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September 23, 2005

RECEIVED

SEP 23 2005

PUBLIC SERVICE  
COMMISSION

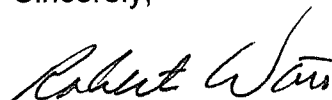
Hon. Elizabeth A. O'Donnell  
Executive Director  
Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, Kentucky 40601

Re: Duke/Cinergy Merger  
Case No 2005-00228

Dear Ms. O'Donnell:

We submit herewith for filing an original and ten copies of the Response to the Attorney General's Motion to Compel in the above-captioned matter. Thank you for your attention to this matter.

Sincerely,



Robert M. Watt, III

Rmw  
Encl.  
Cc: Parties of Record (w/encl.)

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

In the Matter of:

SEP 23 2005

PUBLIC SERVICE  
COMMISSION

JOINT APPLICATION OF DUKE )  
ENERGY CORPORATION, DUKE )  
ENERGY HOLDING CORP., DEER )  
ACQUISITION CORP., COUGAR )  
ACQUISITION CORP., CENERGY )  
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

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**RESPONSE OF DUKE ENERGY CORPORATION  
TO ATTORNEY GENERAL'S MOTION  
TO COMPEL**

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Duke Energy Corporation ("Duke Energy") respectfully submits this response to the Attorney General's Motion to Compel production of a document entitled "updated synergy study" requested in the Attorney General's Supplemental Request for Information at AG 2.9 and AG 2.10. In his motion to compel, the Attorney General essentially makes two arguments. First, he argues that Duke Energy has not met its burden of establishing that the document withheld in response to AG 2.9 and AG 2.10 is protected by the attorney/client privilege. As is set forth below, however, the document withheld is not required to be disclosed under KRE 503 and was properly withheld. Second, the Attorney General argues that since the privileged document relates to synergies to be realized as a result of the merger, and that synergies are one of the reasons advanced by Joint Applicants in support of their Joint Application, that somehow trumps

the attorney/client privilege. The attorney/client privilege, however, is an absolute privilege. As is also discussed below, numerous non-privileged documents regarding synergies have been produced to the Attorney General, and, in addition, Joint Applicants have filed testimony discussing the merger synergies. The Attorney General has been provided voluminous information regarding Joint Applicants' position as to the synergies expected to be realized from the combination of the two companies, and his argument that the attorney/client privilege should be violated in order for him to review a single document on this issue must fail.<sup>1</sup>

**I. The Document Withheld by Duke Energy is Protected By The Attorney/Client Privilege.**

It is well established under Kentucky law that the attorney/client privilege applies to prevent disclosure of otherwise relevant evidence. KRE 503(b) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of legal services to the client:

(1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer; .

. .

The document at issue here meets the requirements of KRE 503 and is protected by the attorney/client privilege. The privileged document requested in AG 2.9 and 2.10, is a 27-page PowerPoint presentation dated May 4, 2005, entitled, "Final Executive Review: Project Panda" and was prepared by Wouter van Kempen, Duke Energy's Managing Director of Mergers and Acquisitions and Tom Flaherty, Senior Vice President of Booz

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<sup>1</sup> Joint Applicants also note that the Attorney General did not contact Joint Applicants in an effort to resolve this discovery dispute prior to filing his motion to compel. A subsequent telephone conversation between Cinergy's counsel, John Finnigan, acting on behalf of Duke Energy, and David Spenard, representing the Attorney General for the purpose of resolving the discovery dispute was not fruitful.

Allen Hamilton (hereinafter “Privileged Document”). The Privileged Document describes the anticipated synergies of the (then) proposed merger between Duke Energy and Cinergy and was prepared for B. Keith Trent, Duke Energy’s (then) Group Vice President, General Counsel and Secretary in an Acting Capacity<sup>2</sup> and Duke Energy’s outside legal counsel Sheldon Adler, Peter Atkins and Mike Naeve of Skadden, Arps, Slate, Meagher & Flom, LLP, in order to assist Duke Energy’s attorneys in providing legal advice to Duke Energy and to the Duke Energy Board of Directors (“Duke Energy Board”). The Privileged Document contains the following footer on each page, “Privileged and Confidential Prepared for Counsel.” The Privileged Document was distributed at the May 7, 2005 Duke Energy Board meeting to the Duke Energy Board, the Duke Energy Executive Committee, Mr. Paul Barry, Vice President of Mergers & Acquisitions, Edward M. Marsh, Deputy General Counsel and Assistant Secretary, and the aforementioned Duke Energy attorneys used the Privilege Document to render legal advice to Duke Energy regarding the regulatory issues and other legal issues anticipated as a result of the merger proposal being decided by the Duke Energy Board. As indicated by the footers in the Privileged Document, it is a confidential communication. The Privileged Document has not been distributed or shown to anyone other than the client’s representatives (and then only to those who had a need to see the document) and the client’s lawyers or lawyers’ representatives.

Accordingly, the Privileged Document meets the standards of KRE 503 and was properly withheld by Duke Energy on the grounds of attorney/client privilege. Judge Wyzanski, in his seminal opinion in United States v. United Shoe Machinery Corp.<sup>3</sup> set

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<sup>2</sup> The “acting” designation was removed from Mr. Trent’s title on June 29, 2005.

<sup>3</sup> 89 F. Supp. 347 (D. Mass. 1950).

forth the reason for the zealous protection of the attorney/client privilege in the corporate context as follows:

In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.<sup>4</sup>

Here, the Privileged Document falls squarely within the policy consideration of United Shoe Machinery and should be protected from disclosure.

**II. The Attorney General Has Been Provided Voluminous Documents and Testimony Regarding the Synergies From the Combination of Duke Energy and Cinergy.**

Joint Applicants have responded to numerous data requests from the Attorney General, producing voluminous pages of information regarding synergies from the combination of Duke Energy and Cinergy, and have submitted testimony from several witnesses in this matter who discuss the synergies from the combination of Duke Energy and Cinergy. The Attorney General's assertion in his motion that Joint Applicants are somehow attempting to thwart his efforts to understand Joint Applicants' position on the issue of synergies by withholding the single Privileged Document at issue is simply not tenable. Citation of authority is not necessary to demonstrate that the relevance of a privileged communication to an issue in a proceeding does not trump the attorney/client

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<sup>4</sup> Id. at 358.

privilege. We may fairly presume that all reported decisions addressing attorney/client privilege issues deal with relevant communications. Why fight over irrelevant communications? For all the foregoing reasons, Duke Energy respectfully submits that the Attorney General's Motion to Compel must be denied.

Respectfully submitted,

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By   
Counsel for Joint Applicants

**CERTIFICATE OF SERVICE**

This is to certify that the foregoing pleading has been served by mailing a copy of same, postage prepaid, to the following persons on this 23<sup>d</sup> day of September 2005:

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