

COMMONWEALTH OF KENTUCKY  
BEFORE THE 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

O R D E R

On September 20, 2005, the Attorney General's Office ("AG") filed a motion to compel Duke Energy Corporation ("Duke Energy"), one of the Joint Applicants, to provide a document referred to as an updated synergy study and all supporting workpapers as originally requested in the AG's second data request, Item Nos. 9 and 10. The updated synergy study was presented to the Duke Energy Board of Directors on May 7, 2005. The Joint Applicants declined to provide the documents requested, claiming that they are protected by the attorney/client privilege.

The AG cites to statements in the joint application that the merger will create cost and operational synergies and that a portion of the net savings created by these synergies will be passed through to retail customers if the merger is approved. Noting that the Joint Applicants rely upon these synergies and the resulting cost savings to justify their merger, the AG asserts that the amount of these synergies is a fundamental

issue to be investigated in this case and that the requested documents relate directly to that issue. The AG claims that the Joint Applicants have failed to carry their burden to demonstrate that the requested documents are protected by the attorney/client privilege. Citing the case of Lexington Public Library v. Clark, 90 S.W.3d 53 (Ky. 2002), the AG argues that the attorney/client privilege does not exist when a document is prepared for business reasons, rather than legal reasons. Finally, the AG argues that it is unreasonable for the Joint Applicants to selectively present documents that support their analysis of merger synergies while objecting to present other relevant documents on this issue. The AG also requests that the existing procedural schedule be modified to provide him an opportunity to file supplemental direct testimony after he has had sufficient time to review the updated synergy study.

Duke Energy filed a response in opposition to the AG's motion. Duke Energy states that the updated synergy study was prepared by its Managing Director of Mergers and Acquisitions and an outside consultant, Thomas J. Flaherty, to assist Duke Energy's attorneys in providing legal advice to Duke Energy and its Board of Directors. Duke Energy asserts that the requested document is 27 pages in length and that each page contains a notation that it is a confidential communication and the document has not been distributed to anyone except the client's representatives and the client's lawyers or lawyers' representatives. Finally, Duke Energy argues that its refusal to provide the document request has not hindered the AG's review of this issue because the Joint Applicants have already provided voluminous documents on merger synergies and have filed testimony from several witnesses who discuss merger synergies.

Based on the motion and being otherwise sufficient advised, the Commission finds that the Joint Applicants have requested approval of their merger on the basis that it will create synergies that will result in cost savings. The Joint Applicants have filed the direct testimony of their consultant, Mr. Flaherty, who sponsors a cost/benefit analysis that identifies synergies that will result from the merger. Mr. Flaherty has a degree in accounting and his testimony states, at page 4, that his consulting firm “assisted the managements of both [Duke Energy and Cinergy Corp.] in the identification and quantification of potential cost savings resulting from the proposed merger of the companies.”

As the Court of Appeals held in Lexington Public Library, “The [attorney/client] privilege ‘protects only those disclosures necessary to obtain legal advice which might not have been made absent the privilege,’ and ‘is triggered only by a client’s request for legal, as contrasted with business, advice.’”<sup>1</sup> Here, Duke Energy has failed to carry its burden to demonstrate that the updated synergy study, which was performed by its consulting accountant, was prepared for a legal reason, rather than a business reason. Furthermore, under the circumstances presented here, the filing of direct testimony by Mr. Flaherty on the issues of merger synergies and resulting cost savings constitutes a waiver of any attorney/client privilege that might otherwise exist with respect to similar studies that were previously performed by Mr. Flaherty for Duke Energy.<sup>2</sup>

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<sup>1</sup> Id. at 60 (internal citations omitted).

<sup>2</sup> The Commission makes no finding herein as to whether the updated synergy study is entitled to be withheld from public disclosure under 807 KAR 5:001, Section 7.

IT IS THEREFORE ORDERED that:

1. The Joint Applicants shall file, within 3 days of the date of this Order, the updated synergy study and any available workpapers as requested in the AG's second data request, Item Nos. 9 and 10.

2. The AG shall file supplemental prepared direct testimony, if any, no later than October 7, 2005 on the limited issue of the updated synergy study.

Done at Frankfort, Kentucky, this 27<sup>th</sup> day of September, 2005.

By the Commission

ATTEST:



Executive Director