCKY, INC., DIAMOND ACQUISITION)	
CORPORATION, AND PROGRESS ENERGY, INC.)	
FOR APPROVAL OF THE INDIRECT TRANSFER)	
OF CONTROL OF DUKE ENERGY KENTUCKY, INC.)	

This Agreement is entered into by and between Duke Energy Corporation, Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation and Progress Energy, Inc. [hereinafter referred to as “Joint Applicants”], and the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention [the “Attorney General”] by and through their representatives.

WHEREAS, the Attorney General has moved or will move to intervene in the above-referenced case involving the 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. (“The Transfer of Control Case”), and has requested review of certain information which the Joint Applicants believe to be confidential and proprietary;

WHEREAS, the Joint Applicants, either collectively or individually, have sought or will seek confidential treatment by the Kentucky Public Service Commission for all information that they believe to be confidential and proprietary and for which they believe public disclosure would prove harmful to them;

WHEREAS, the Joint Applicants have requested or will request that the Commission protect from public disclosure the information which the Joint Applicants believe to be confidential and proprietary, and therefore has provided or will provide the Attorney General with access to the information pursuant to the following confidentiality agreement alone;

WHEREAS, during the course of this proceeding the Joint Applicants may, by Petition for Confidential Treatment, seek protection from public disclosure of other and/or additional information the Joint Applicants believe to be confidential and proprietary and will under those circumstances provide the Attorney General with access to that information pursuant to the following confidentiality agreement alone; and

WHEREAS, the Attorney General is willing to enter into this agreement and have access to the information at issue upon the terms and conditions contained herein;

NOW, THEREFORE, the parties covenant and agree as follows:

1. Access to information which the Joint Applicants believe to be confidential and proprietary that is or will become the subject of the aforementioned Petition for Confidential Treatment, and access to all further information for which confidential treatment may be sought by said Petition in this case will be limited strictly to the Attorney General, and his legal counsel and/or consultants, who shall execute a non-disclosure certificate as described in paragraph 3 and attached as Exhibit A to this agreement. Access to such confidential and proprietary information shall not be given to individuals or organizations with whom the Attorney General currently has, or in the future will/may have, a joint defense agreement and/or any individuals or organizations participating or involved in the above-captioned proceeding and/or merger-related proceeding(s) in any other jurisdiction(s) or before any other agency or commission.

2. Use of the information provided pursuant to this confidentiality agreement shall be limited strictly to The Transfer of Control Case before the Kentucky Public Service Commission and any appeals from The Transfer of Control Case.

3. The non-disclosure certificate shall require the Attorney General, his legal counsel and/or consultants to read a copy of this agreement and certify in writing that he or she has reviewed this agreement and agrees to be bound by its terms before disclosure of the confidential and proprietary information will be made to that individual. The certificate shall contain the full name of the Attorney General's legal counsel and/or consultant(s), and their permanent business address. A copy of each certificate will be provided to the Joint Applicants as soon as is reasonably practicable following the execution of each certificate.

4. All copies of documents containing information that are provided to the Attorney General under this agreement pending a ruling by the Commission upon a Petition for Confidential Treatment, and information for which the Kentucky Public Service Commission has Ordered that confidential treatment shall be afforded, shall be deemed to be held in trust pursuant to this agreement and shall be returned to the Joint Applicants upon demand at the conclusion of The Transfer of Control Case. Upon demand for return of the information, any notations or other work product of the Attorney General, his counsel or consultants made or contained in the information shall be redacted prior to the return of the information to the Joint Applicants. Neither the Attorney General, his legal counsel, his consultant(s) or anyone acting under their control, direction or supervision shall make or retain copies of the information for which confidentiality has been afforded by the Commission or the information for which confidentiality has been sought, but has not yet been ruled upon by the Commission.

5. If the Attorney General desires to make use of any confidential or proprietary information obtained as a result of his, his legal counsel's or consultant's examination of the information, whether in testimony filed by the Attorney General or through cross-examination of any witness or otherwise, the Attorney General shall notify the Joint Applicants in advance of the proposed use and shall meet with the Joint Applicants' representatives to attempt in good faith to establish a procedure that will accommodate the desire of the Attorney General to make use of the information without risking its public disclosure. If the Joint Applicants and the Attorney General are unable to agree on a means of preventing public disclosure of the confidential and proprietary information, the Joint Applicants and the Attorney General will submit these issues to the Kentucky Public Service Commission for resolution before the proposed use of the information is made.

6. In the event that a person seeks such confidential or proprietary information by a public records request, the Attorney General will initially refuse to disclose such confidential or proprietary information pursuant to this agreement or if applicable, pursuant to a previous determination of confidentiality by the Kentucky Public Service Commission. Should the person seeking such confidential or proprietary information seek to enforce disclosure, the Attorney General will immediately notify the Joint Applicants. Thereafter, the Attorney General will continue to comply with the provisions of KRS 61.870 et seq.

7. Each and every party to this agreement will act in good faith, and no party to the agreement will do anything to deprive any other party of the benefit of this agreement. The parties agree that the Kentucky Public Service Commission is the sole and exclusive forum for considering any alleged breach of this Agreement, and that the remedies within the jurisdiction of the Commission are the only available remedies. This Agreement does not restrict the parties

from seeking any injunctive relief in the Franklin Circuit Court which they believe that they are otherwise entitled to seek; furthermore; it does not extinguish any right to judicial review of the Commission's actions. The parties do, however, expressly waive any other relief or remedy to which they might be entitled in the absence of the limitations of this Agreement.


8. The Attorney General's participation in this agreement shall not be construed as an admission that the information claimed to be confidential and proprietary is, as a matter of law, confidential and proprietary, or as a waiver of any right to assert that the information is not confidential and proprietary before the Public Service Commission or any court of competent jurisdiction. In the event the Commission should rule that any of the information should be removed from the restrictions imposed by this agreement, no party shall disclose such information until the Commission's Order subjecting the information to public disclosure is final pursuant to KRS 278.410, or until all appeals of such Order have been exhausted, unless authorized to do so by the providing party or a court of competent jurisdiction.

9. This agreement shall bind the parties to it from the date of its execution. Every executed copy of this agreement will be deemed an original.

10. By executing this agreement, counsel affirmatively represents that they have the authority and capacity to bind the parties whom they represent whose duties are identified herein.

EXECUTED AND EFFECTIVE THIS 10th day of May, 2011.

By: 
Counsel for the Attorney General

By: 
Counsel for Joint Applicants, Duke Energy Corporation, Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., and Diamond Acquisition Corporation


By: 
Counsel for Joint Applicant, Progress Energy, Inc.

EXHIBIT A
NON-DISCLOSURE CERTIFICATE

IN THE MATTER OF:

**THE JOINT APPLICATION OF DUKE ENERGY)
CORPORATION, CINERGY CORP., DUKE)
ENERGY OHIO, INC., DUKE ENERGY) CASE NO. 2011-00124
KENTUCKY, INC., DIAMOND ACQUISITION)
CORPORATION, AND PROGRESS ENERGY, INC.)
FOR APPROVAL OF THE INDIRECT TRANSFER)
OF CONTROL OF DUKE ENERGY KENTUCKY, INC.)**

The undersigned hereby certify that, before disclosure to them of any confidential and proprietary information of Duke Energy Corporation, Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation, and/or Progress Energy, Inc. has been disclosed to them, they have read the confidentiality agreement between Duke Energy Corporation, Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation and Progress Energy, Inc. and the Attorney General, dated May 10, 2011, which is incorporated herein by reference as if set forth in its entirety, and agree to be bound by its terms.

<u>Name</u>	<u>Address</u>
<u>Dennis G. Howard, II</u>	<u>1024 Capital Center Dr. Frankfort, KY 40601</u>
<u>Lawrence W. Cook</u>	<u>" " "</u>
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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

AUG 30 2005

PUBLIC SERVICE COMMISSION

In the Matter of:

Joint Application of Duke Energy Corporation,)
Duke Energy Holding Corp., Deer Acquisition)
Corp., Cougar Acquisition Corp., Cinergy Corp.,)
The Cincinnati Gas & Electric Company, and)
The Union Light, Heat and Power Company for)
Approval of a Transfer and Acquisition)
of Control)

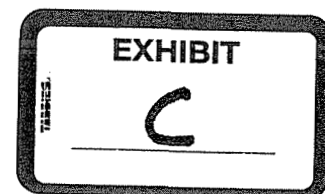
Case No. 2005-00228

JOINT APPLICANTS' PETITION OF
FOR CONFIDENTIAL TREATMENT OF INFORMATION

Pursuant to 807 KAR 5:001, Section 7, Duke Energy Corporation, Duke Energy Holding Company, Deer Acquisition Corp., Cougar Acquisition Corp., Cinergy Corp., The Cincinnati Gas & Electric Company, and The Union Light, Heat and Power Company (collectively "Joint Applicants") request the Commission to classify and protect as confidential certain information (hereinafter "Confidential Information") which Joint Applicants provided in response to the Commission Staff's first set of discovery requests and the Attorney General's first set of information requests in this proceeding. In support, the Joint Applicants state:

1. Joint Applicants are filing responses to the initial information requests of the Commission Staff and the Attorney General on August 30, 2005. These responses contain the following Confidential Information:

(a.) Commission Staff Request 1.17 – Confidential Coal Pricing



- (b.) AG Request 1.4 – Reports/Engagement Letters with Outside Advisors
- (c.) AG Request 1.19 – Due Diligence Reports
- (d.) AG Request 1.20 – Engagement Letter with Cinergy’s Financial Advisor
- (e.) AG Request 1.21 – Engagement Letter with Duke’s Financial Advisor
- (f.) AG Request 1.27 – Lazard Fairness Opinion
- (g.) AG Request 1.28 – Merrill Lynch Fairness Opinion
- (h.) AG Request 1.29 – Duke Board of Directors Minutes
- (i.) AG Request 1.30 – Cinergy Board of Directors Minutes
- (j.) AG Request 1.31 – Hart-Scott-Rodino filing

2. The Kentucky Open Records Act exempts from disclosure certain confidential commercial information. KRS 61.878(1)(c). To qualify for this exemption, a party must establish that the material is generally recognized as confidential, and that disclosure of the confidential information would permit an unfair advantage to competitors of that party. Additionally, the Kentucky Open Records Act exempts from disclosure all public records or information the disclosure of which is prohibited under federal law or regulation. KRS 61.878(1)(k).

3. The Confidential Information described above contains sensitive, confidential information, the disclosure of which could harm Joint Applicants and would provide unfair advantages for their competitors. The Confidential Information contains the terms and conditions of Joint Applicants’ coal contracts. A potential seller of coal to Joint Applicants could use this information to negotiate higher prices than the seller might otherwise be able to negotiate. This could lead to higher costs for Joint Applicants, and put them at a disadvantage with respect to other providers of power and alternative fuels.

The Confidential Information would reveal the methodologies used and the information reviewed in the due diligence and financial fairness reviews, which is not generally known to the public. The Confidential Information would reveal the prices charged by Duke's and Cinergy's advisors for due diligence and/or financial fairness reviews, which is not generally known. The Confidential Information includes Duke's and Cinergy's Board of Directors minutes, which contain sensitive discussions relating to the merger transaction, which would reveal the Joint Applicants' Board of Directors' deliberations and decision-making process, and which are highly confidential. Public disclosure of this Confidential Information could harm the parties and provide an unfair advantage to competitors. Additionally, other companies which Joint Applicants may seek to acquire could use this information to manipulate the information they supply to Joint Applicants in due diligence reviews for future merger transactions, which could lead Joint Applicants to either acquire another company which they otherwise might not have acquired, or pay a higher price than they otherwise would have paid, to the Joint Applicants' competitive disadvantage.

Additionally, the Attorney General requested the Joint Applicants' Hart-Scott-Rodino filing in AG Request 1.31. Pursuant to 15 U.S.C. Section 18a (h), the entirety of a Hart-Scott Rodino filing is considered confidential, and is exempt from disclosure under the Freedom of Information Act. As a result, the Hart-Scott Rodino filing is exempt from disclosure under the Kentucky Open Records Act, pursuant to KRS 61.878(1)(k).

4. The disclosure of the Confidential Information would harm Joint Applicants and would provide an unfair advantage to their competitors unless the Commission

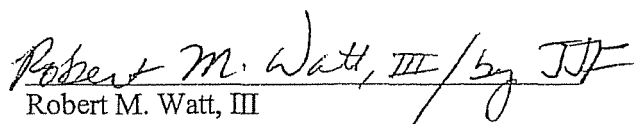
accords confidential treatment of the Confidential Information pursuant to 807 KAR 5:001, Section 7.

5. Joint Applicants have filed one set of the Confidential Information under seal, in unredacted format, except for redacting privileged and confidential attorney-client communications, and also redacting information from Board of Directors minutes unrelated to these information requests. Joint Applicants agree to make the Confidential Information available to the Attorney General's office and any other non-competitive intervenor in this case upon the execution of an appropriate confidentiality agreement by such party or parties. Finally, Joint Applicants have filed redacted versions of the non-confidential material covered by this petition, except that they have not completed redacting all of the due diligence reports. Joint Applicants will complete redacting these due diligence reports, and will provide the redacted version in a supplemental filing.

WHEREFORE, Joint Applicants respectfully request that the Commission classify and protect as confidential the Confidential Information described herein.

Respectfully submitted,

Attorneys for Joint Applicants:

 Robert M. Watt, III / by JIF

Robert M. Watt, III
Attorney for Joint Applicants
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Fax: (859) 253-1093
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Corporation, Duke Energy
Holding Corp., Deer Acquisition
Corp., and Cougar Acquisition Corp.:


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Vice President & General Counsel, Duke
Power
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Chief Regulatory Counsel
Duke Energy Corporation
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Fax: (704) 382-5690
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Attorneys for Cinergy Corp.,
The Cincinnati Gas & Electric
Company, and The Union Light,
Heat and Power Company:

James B. Gainer
Vice President and General Counsel,
Regulated Businesses
Kate E. Moriarty
Assistant General Counsel
John J. Finnigan, Jr.
Senior Counsel
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Cincinnati, Ohio 45201-0960
Phone: (513) 287-3601
Fax: (513) 287-3810
e-mail: jfinnigan@cinergy.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Joint Applicants' Petition for Confidential Treatment of Information was served on the following parties, by hand delivery, this 30th day of August, 2005.



John J. Finnigan, Jr.

Hon. Dennis G. Howard, II
Acting Director
Office of Rate Intervention
Hon. David E. Spenard
Assistant Attorney General
Office of Rate Intervention
CO.
1024 Capital Center Drive, Suite 200
Frankfort, Ky 40601

COUNSEL FOR GREGORY D. STUMBO
ATTORNEY GENERAL

Hon. Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 2110
Cincinnati, Ohio 45202

COUNSEL FOR THE KROGER



Ernie Fletcher
Governor

LaJuana S. Wilcher, Secretary
Environmental and Public
Protection Cabinet

Christopher L. Lilly
Commissioner
Department of Public Protection

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

Mark David Goss
Chairman

Teresa J. Hill
Vice Chairman

Gregory Coker
Commissioner

October 10, 2005

Hon. Robert M. Watt, III
Stoll, Keenon & Park LLP
300 West Vine Street, Suite 2100
Lexington, KY 40507-1801

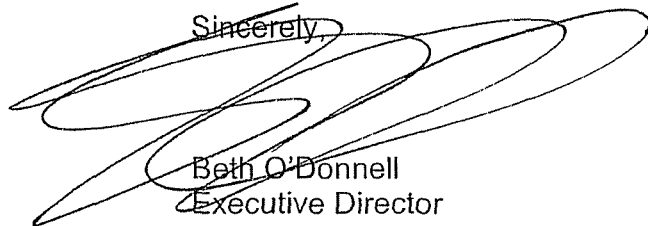
RE: Duke Energy Corporation, et al
Case No. 2005-00228
Petition for Confidential Protection

Dear Mr. Watt:

The Commission has received the petition of Duke Energy Corporation, et al filed August 30, 2005, to protect as confidential certain responses to the Commission Staff and the Attorney General's August 30, 2005 data requests. A review of the information has determined that it is entitled to the protection requested on the grounds relied upon in the petition and it shall be withheld from public inspection.

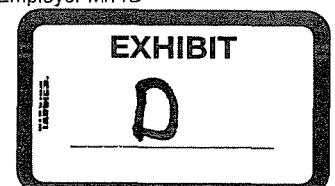
If the information becomes publicly available or no longer warrants confidential treatment, you are required by 807 KAR 5:001, Section 7(9)(a), to inform the Commission so that the information may be placed in the public record.

Sincerely,



Beth O'Donnell
Executive Director

cc: All parties of record





Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

David L. Armstrong
Chairman

James W. Gardner
Vice Chairman

Charles R. Borders
Commissioner

September 30, 2010

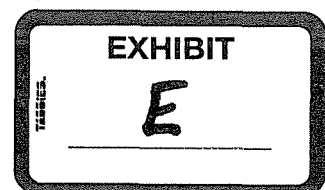
Stoll Keenon Ogden PLLC
Attention: Kendrick R. Riggs
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202

Re: PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC,
Louisville Gas and Electric Company and Kentucky Utilities Company
Petition for Confidential Protection received 7/6/10
PSC Reference #: 2010-00204

Dear Mr. Riggs:

The Public Service Commission has received the Petition for Confidential Protection you filed on July 6, 2010 on behalf of PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas and Electric Company and Kentucky Utilities Company ("Joint Applicants") to protect certain information filed with the Commission as confidential pursuant to Section 7 of 807 KAR 5:001 and KRS 61.878. The information you seek to have treated as confidential is identified as being contained in the Joint Applicants' Responses to the Commission and Intervenors' Data Requests. The information is more particularly described as Response to the Attorney General's Data Request No. 1 regarding minutes of acquisition meetings, etc.; Attorney General's Data Request No. 22 regarding due diligence reports concerning the acquisition; Attorney General's Data Request No. 31 regarding HSR filings; Commission Data Request No. 2 regarding PPL presentations made to investment bankers relating to the proposed acquisition; Commission Data Request No. 18(b) regarding copies of analysis, calculations, estimates or projections performed for acquisition; and Commission Data Request No. 22 regarding violations, programs, and audits involving N. American Electric Reliability Council entities.

Your justification for having the Commission handle this material as confidential is that the public disclosure of the information would compromise the Joint Applicants' competitive position in the industry, which would result in an unfair commercial advantage to their competitors.

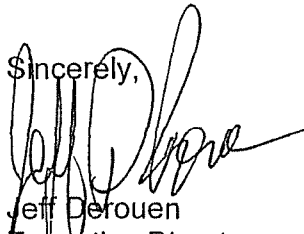


Mr. Riggs
September 30, 2010
Page 2

Based on a review of the information and pursuant to KRS 61.878 and 807 KAR 5:001, Section 7, the Commission has determined that the information requested to be held confidential is of a proprietary nature, which if publicly disclosed would permit an unfair commercial advantage to the Joint Applicants' competitors. Therefore, the information requested to be treated as confidential **meets the criteria for confidential protection** and will be maintained as a nonpublic part of the Commission's file in this case. The procedure for usage of confidential materials during formal proceedings may be found at Section 7(8) of 807 KAR 5:001.

If the information becomes publicly available or no longer warrants confidential treatment, PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas and Electric Company and Kentucky Utilities Company are required by Section 8(9)(a) of 807 KAR 5:001 to inform the Commission so that the information may be placed in the public record.

Sincerely,



Jeff Derouen
Executive Director

kg/

cc: Parties of Record

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE JOINT PETITION OF KENTUCKY-AMERICAN)
WATER COMPANY, THAMES WATER AQUA)
HOLDINGS GMBH, RWE AKTIENGESELLSCHAFT,)
THAMES WATER AQUA US HOLDINGS, INC.,) CASE NO. 2006-00197
AND AMERICAN WATER WORKS COMPANY, INC.)
FOR APPROVAL OF A CHANGE IN CONTROL OF)
KENTUCKY-AMERICAN WATER COMPANY)

O R D E R

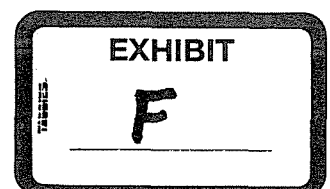
Joint Petitioners¹ have moved for confidential treatment for certain information relating to the business affairs of RWE Aktiengesellschaft ("RWE") and American Water Works Company ("AWWC"). The Attorney General ("AG") has responded in opposition to certain portions of that motion. Having reviewed the materials at issue and the parties' pleadings, we find the motions should be granted.²

During the discovery phase of this proceeding, Commission Staff and Lexington-Fayette Urban County Government ("LFUCG") requested that the Joint Petitioners provide all reports from the Joint Petitioners' financial advisers related to the proposed transfer of control transaction³ and all board of director minutes and information

¹ "Joint Petitioners" are: Kentucky-American Water Company; American Water Works Company; Thames Water Aqua US Holdings, Inc.; Thames GmbH; and RWE Aktiengesellschaft.

² The Commission ruled upon these motions at the hearing that was held in this matter on August 17, 2006. By this Order, we affirm those rulings and provide the reasoning for our decision.

³ Commission Staff's First Information Request to Joint Petitioners, Item 8.



provided to any Board of Directors in which change of control is discussed.⁴ LFUCG further requested financial information regarding AWWC's unregulated lines of business.⁵ Joint Petitioners provided this information, but also petitioned for confidential treatment of these responses.⁶

Joint Petitioners argue that the financial adviser's reports that Commission Staff requested contain financial and other confidential information about RWE and AWWC that is not available to the public and that competitors could use to gain a competitive advantage over these entities. The information could also be used by entities in the security industry to gain a financial advantage over RWE in "the negotiation of relationships and agreements relating to the Proposed Transaction" and possibly make the proposed transaction more costly to RWE.⁷ Public disclosure of some of the information contained in the materials at issue, Joint Petitioners further assert, could constitute an offer to sell and would violate federal security laws that prohibit offers to sell securities prior to the filing of a registration with the Securities and Exchange Commission. Finally, Joint Petitioners argue that the materials in question also contain information that is protected by the attorney-client privilege and work product privilege.

⁴ LFUCG's Initial Requests for Information, Item 45.

⁵ Id. at Item 33.

⁶ The AG has entered into a protective agreement with Joint Petitioners regarding the materials in question and has been provided a non-redacted copy of most of the materials in question. Joint Petitioners have continued to withhold some of the materials from the AG on the grounds that these materials are non-responsive or are exempted from discovery under the attorney-client privilege or work product privilege. See Order of August 17, 2006.

⁷ Petitioners' Motion for Confidential Treatment at 2.

Joint Petitioners argue that portions of the presentations to the board of directors and of the minutes of the board of directors' meetings contain sensitive commercial or proprietary information whose disclosure would unfairly advantage RWE's competitors. They further argue that the disclosure of this information could adversely affect the proposed public offering of AWWC stock and could violate U.S. security laws that prohibit offers to sell securities prior to the filing of a registration statement with the Securities and Exchange Commission.

As to the documents that relate to AWWC's unregulated lines of business, Joint Petitioners argue that the documents contain information that is sensitive commercial or proprietary information whose disclosure would unfairly advantage AWWC's competitors. They note the information could be used by AWWC's competitors in these lines of businesses to underprice or underbid AWWC entities. They further assert that such information is not relevant to the ultimate issues before the Commission.

While generally silent on Joint Petitioners' motion, the AG objects to confidential treatment being afforded to two sets of materials. Referring to a table that contains a state-by-state summary of the status of rate case applications, he notes that information concerning rate case applications is not generally considered confidential and that Joint Petitioners have failed to demonstrate any harm resulting from its disclosure. Similarly, he notes that Joint Applicants' projections regarding AWWC's non-regulated lines of business are relevant as the level of growth in this sector is "clearly a material factor in the divestment decision."⁸

⁸ AG's Response at 4.

Having considered the motions and being otherwise sufficiently advised, the Commission finds that KRS 61.878(1)(c) exempts from public inspection the information for which the Joint Applicants seek confidential treatment and that the information should be afforded confidential treatment.

IT IS THEREFORE ORDERED that:

1. Joint Petitioners' Motion for Confidential Treatment of Board Materials and Motion for Confidential Treatment is granted.

2. Confidential treatment is accorded to the requested portions of Item 8 of Joint Petitioners' Response to Commission Staff's First Information Request and Items 33 and 45 of LFUCG's Initial Requests for Information.

3. Joint Petitioners shall make available upon request an unredacted copy of the material deemed confidential, except those materials expressly identified in the Commission's Order of August 17, 2006, to any party in this proceeding provided the requesting party enters into a protective agreement with Joint Petitioners regarding the use and disclosure of such materials.

Done at Frankfort, Kentucky, this 29th day of August, 2006.

By the Commission

ATTEST:



Executive Director

Case No. 2006-00197

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

MAY 26 2009

PUBLIC SERVICE
COMMISSION

In the Matter of:

Joint Application of Duke Energy Corporation,)
Duke Energy Holding Corp., Deer Acquisition)
Corp., Cougar Acquisition Corp., Cinergy Corp.,)
The Cincinnati Gas & Electric Company, and)
The Union Light, Heat and Power Company for)
Approval of a Transfer and Acquisition)
of Control)

Case No. 2005-00228

PETITION OF DUKE ENERGY KENTUCKY, INC.
FOR CONFIDENTIAL TREATMENT OF INFORMATION
CONTAINED IN THE LIBERTY CONSULTING GROUP'S FINAL REPORT AUDIT
OF MERGER-RELATED AGREEMENTS DATED MAY 19, 2009.

Duke Energy Kentucky, Inc. (Duke Energy Kentucky or Company), pursuant to 807 KAR 5:001, Section 7, respectfully requests the Commission to classify and protect certain information provided in Liberty Consulting Group's Final Report Audit of Merger Related Agreements Duke Energy Kentucky (Audit Report). The Audit Report was required by Merger Commitment No. 12 as set forth in the Order issued by the Commission in Case No. 2005-00228. The information Duke Energy Kentucky seeks confidential treatment (Confidential Information) includes but is not limited to: (1) a summary of 2007 affiliate transactions across the Duke Energy Corporation holding Company structure (Duke Energy); (2) overall governance and labor charges, including labor to and from affiliates across Duke Energy; (3) Corporate allocation percentages from various departments to Duke Energy Kentucky; (4) inter-company charges to affiliates and detailed requests for service to affiliates. All of the above-described Confidential Information contains sensitive business



and financial information, the disclosure of which would injure Duke Energy Kentucky, and its affiliates, and compromise the companies' respective competitive positions and business interests.

In support of this Petition, Duke Energy Kentucky states:

1. The Kentucky Open Records Act exempts from disclosure certain commercial information. KRS 61.878 (1)(c). To qualify for this exemption and, therefore, maintain the confidentiality of the information, a party must establish that disclosure of the commercial information would permit an unfair advantage to competitors of that party. Public disclosure of the information identified herein would, in fact, prompt such a result for the reasons set forth below.

2. The Commission approved the merger of Duke Energy and Cinergy Corp. in Case No. 2005-00228. As part of its merger commitments, Duke Energy Kentucky agreed to have an independent audit of the various service agreements approved as part of the merger. The first Audit Report was recently completed by Liberty Consulting Group and the Audit Report was developed. The Audit Report details a comprehensive audit of the various agreements and by necessity the Audit Report describes sensitive financial information and other business operations of Duke Energy Kentucky as well as the other parties to the various agreements. Duke Energy Kentucky on its own behalf, as well as on behalf of the other entities whose financial and business operation information is described in the Audit Report, respectfully request that certain limited information described in this petition be withheld from public disclosure and be maintained under seal.

3. The Confidential Information contained in pages 7-8 and 24 depicts summaries of affiliate transactions including costs. Disclosure would make public the operating costs of

not only Duke Energy Kentucky, but also of its affiliated regulated utilities and affiliated non-regulated companies under the Duke Energy Holding Company structure, which are permitted to provide one another goods and services under Commission- approved agreements. Disclosing this information would provide Duke Energy Kentucky's competitors, as well as competitors of its sister utilities and non-regulated affiliated companies with insight into how the utilities in the Duke Energy Holding Company structure operate. This information could provide a distinct competitive advantage to vendors in bidding for and securing new contracts for services to Duke Energy Kentucky, not to mention its affiliates. It could also provide a competitive advantage to a competitor of Duke Energy Kentucky, its sister utilities mentioned in the Audit Report, and the affiliated non-regulated companies listed.

3. Pages 49, 51-64 and 72-73, 102 of the Audit Report list and describe information regarding overall charges from Duke Energy Business Services (DEBS) to Duke Energy Kentucky, its sister utilities, and its non-regulated affiliates. The information includes, but is not limited to, labor charges for the individual business units, corporate governance allocations, Duke Energy Kentucky's allocated costs for various departments, and costs for the various utility operating companies and non-utility affiliates in Duke Energy. Public disclosure would afford vendors a distinct competitive advantage in bidding for and securing new contracts for services provided to Duke Energy Kentucky and its affiliates. Disclosure would also afford an obvious advantage to competitors of Duke Energy Kentucky or any of its listed affiliates, in any contractual negotiations and would necessarily impair Duke Energy Kentucky's or its affiliates ability to negotiate with prospective contractors and vendors.

4. The Confidential Information contained in tables and charts on pages 80-99 details the charges, for loaded labor, materials, vehicle expense, outside services, and journal entries by and between the regulated utilities and non regulated affiliates in Duke Energy. The information also includes descriptions and estimated and actual costs of specific services that were requested during the audit period by and between the various companies in Duke Energy. These services were performed according to the various Commission –approved service agreements. The information would afford competitors of any of the named companies, a distinct competitive advantage in bidding for and securing new contracts for services. It would give competitors keen insight on how the various named entities operate and what the exact costs include. Further, public disclosure would afford an obvious advantage to competitors in any contractual negotiations and would necessarily impair Duke Energy Kentucky’s ability to negotiate with prospective contractors and vendors.

5. The Confidential Information contained in pages 105-106 pertains to the Commission-approved Utility Money Pool Agreement. The Money Pool Agreement allows the parties to more efficiently use cash by pooling daily excess and deficits of funds. The Confidential Information details the participation levels of all of the parties to the agreement, including Duke Energy Kentucky. It also includes Duke Energy Kentucky’s monthly borrowing under this agreement. This information is maintained internally by Duke Energy Kentucky personnel, is not on file with any public agency, and is not available from any commercial or other source outside Duke Energy Kentucky. Releasing the information will give potential creditors and lenders insight into sensitive and confidential financial operations of Duke Energy Kentucky.

6. The aforementioned Confidential Information in all pages listed is distributed within Duke Energy and Duke Energy Kentucky only to those employees who must have access for business reasons, and is generally recognized as confidential and proprietary in the energy industry.

7. The information for which Duke Energy Kentucky is seeking confidential treatment is not known outside of Duke Energy.

8. Duke Energy Kentucky does not object to limited disclosure of the confidential information described herein, pursuant to an acceptable protective agreement, to the Attorney General or other stakeholders with a legitimate interest in reviewing the same.

9. In accordance with the provisions of 807 KAR 5:001 Section 7, the Company is providing the Commission one copy of the Confidential Material highlighted and ten copies without the confidential information. Duke Energy Kentucky has taken steps to only seek confidential treatment of the sensitive information contained in the responses, and in the interest of disclosure is only seeking confidential treatment of specifically identified information.

WHEREFORE, Duke Energy Kentucky, Inc. respectfully requests that the Commission classify and protect as confidential the specific information described herein.

Respectfully submitted,

DUKE ENERGY KENTUCKY



Rocco D'Ascenzo (92796)

Senior Counsel

Amy B. Spiller (853009)

Associate General Counsel

139 E. Fourth Street, 25 AT II

P.O. Box 960

Cincinnati, OH 4520

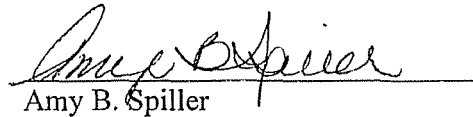
(513) 419-1852 (telephone)

(513) 419-1846 (facsimile)

e-mail: rocco.d'ascenzo@duke-energy.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Duke Energy Kentucky, Inc.'s Petition for Confidential Treatment of Information Contained in The Liberty Consulting Group's Final Report Audit of Merger-Related Agreements dated May 19, 2009 was served on the following by overnight mail, this 22^a day of May 2009.



Amy B. Spiller

Honorable Dennis G. Howard, II
Honorable David E. Spenard
Assistant Attorneys General
1024 Capital Center Drive, Suite 200
Frankfort, Kentucky 40601



Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
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David L. Armstrong
Chairman

James W. Gardner
Vice Chairman

Charles R. Borders
Commissioner

October 23, 2009

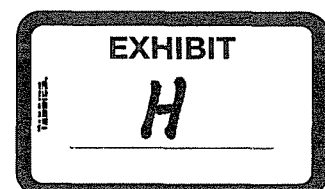
Duke Energy Kentucky
Attention: Rocco D'Ascenzo
139 E. Fourth Street, 25 AT II
P.O. Box 960
Cincinnati, Ohio 45202

Re: Duke Energy Kentucky - Petition for Confidential Treatment received 5/26/09
PSC Reference – Case No. 2005-00228

Dear Mr. D'Ascenzo:

The Public Service Commission has received the Petition for Confidential Treatment you filed on May 26, 2009 on behalf of Duke Energy Kentucky to protect certain information filed with the Commission as confidential pursuant to Section 7 of 807 KAR 5:001 and KRS 61.870. The information you seek to have treated as confidential is identified as information contained in Duke's Merger Commitment #12, pages 7, 8, 24, 49, 51-64, 72-73, 80-99, 102, and 105-106, containing (1) a summary of 2007 affiliate transactions across holding company structure; (2) overall governance and labor changes to and from affiliates; (3) corporate allocation percentages; (4) inter-company charges to affiliates and detailed requests for service to affiliates. Your justification for having the Commission handle this material as confidential is that the public disclosure of the information would compromise Duke Energy Kentucky's competitive position in the industry and result in an unfair commercial advantage to its competitors.

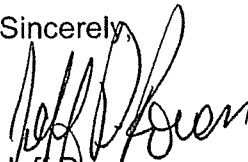
Based on a review of the information and pursuant to KRS 61.878 and 807 KAR 5:001, Section 7, the Commission has determined that the information you seek to keep confidential is of a proprietary nature, which if publicly disclosed would permit an unfair commercial advantage to Duke Energy Kentucky's competitors. Therefore, the information requested to be treated as confidential **meets the criteria for confidential protection** and will be maintained as a nonpublic part of the Commission's file in this case. The procedure for usage of confidential materials during formal proceedings may be found at Section 7(8) of 807 KAR 5:001.



Mr. D'Ascenzo
October 23, 2009
Page 2

If the information becomes publicly available or no longer warrants confidential treatment, Duke Energy Kentucky is required by Section 8(9)(a) of 807 KAR 5:001 to inform the Commission so that the information may be placed in the public record.

Sincerely,



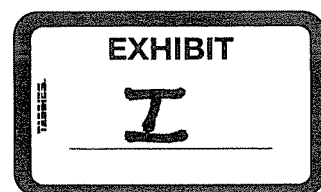
Jeff Derduen
Executive Director

kg/

cc: Parties of Record

Antitrust Division Manual

U.S. Department of Justice
Antitrust Division
Fourth Edition
Last Updated December 2008



adjusted for inflation at least once every four years.) A 1991 Memorandum of Agreement between the Department of Justice and the FTC, for the purpose of promoting efficient and effective handling of civil penalty actions, provides that when the FTC requests that the Department of Justice bring a HSR civil penalty action, FTC attorneys may be appointed as Special Attorneys, under the supervision and control of the Attorney General.

Under § 7A(g)(2), 15 U.S.C. § 18a(g)(2), either enforcement agency can seek injunctive relief if there has not been substantial compliance with the notification requirements of the Act and the Rules or with a second request. Under this section, the district court may order compliance and “shall extend the waiting period . . . until there has been substantial compliance.” (The Act contains one exception: where a person whose stock is sought to be acquired by means of a tender offer (either cash or non-cash) has not substantially complied, the waiting period may not be extended.) Section 7A(g)(2)(C), 15 U.S.C. § 18a(g)(2)(C), also authorizes the court to “grant such other equitable relief as the court in its discretion determines necessary or appropriate.”

iii. Confidentiality of HSR Materials

Section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h), provides that HSR material (“[a]ny information or documentary material” filed with the Division or the FTC pursuant to the HSR Act) may not be made public except “as may be relevant to any administrative or judicial action or proceeding.” The FTC and the Division interpret this provision to mean an administrative or judicial action or proceeding to which the FTC or the Department of Justice is a party. Thus, HSR material may be disclosed in a complaint, brief, motion, or other pleading filed in an action to which the Department is a party. HSR material may also be disclosed, pursuant to the statute, to Congress.

HSR material is expressly exempted from disclosure under the FOIA. It may not be disclosed to state or foreign enforcement agencies or to third parties during depositions or interviews without the consent of the party producing the material. The Division has taken the position that it will not disclose HSR material to other federal agencies except the FTC itself. The confidentiality constraints apply not only to HSR information contained in HSR filings, second request responses and information provided voluntarily by the merger partners during an HSR investigation, but also to the fact that an HSR filing has been made, the fact that a second request has been issued, and the date the waiting period expires.

Section 7A(h) has been interpreted by the two circuits that have addressed the issue as prohibiting the agencies from disclosing HSR information to state attorney general offices. *See Lieberman v. FTC*, 771 F.2d 32 (2d Cir. 1985);

Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985). Mechanisms have been developed by the National Association of Attorneys General (NAAG), the Division, and the FTC that encourage parties in some instances to provide state enforcement officials with HSR materials and allow greater coordination between federal and state authorities investigating the same merger. NAAG's Voluntary Premerger Disclosure Compact allows parties voluntarily to file with a designated liaison state a copy of their initial HSR filings, and copies of second request schedules and production, in return for the Compact signatories agreeing not to serve their own compulsory process during the HSR waiting period.

To facilitate coordination of parallel federal and state merger investigations as much as possible within statutory constraints, the Department announced and implemented a Protocol in March 1992 (revised in March 1998). By its terms, the Protocol applies where all acquiring and acquired persons in a transaction submit a letter to the Division that (1) agrees to provide the designated liaison state (as identified by the NAAG Compact) all information submitted to the Division under the HSR Act or pursuant to CIDs, and (2) waives the HSR and CID confidentiality provisions to the extent necessary to allow discussions of protected materials between the Division and the state attorneys general. Where these requirements are met, the Division will provide the coordinating state copies of the Division's second request and CID schedules and the HSR waiting period expiration date. The Protocol further states: "To the extent lawful, practicable and desirable in the circumstances of a particular case, the Antitrust Division . . . and the State Attorneys General will cooperate in analyzing the merger." See Chapter VII, Part C.5 (describing in more detail the relationship between the Division and state attorneys general in merger investigations). Waivers of HSR and CID confidentiality may also be used to allow sharing of parties' confidential information with foreign antitrust authorities and with other federal agencies.

Staff may frequently receive requests for greater protection for HSR material than that provided by the statute. As a policy matter, the Division will not grant greater restrictions on the Division's use of HSR material than that contained in the statute. An exception to this policy can only be made after consultation with the section chief, the FOIA Unit, and the Office of Operations.

The Division's policy is to try to give a submitter ten days' notice, whenever possible, before placing HSR material on the public record in any administrative or judicial action or proceeding, regardless of whether the submitter is a party. Exceptions to this policy may be authorized by the Assistant Attorney General, especially in cases where ten days' notice is not feasible (for example, where a temporary restraining order is being sought or where documents are attached to

initial motion papers). Use of HSR material during litigation should be governed by a court-ordered protective order. *See* 45 Fed. Reg. 21,215-16 (1980).

In contrast to the ACPA, which expressly permits CID material to be used by the Division in connection with the taking of oral testimony pursuant to CID, *see* 15 U.S.C. § 1313(c)(2), Section 7A does not expressly authorize the use of HSR material in CID depositions. Thus, use of HSR material at depositions is governed by Section 7A's requirement that no such information or documentary material "may be made public." Accordingly, HSR material produced by a party should not be shown to another party or third party during a CID deposition or otherwise.

iv. Relationship of Premerger Notification to Other Statutes

Section 7A(i), 15 U.S.C. § 18a(i), contains two important explanations of the relationship between the Act and other activities of the Division and the FTC. Under § 7A(i)(1), any action by either agency or any failure of either agency to take any action under the premerger notification legislation has no effect on any proceeding under any other provision of the HSR Act or any other provision of law. This means, for example, that the Division may challenge a transaction even if the waiting period has expired or if the Division has early terminated the waiting period. Moreover, under § 7A(i)(2), the ability of the enforcement agencies to make full use of the ACPA, the Federal Trade Commission Act, and any other provision of law "to secure at any time from any person documentary material, oral testimony, or other information" is not affected by the premerger notification requirements.

2. Reviewing Premerger Filings

a. Procedures for Getting Premerger Filings to Staff for Review

The HSR Act requires parties to notify the FTC and the Department of Justice of certain proposed transactions. Three copies of the premerger notification form (and one set of attachments) must be submitted to the Division's Premerger Notification Unit and an additional two copies (and one set of attachments) must be submitted to the FTC. The filings are date stamped and immediately logged in. The FTC's Premerger Office assigns a premerger number to the transaction and computes the original waiting period. This information is immediately available to the Division through a direct link to the FTC's computer database. The Division's Premerger Notification Unit assigns the filing to the appropriate section based on the commodities involved in the transaction and the location of the parties. One copy of the filings with attachments is sent to the appropriate section for review and a copy of the filings without the attachments is sent to