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Commonwealth of Kentucky  
Before the Public Service Commission

SEP 20 2005

PUBLIC SERVICE  
COMMISSION

In the Matter of: )  
THE JOINT APPLICATION OF DUKE ENERGY ) Case No. 2005-00228  
CORPORATION, DUKE ENERGY HOLDING )  
CORP., DEER ACQUISITION CORP., COUGAR )  
ACQUISITION CORP., CINERGY CORP., THE )  
CINCINNATI GAS AND ELECTRIC COMPANY, )  
AND THE UNION LIGHT, HEAT AND POWER )  
COMPANY FOR APPROVAL OF A TRANSFER )  
AND ACQUISITION OF CONTROL )

ATTORNEY GENERAL'S  
MOTION TO COMPEL

The Attorney General submits this Motion to Compel Duke Energy to provide an "updated synergy study" sent to the Duke directors and presented to the Duke board on 7 May 2005. In support of his Motion, the Attorney General states the following.

The Joint Application states, in clear terms, that the transaction "will present opportunities for optimizing operations across a larger platform and creating economies of scale that will enhance ULH&P's ability to supply reliable service at low costs."<sup>1</sup> The Joint Applicants state,

**Certain synergies will result from the combination of these two companies.** The transaction permits duplicative functions and systems between Duke Energy and Cinergy to be eliminated, and both companies will recognize cost efficiencies over time. ULH&P commits to share with its Kentucky retail customers the portion of the net savings created by

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<sup>1</sup> Joint Application, Volume I of II, Numbered Paragraph 11.

the merger that are allocable to ULH&P's retail gas and electric operations. **ULH&P will demonstrate what cost savings are expected as a result of the transaction, where those cost savings will be generated, the time period used to measure the anticipated savings, how those cost savings will be allocated among the various entities involved in the transaction, and to what degree (and in what fashion) cost savings resulting from the merger will benefit ULH&P's retail customers.** (Emphasis added)<sup>2</sup>

The Joint Applicants further note, "in addition to cost synergies, several operational synergies will result from the combination of Duke Energy and Cinergy."<sup>3</sup> They also note, in discussing post-transaction financial strength, "the significant synergies created by the merger will lower the overall cost structure of the combined company," and that "the combination of all of these synergies translates into increased productivity and lower costs, which creates a financially sound organization."<sup>4</sup> Moreover, Duke Energy and Cinergy assert that "the synergies that result [from the transaction], will create a new, diversified, financially strong company with increased financial flexibility, efficiencies, productivity and revenue, and lower costs," and "it is in the public interest to support this combination."<sup>5</sup>

This transaction is about synergies, and these statements of the Joint Applicants are only a sample of their representations to this Commission that the synergies resulting from this proposal provide a basis for this Commission to

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<sup>2</sup> Joint Application, Volume I of II, Numbered Paragraph 14.

<sup>3</sup> Joint Application, Volume I of II, Numbered Paragraph 15.

<sup>4</sup> Joint Application, Volume I of II, Numbered Paragraph 20.

<sup>5</sup> Joint Application, Volume I of II, Numbered Paragraph 22.

determine that the proposal meets the requirements of KRS 278.020. The synergies and net merger savings are also fundamental to the Joint Applicants' merger savings sharing mechanism proposal that is part of this request for Commission approval.

Therefore, central to the question of whether this Commission should grant its approval, as conceded by the plain language of the Joint Application, is the issue of synergies. In his Supplemental Request for Information, the Attorney General made a request for the Joint Applicants to provide an "updated synergy study" that was sent to Duke's directors between 20 April 2005 and 7 May 2005.<sup>6</sup> The Attorney General also made a request for a synergy savings analysis presented to and discussed with Duke's board on 7 May 2005, as well as all workpapers and other documents used to create that synergy savings analysis.<sup>7</sup> Duke Energy objects to the requests and asserts that the information sought is protected by the attorney/client privilege.<sup>8</sup> The responses do not provide proof that the elements of the privilege are present. The Attorney General seeks an order compelling Duke Energy to supply the information.

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<sup>6</sup> OAG Supplemental Request for Information, Item 2 – 9.

<sup>7</sup> OAG Supplemental Request for Information, Item 2 – 10.

<sup>8</sup> Joint Applicants' Response to OAG 2 – 9 and 2 – 10 (Attached as "A" and "B").

1. Duke Energy's responses do not demonstrate a fulfillment of the legal requirements for application of the privilege, and its claim should be rejected.

"Because privileges operate to exclude relevant evidence, '[t]he party asserting the privilege has the burden to prove the privilege applies.'" *Stidham v. Clark*, 74 S.W.3d 719, 725 (2002) citing *United States v. Plache*, 913 F.2d 1375, 1379 (9<sup>th</sup> Cir. 1990). Duke Energy's responses offer no proof in support of the assertion of the privilege. If a party seeks to invoke the privilege but fails to provide sufficient detail to demonstrate the fulfillment of all the legal requirements for the privilege, the claim of privilege will be rejected. See *Lexington Public Library v. Clark*, 90 S.W.3d 53, 63 (Ky. 2002). Therefore, Duke Energy's claim of privilege should be rejected.

Furthermore, the attorney/client privilege is not applicable when the attorney acts as a business advisor. *Lexington Public Library*, 90 S.W.3d at 60 (internal citation omitted). Thus, the fact that an attorney is involved does not render a document privileged. *Lexington Public Library*, 90 S.W.3d at 60 (internal citation omitted). Again, it is Duke Energy's burden to prove that the elements of the privilege that it seeks to claim exist, and it has not met its burden.

The question of the existence of the privilege is determined by the Commission not unilaterally by Duke Energy. If Duke Energy seeks to rely upon the privilege, it must prove it. This record is replete with evidence supporting the position that the synergies for this transaction are relevant and material and the synergy savings report at issue warrants thorough review. In addition to the

other steps that Duke Energy must take, it must submit the materials to the Commission for an *in camera* review in order for the Commission to make the determination of whether the synergy savings analysis was generated for a business purpose or a legal purpose. See *Lexington Public Library*, 90 S.W.3d at 56; see also *Stidham v. Clark*, 74 S.W.3d at 727. It may not simply withhold the information. It has a burden to meet.

2. The Duke Energy Synergy Savings Report at issue has not been demonstrated as subject to any privilege and should be disclosed.

The Attorney General as well as this Commission recognize the reasonable expectation of the Joint Applicants' desire to protect sensitive information. To this end, the Attorney General has entered into a protective agreement with the Joint Applicants as a means of allowing the Joint Applicants the opportunity to pursue confidential treatment for certain items including information relating to cost-savings and post-transaction synergies. Indeed, the information sought under these two requests may be entitled to such treatment; however, it is inappropriate for Duke Energy to withhold the information.

The Attorney General also recognizes the reasonable expectation of protecting certain communications falling under the rubric of attorney/client privilege. It is, however, unreasonable for the Joint Applicants to urge the Commission to approve this transaction using the claim of synergies as the basis

for the approval and thereafter hide behind a claim of attorney/client privilege when a reasonable inquiry is made to obtain relevant, material information.<sup>9</sup>

Again, this transaction is about synergies. The Joint Applicants have supplied certain information to this Commission about their assessments of the synergies, yet they do not provide a complete picture. The synergy savings analysis sought under OAG 2 – 9 and OAG 2 -- 10 concerns a discussion relating to material and significant changes following a preliminary synergy savings report that was presented to the Duke board on 20 April 2005. Duke Energy declines to provide the information to complete the picture.

The information sought goes to the heart of what ULH&P and the Joint Applicants have undertaken and have the responsibility to demonstrate before this Commission. Moreover, the selective presentation of information regarding the potential synergies of this transaction raises concerns about Duke Energy's candor before this Commission. If Duke Energy seeks to build the approval of this transaction on synergies, then Duke Energy must be willing to provide the relevant and material information concerning its foundation.

Accordingly, the Attorney General requests that the Commission enter an Order compelling Duke Energy to provide the information concerning the synergy savings analysis sought by OAG 2 – 9 and OAG 2 – 10. Further, the Order should specify that Duke Energy will present a witness (or witnesses) for

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<sup>9</sup> The privilege is exclusively Duke Energy's privilege to claim (KRE 503), and any refusal to provide the complete picture on transaction synergies is solely the product of Duke Energy's desire to keep it secret.

cross-examination who will be able to answer questions concerning the information. Finally, in the event that the Commission orders the production of this information, the Attorney General respectfully requests that he be given a reasonable opportunity to supplement his testimony in the event that he does not receive the information in time to have a fair opportunity to incorporate the information into his pre-filed direct testimony, presently due Wednesday, 28 September 2005.

WHEREFORE, the Attorney General submits this Motion to Compel.

Respectfully submitted,

GREGORY D. STUMBO  
ATTORNEY GENERAL

*David Edward Spenard*

David Edward Spenard

Dennis G. Howard II

Assistant Attorneys General

1024 Capital Center Drive, Suite 200

Frankfort, Kentucky 40601-8204

502-696-5453

(FAX) 502-573-8315

*Notice of Filing and Certificate of Service*

Counsel certifies filing of the original and ten photocopies of this Motion to Compel by hand delivery to Beth O'Donnell, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; furthermore, service of the filing was by mailing a true and correct of the same, first class postage prepaid, to John J. Finnigan, Jr., The Union Light, Heat and Power Company, 139 East Fourth Street, Cincinnati, Ohio, 45202; Kodwo Ghartey-Tagoe, Duke Power, P. O. Box 1244, Mail Code: PB05E, Charlotte, North Carolina 28201; Michael L. Kurtz, Boehm, Kurtz, & Lowry, 36 East Seventh Street Suite 1510, Cincinnati, Ohio 45202; Paul R. Newton, Duke Power P. O Box 1244, Mail Code: PB05E, Charlotte, North Carolina 28201; Kate E. Moriarty, The Union Light, Heat and Power Company, 139 East Fourth Street, Cincinnati, Ohio 45202; and Robert M. Watt III, Stoll, Keenon & Park, LLP, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507-1093, all on this 20<sup>th</sup> day of September 2005. (The Attorney General has also this day sent this Motion, in pdf format, to the e-mail addresses listed on the service list for this case.)

David Edward Spencel  
Assistant Attorney General



Attorney General of Kentucky  
Cinergy/Duke Merger  
Supplemental Request for Information, Set No. 2  
PSC Case No. 2005-00228  
Request Received September 8, 2005

AG 2.9

**Request:**

Reference: Duke's Hart-Scott-Rodino filing, document 4(c)(29). Page 3 of the document refers to an "updated synergy study" that apparently was sent to Duke's directors between April 20, 2005, and May 7, 2005. Please provide a copy of this updated synergy study.

**Response:**

Duke Energy objects to this request on the ground that it seeks information protected by the attorney/client privilege.

**Witness: Richard J. Osborne**

Attorney General of Kentucky  
Cinergy/Duke Merger  
Supplemental Request for Information, Set No. 2  
PSC Case No. 2005-00228  
Request Received September 8, 2005

AG 2.10

**Request:**

Reference: Duke's Hart-Scott-Rodino filing, document 4(c)-P6 (minutes of Duke board meeting on May 7, 2005). Page 6 of the document states (with dollar amounts deleted due to the alleged proprietary nature of document): "Mr. Barry ... reviewed the assumptions that had changed since a preliminary synergy savings report was presented to the Board at its meeting on April 20. Mr. Barry stated that 10-year gross savings, pre-sharing, are now estimated to be \$#. # billion rather than \$#. # billion." Please provide a copy of the synergy savings analysis presented to and discussed with Duke's board on May 7, 2005, as well as all workpapers and other documents used to create that synergy savings analysis.

**Response:**

Duke Energy objects to this request on the ground that it seeks information protected by the attorney/client privilege.

**Witness: Richard J. Osborne**