141. Finally, we note that the current proceeding is not the proper venue for Public Citizen to challenge the validity of the Commission's regulations; its arguments are, in fact, a collateral attack on those regulations. We will not ignore our regulations because a party to a specific case argues that the regulations are invalid. If Public Citizen believes that the Commission should amend its regulations, Public Citizen should submit a petition for rulemaking setting forth the changes it believes are necessary.[122]

The Commission orders:

(A) Applicants' proposed merger is authorized, as discussed in the body of this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Acquisition.

(F) If the Proposed Acquisition result in changes in the status or the upstream ownership of Applicants' affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 shall be made.

(G) The Applicants shall submit their proposed final accounting on the merger within six months of the consummation of the merger as more fully discussed in the body of this order. The Applicants shall account for the transfer of the generation assets in

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[122] 18 C.F.R. § 385.207(a)(4) (2005).

accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts as more fully discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Application of Cinergy Corp., on Behalf of The Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company.	)	Case No. 05-732-EL-MER
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures in Order to Defer Costs Incurred in Order to Realize Cost Savings as a Result of the Merger Transaction.	)	Case No. 05-733-EL-AAM
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures in Order to Defer Costs Incurred in Order to Realize Cost Savings as a Result of the Merger Transaction.	)	Case No. 05-974-GA-AAM

FINDING AND ORDER

The Commission finds:

(1) On June 1, 2005, Deer Holding Corp. and Cinergy Corp. (Cinergy), on behalf of its subsidiary, the Cincinnati Gas & Electric Company (CG&E), jointly filed an application for the Commission's consent and approval of a change in the control of CG&E, and for (a) specific authority to implement a rate credit mechanism to share net merger savings with customers, (b) specific authority to modify current electric utility accounting procedures to defer merger-related transaction costs and costs to achieve merger savings, and (c) approval or acceptance of certain affiliate agreements necessitated by the merger, including a service company agreement. This application, together with the additional application and testimony filed on August 1, 2005, as referenced below, will be jointly referred to as the application.

(2) Motions to intervene in these proceedings were filed, between June 3, 2005, and August 1, 2005, by Ohio Energy Group, Inc. (OEG); Industrial Energy Users-Ohio (IEU-Ohio); the Office of the Ohio Consumers' Counsel (OCC); Direct Energy Services, LLC (Direct Energy); the Kroger Co. (Kroger); Ohio Partners for Affordable Energy (OPAE); Mr. Albert E. Lane; ProLiance Energy, LLC; the Formica Corporation (Formica); the Ohio Association of School Business Officials; the Ohio School Boards Association; the Buckeye Association of School Administrators (collectively, the Schools); the city of Forest Park (Forest Park); the city of Cincinnati (Cincinnati); the city of Lebanon (Lebanon); Interstate Gas Supply, Inc. (Interstate); and American Municipal Power-Ohio, Inc. (AMP-Ohio). Memoranda contra the motions by IEU-Ohio, Lebanon, and AMP-Ohio were filed by CG&E. Replies were filed by AMP-Ohio and Lebanon. No motions for intervention have been granted.

(3) By entry dated June 14, 2005, the Commission suspended approval of the application in these proceedings, ordered a stay of discovery, and invited interested persons to file comments and reply comments identifying issues which the commenters believed should be considered by the Commission.

(4) On August 1, 2005, CG&E filed an application for authority to modify its gas accounting procedures in the same manner as its electric accounting procedures. Together with this additional application, CG&E filed testimony from ten witnesses, supporting and detailing its application as a whole. CG&E also moved to consolidate the application for approval of the merger, and the two applications for modification of accounting procedures. On that date, CG&E also filed a motion to change the caption to substitute Duke Energy Holding Corp. in place of Deer Holding Corp, in order to recognize a recent change in the corporate name. The motions for consolidation and caption change were granted by examiner entry of August 18, 2005.

(5) On August 1 and September 1, 2005, comments and/or reply comments were filed, regarding the issues that should be considered by the Commission in these proceedings, by Mr. Lane; the Dayton Power & Light Company (DP&L); Formica, OCC, Direct Energy, IEU-Ohio, Cincinnati, the Schools, Stand Energy Corporation (Stand), OPAE, Lebanon, Interstate, AMP-

Ohio, OEG, CG&E, and Columbus Southern Power Company (CSP).

(6) By entry dated October 26, 2005, the Commission ordered its staff to examine the application and the filed comments and to make recommendations to the Commission. The recommendations were to be filed by November 14, 2005. The Commission also invited interested persons to file comments and reply comments relating to the substance of staff's recommendations, by December 1 and December 8, 2005, respectively.

(7) On November 14, 2005, staff filed its recommendations, as directed by the Commission. On the basis of its review of the comments received from interested persons, staff discusses seven issues. The issues discussed by staff relate to rate credits, reliability, customer service, affiliate transactions, the transfer of certain assets, MISO and RTO membership, and gas choice. The specific recommendations made by staff will be discussed in detail below.

(8) Comments and reply comments in response to staff's recommendations were filed on November 21, December 1, and December 8, 2005, by Mr. Lane, AMP-Ohio, the Schools, Interstate, Lebanon, OPAE, OCC, Cincinnati, the applicants, Formica, OEG, IEU-Ohio, Direct Energy, OPAE, and Eagle Energy, LLC (Eagle). Correspondence relating to the application was filed by various school districts and by one consumer.

(9) The change in control detailed in the application would be consummated through a series of transactions. The applicants state that Deer Holding Corp.[1] would acquire Cinergy in an all-stock transaction, following which both Cinergy and the current Duke Energy Corporation would be wholly owned subsidiaries of Deer Holding Corp. The application provides that Deer Energy Corp. would then be renamed "Duke Energy Corporation."

(10) Jurisdiction for the Commission to review the application is provided under Section 4905.402, Revised Code. That section provides, in division (B), as follows:

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1 Subsequent to the filing of the application, Deer Holding Corp. changed its name to Duke Energy Holding Corp., as described in finding (4).

> No person shall acquire control, directly or indirectly, of a . . . domestic electric utility or a holding company controlling a domestic electric utility unless that person obtains the prior approval of the public utilities commission under this section. To obtain approval the person shall file an application with the commission demonstrating that the acquisition will promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge. The application shall contain such information as the commission may require. If the commission considers a hearing necessary, it may fix a time and place for hearing. If, after review of the application and after any necessary hearing, the commission is satisfied that approval of the application will promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge, the commission shall approve the application and make such order as it considers proper.

For purposes of this statute, "control" is defined by division (A)(1) as

> the possession of the power to direct the management and policies of a domestic electric utility or a holding company of a domestic electric utility, through the ownership of voting securities, by contract, or otherwise. . . . Control is presumed to exist if any person, directly or indirectly, owns, controls, holds the power to vote, or holds with the power to vote proxies that constitute, twenty per cent or more of the total voting power of the domestic company or utility or the holding company.

For purposes of this statute, "electric utility" is defined, by reference to Section 4928.01(A)(7),[2] Revised Code, and, thereby,

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[2] Section 4905.402(A)(2), Revised Code, in defining the term "electric utility," actually refers to Section 4928.07, Revised Code. However, as that latter section makes no reference to a definition of this term, the Commission has determined that the reference was intended to be directed toward the seventh entry in the definition section under Chapter 4928, Revised Code.

to Section 4905.03, Revised Code, as an entity that is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state."

(11) The Commission finds that CG&E is a domestic electric utility and that Cinergy is a holding company controlling a domestic electric utility under the terms of Section 4905.402, Revised Code. In addition, the Commission finds that proposed merger, as detailed in the application, would result in the acquisition by Duke Energy Holding Corp. (previously named Deer Holding Corp., as described in finding [4]) of one hundred percent of the stock of Cinergy Corp. Such acquisition will give Duke Energy Holding Corp. control of Cinergy. Thus, the proposed merger may be accomplished only upon the approval of the Commission pursuant to Section 4905.402, Revised Code.

(12) Under the terms of the governing statute, we must, first, determine whether a hearing is necessary. The Commission has reviewed, in detail, the application, comments of various interested persons relating to the appropriate issues to be considered, the recommendations of staff, and the comments of interested persons addressing staff's recommendations. The Commission finds that a hearing is not necessary for us to consider fully the comments and arguments presented in this case, to consider the effects of the merger on the public, and to determine the appropriate resolution of the issues related to the application. Therefore, we also find that cause to grant intervention under Section 4903.221, Revised Code, has not been shown. Intervention is, therefore, denied with regard to all persons who filed motions for intervention.

(13) The Commission is required to approve the merger if we find that it will promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge. In the discussion that follows, we will consider a series of issues relating to our evaluation of the merger. Following analysis of those issues, we will reach the ultimate determination of whether or not to approve the merger, as set forth in the application.

(14) Rate Credits

Application. The application proposes that Ohio retail customers be granted a rate credit, net of costs, in the total amount of $14,674,900. According to the applicants' proposal, CG&E would be authorized to defer transaction costs and costs to achieve merger savings, and to amortize them over a five-year period. CG&E would, under applicants' proposal, return a percentage of those savings, net of costs of the merger, to customers over a five-year period. The applicants note that any additional actual cost savings for fuel and gas would be passed through to customers by means of the fuel and economy purchase power rider and the purchased gas adjustment clause, for electricity and gas, respectively. The merger savings would be allocated, under their plan, to rate classes based on the proportion of operation and maintenance expense in the cost of service study used in CG&E's most recent rate cases.

Staff Recommendations. Staff recommends that the methodology used for calculating a credit to be applied to customers' rates should be consistent with the methodology being used in other states which are reviewing the proposed merger. Based on staff's review of those other states' methodologies, and the application of a consistent calculation system, staff recommends that the total rate credit for Ohio retail customers be increased to $35,785,700.

Staff also advises that the Commission require the applicants to allow that credit amount to be increased in the event that the applicants provide rate credits based on a larger percentage of merger savings in any other state that is reviewing this proposed merger (referred to as a "most favored nations" provision). In that event, staff recommends that such higher percentage be similarly applied in Ohio.

Finally, staff recommends that, if costs associated with the merger are to be deferred, staff should have an opportunity to investigate those deferred costs before any rate recovery is granted.

Comments - Applicants. In response to staff's recommendation in this area, the applicants state that they are willing to increase the available rate credit to $35,785,700, consisting of merger savings related to regulated services in the same proportion as

provided in other states (totaling $16,376,500 for electric distribution and $4,167,700 for gas service) and a rate stabilization surcredit of $15,241,500, intended to be a voluntary credit to facilitate economic development in a time of increasing rates. These amounts are proposed to be allocated as set forth in detail in the applicants' comments and credited to customers over a one-year period beginning on January 1, 2006, and ending on December 31, 2006. In addition, the applicants agree to staff's proposed "most favored nations" provision, by which the rate credit would be increased to match any higher percentage used to calculate credits to be provided in any other state in which merger approval has been requested. The applicants' agreement to these provisions is conditioned on (a) its new electric distribution rates being effective as of January 1, 2006, as previously approved,[3] (b) the surcredit being reversed if the merger is not approved and consummated, and (c) the merger application being approved by the Commission no later than January 1, 2006. The applicants specifically commit to several ratemaking and accounting matters, including CG&E's sharing of anticipated merger savings, net of costs, regardless of whether or not such savings are actually achieved.

Comments – Other. OEG and IEU-Ohio support the staff's recommendation with regard to the appropriate level of the rate credit. OEG would, however, alter the allocation method and timing of the refund. IEU would also expand the Commission's review to include issues related to broader goals. The Schools, in their comments, argue that the amount of the rate credit cannot be appropriately ascertained without discovery and a hearing process. They also contend that staff's recommendations should have addressed the appropriate allocation of the credits between electric and gas operations and, also, should have addressed special needs relevant only to the schools. OPAE's comments discuss its belief that the merger savings should not be passed to customers on a net-of-costs basis. OPAE argues that merger costs should not be borne by customers, since ratepayers receive their

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3 The rates are being considered in *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, Case No. 05-59, *et al.* Approval of the planned effective date for the new distribution rates was granted in *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, *et al* (RSP case).

benefits from the setting of base rates in appropriate proceedings. It contends that benefits in between rate cases go to the benefit of the companies, not the customers. OCC agrees that the rate credit should be increased over what was proposed, and agrees that Ohio ratepayers should get the same benefits that are granted in other states. Also, OCC agrees that accounting deferrals should be subject to subsequent review at such time as CG&E seeks recovery. However, OCC is concerned that the level of savings is still too low and still occurs over too long a period. Cincinnati questions whether a reasonable rate credit can be determined without discovery. Formica disputes staff's approach in attempting only to match other states' results and argues for a hearing process. Formica also disputes the level of savings that are appropriate. Eagle suggests a revised allocation system designed to aid certain classes of customers.

Commission Conclusion. The Commission believes that staff's recommendations, as modified by the applicants' comments, are appropriate under the current circumstances. However, the Commission will make four conditions to the modified recommendations. First, the amount of the rate credits actually distributed to retail customers is to be subject to true-up following December 31, 2006. To this end, CG&E is directed to submit to staff an accounting of all rate credits actually distributed to customers, by no later than January 16, 2007. Second, the Commission notes that, in their comments, applicants commit "to share the merger savings, net of merger costs . . . regardless of whether or not such savings are actually achieved." The Commission approves of this commitment. Third, the Commission directs the applicants to notify staff of the terms of approval of the merger granted by other states, within five days of such approval. Fourth, with regard to applicants' application for authority to defer any costs associated with the merger transaction for subsequent recovery, the Commission finds that, in the event that CG&E incurs merger-related expenses that are not netted against merger savings, CG&E may seek to demonstrate such costs in any appropriate test period. The application for authority to defer costs is therefore denied.

(15) Reliability

Application. Applicants state, in the application, that they are committed to providing reliable service to customers, at just and

reasonable rates. Applicants also assure that CG&E will continue to provide the same level of service it has historically achieved. They note that Cinergy has consistently exceeded each applicable target of the Commission electric service and safety (ESS) standards, set forth in Rule 4901:1-10, Ohio Administrative Code (O.A.C.), and that they anticipate that there will be no change to CG&E's provision of reliable and safe service after the merger. They also assert that the larger employee base of the merged companies will allow for a greater capability for mutual assistance and restoration during severe weather events in Ohio.

Staff Recommendations. Staff recommends that the Commission require CG&E to make certain expenditures if, after the merger and in each year through 2010, CG&E's service reliability results in a noticeable degradation in performance. For this purpose, staff would define "noticeable degradation" as a 20 percent negative effect on any two of the four service reliability indices reported by CG&E under Rule 4901:1-10-10, O.A.C., as compared with its performance on those indices in its reporting for the 2005 calendar year. In the event of such a "noticeable degradation" in any year from 2006 through 2010, staff recommends that CG&E would then be required to make expenditures in the amount of $1.5 million (for each year that a noticeable degradation exists) above and beyond budgeted expenditures. These funds would be incorporated into an action plan, as outlined in Rule 4901:1-10-10, O.A.C., but would be in addition to amounts otherwise required in such a plan if one is required that year. The amounts so expended by CG&E would be for the benefit of distribution customers. CG&E would have the burden of proving that its expenditures meet these requirements.

The staff also stressed that nothing in the merger should be construed to limit the Commission's normal oversight of the emerging company. The staff stated that the automatic threshold is "in addition to the ongoing rules and regulations governing public utilities."

Comments – Applicants. The applicants agree with staff's recommendations regarding reliability. The applicants also agree that 2005 levels should be used as the reliability benchmark.

Comments – Other. Comments in response to the staff's reliability recommendations were also made by OEG, IEU-Ohio,

OCC, OPAE, and Cincinnati. OEG and IEU-Ohio both support staff's reliability recommendations. OPAE claims that staff's recommendations do not go far enough. It suggests that the Commission should include a condition that reliability may not decline and that, if it does decline, such resources as are necessary to reverse the trend must be devoted to the problem. OCC is concerned that the staff recommendations are unclear and do not address gas system reliability. OCC recommends that CG&E commit to maintain or improve the reliability of both its electric distribution network and natural gas distribution network if the merger is approved. OCC suggests that maximum allowable decline in performance should be five percent. OCC also indicates that the benchmark for reliability should be CG&E's mean reliability performance over the years 2001 through 2004, as measured by one of the Commission's reliability standards, since that standard takes into account both frequency and duration of outages. OCC argues that, in the event of a five percent decline, CG&E should undergo an audit of its policies, procedures, and resources supporting the maintenance and reliability of its electric distribution network. After such an audit, the Commission should initiate a proceeding that permits the staff, OCC, and others to comment on the findings of the audit and to suggest steps that should be taken by CG&E to restore reliability to pre-merger levels. OCC also believes that it should receive copies of all reliability reports filed with Commission. Cincinnati is concerned that staff's recommendation leaves open the possibility for unstable and unreliable customer care and utility service. Cincinnati contends that allowing a 20 percent negative effect in any two of the indices, as suggested by staff, is too low a standard.

Commission Conclusion. As noted by the applicants, "both Cinergy and Duke Energy take pride in their shared commitment to provide reliable utility service, and this dedication to reliability will continue to the benefit of all of CG&E's consumers." The Commission believes that any decline in electric distribution reliability is unacceptable. Unstable and unreliable customer care and utility service should not be the result of the merger. The Commission's authority to ensure service reliability will not be affected by this merger. If the Commission finds that reliability is diminishing, as compared with current levels, the Commission will have authority under current rules to take appropriate actions. Title 49 of the Revised Code also provides other avenues

for the commenters or other individuals to seek remedies if they are concerned that reliability is declining. The Commission reads staff's recommendations in these proceedings as merely providing a threshold at which automatic actions will occur. The Commission is not precluded from ordering CG&E to make additional expenditures to improve service quality. Therefore, the Commission adopts staff's recommendations with regard to electric service reliability.

With regard to CG&E's natural gas distribution network, the Commission would note that it recently approved the institution of a rider to fund the improvement or replacement of certain portions of CG&E's natural gas distribution network. In addition, as noted above, the merger will not impair the Commission's authority to ensure safe and reliable natural gas service.

(16) Customer Service

Application. In the application, it was noted that both Cinergy and Duke have long traditions of superior customer service and have been nationally recognized for their excellence. They noted that Cinergy was recognized for call center operational excellence and customer satisfaction under the J.D. Power and Associates Certified Call Center Program. The applicants claim that the current level of customer service will not change as a result of the merger.

Staff Recommendations. Staff makes two recommendations related to the continued performance of CG&E with respect to customer service issues after the merger. First, staff recommends that CG&E retain company officials in Ohio with the authority to resolve consumer complaints mediated by the Commission and its staff. Staff also recommends that the Commission have the ability to remotely monitor all Ohio-specific customer service calls, either from a location in Ohio or in a manner agreed to by staff.

Comments – Applicants. The applicants indicate that, at present, it is technologically infeasible for CG&E to enact real-time remote call monitoring that is specific to Ohio. The call center system currently used by CG&E allows customer service representatives to respond to Ohio, Kentucky, and Indiana calls but cannot

ensure Ohio-specific calls only. The applicants suggest that staff should audit Ohio calls using CG&E's recording technology. This would enable staff to review recorded calls on a random basis. Applicants also make several commitments related to customer service, including (a) providing a variety of customer programs and services that enable better customer management of energy bills, (b) having qualified and skilled customer service representatives available 24 hours a day, in order to respond to power outage calls, as well as continuing to provide access to online services and automated telephone service 24 hours a day, (c) having customer service representatives during core business hours to handle all types of customer inquiries, and (d) surveying customers regarding satisfaction.

Comments -- Other. OPAE and Cincinnati filed comments in response to the staff's recommendations. OPAE argues that staff's recommendations fail to address additional customer service issues that will be caused by the merger. OPAE claims that out-of-state call center personnel are likely to be unfamiliar with Ohio-specific programs and consumer protection rules. As a result, OPAE recommends that the Commission should require CG&E to maintain Ohio call centers which are dedicated to the Ohio service territory. OPAE also requests that CG&E be required to retain its existing low-income program specialists, trained in the operation of the percentage income payment plan (PIPP) and related matters. Cincinnati claims that, under staff's recommendation, there would be too few officials available for handling consumer complaints and the resolution of such complaints would take too long.

Commission Conclusion. Upon review of staff's recommendations and the comments received, we find that staff's recommendations are appropriate. The applicants' proposed modification is not acceptable. We believe that retaining company officials in Ohio with the authority to resolve consumer complaints will ensure that complaints that are mediated by the Commission and its staff will be resolved in a timely fashion. Staff already has access to CG&E's recorded customer calls. CG&E shall provide access to a remote call center system that will allow staff to monitor live calls from a remote location and will ensure that customer service calls are handled in the most efficient manner. Until the technology to separate live calls based on the state of origin does exist, CG&E should work with staff to

provide staff with adequate measures to monitor live Ohio calls. In addition, CG&E's customer service commitments will ensure that responsive customer service remains a top priority after the merger.

(17) Affiliate Transactions

Application. In the application, the applicants confirm that CG&E will continue to operate as a public utility following the merger, and will continue to comply with Ohio law with regard to transactions with affiliates. As a part of that compliance, the applicants request approval of several agreements among various affiliates.[4]

Staff Recommendations. Staff opines that CG&E must be protected from potential adverse impacts of actions by affiliates or the holding company that results from the proposed merger. Staff states that existing laws and regulations will adequately insulate CG&E and Ohio ratepayers.

Comments – Applicants. The applicants commit that CG&E will protect against cross-subsidization in transactions with affiliates and, in addition, note that transactions between CG&E and its affiliates will remain subject to the Commission's ratemaking authority.

Comments – Other. OPAE notes that the proposed affiliate transactions may exacerbate the market power of CG&E that, it contends, has resulted in only marginal levels of shopping. OPAE indicates that the application contemplates increased affiliate transactions, including the wheeling of power among various entities. OPAE recommends that the Commission undertake a market power analysis of the proposal or develop conditions to mitigate the resultant market power. OCC urges vigilance by the Commission in its review of affiliate transactions and suggests the initiation of a Commission-ordered investigation in this area. IEU-Ohio concurs with staff's recommendations.

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4 These agreements, listed in the application and in applicants' December 1, 2005, comments, comprise utility service agreement, services agreements, an operating companies service agreement, a money pool agreement, and a tax sharing agreement.

Commission Conclusion. The Commission agrees with staff's statement that CG&E, as a regulated public utility, must be protected against adverse actions by affiliates. The Commission notes that such protection is already provided under Ohio law and that the affiliates have committed to continue pricing services, under a variety of affiliate agreements, at fully embedded cost. Therefore, the Commission is satisfied that CG&E will be appropriately protected under the proposed merger. The Commission also finds that the proposed affiliate agreements are acceptable and should be approved.

(18) DENA Assets

Application. Testimony filed by the applicants in support of the proposed merger refers to the transfer to CG&E of certain generation assets that are located in the Midwest and currently owned by Duke Energy North America (DENA assets). In that testimony, the applicants explain that five natural gas-fired, combined-cycle plants (or, in one case, a partial interest therein), with a combined generating capacity of more than 3600 megawatts, would be transferred at book value. According to that testimony, revenues from the dispatch of the DENA assets do not meet the cash costs associated with their operation. However, the testimony notes that CG&E would enter into an arrangement to assure that the transfer would not impact CG&E.

Staff Recommendations. In CG&E's RSP case, the Commission allowed the creation of a system reliability tracker (SRT) and a fuel and purchased power tracker (FPP). Staff notes that in *In the Matter of the Application of The Cincinnati Gas & Electric Company To Adjust and Set its System Reliability Tracker Market Price*, 05-724-EL-UNC, the Commission approved a stipulation relating to the approval of the SRT rate. As a part of that stipulation, CG&E agreed that Commission approval would be required prior to any recovery in the SRT rider for the use of DENA assets. Likewise, Commission approval is required for the FPP rider. Therefore, staff opined that no further protection is necessary with regard to the DENA assets.

Comments – Applicants. In their comments, the applicants stress that generation is deregulated in Ohio, meaning that there is no generation rate base through which to pass costs related to the DENA assets on to customers. The applicants also note that

CG&E's market-based price for generation was approved by the Commission in the RSP case and can not, therefore, be changed by CG&E without Commission approval. Third, the applicants acknowledge that CG&E cannot pass costs related to the DENA assets through the SRT or the FPP without Commission approval since, with regard to both of those riders, the Commission regularly approves the level of recovery. In addition, the applicants point to the stipulation in the recent SRT case, noting that the Commission will hold a hearing if any interested party is concerned about use of DENA assets in the SRT. Finally, the applicants note that the SRT and FPP rates are limited to recovery of costs incurred in CG&E's "currently-owned generating units."

Comments – Other. The Schools suggest that significant issues remain with regard to the DENA assets, requiring discovery and a hearing. OCC believes that the DENA asset transfer will create significant risks for customers, based on the possibility that uneconomic power from those assets is used to supply CG&E's load associated with standard service offerings, with little corresponding benefit. OCC states that it is not assured that costs associated with the DENA assets will not be charged to residential customers and proposes a series of conditions designed to allay its concerns. Formica complains that there is insufficient evidence relating to the DENA assets and suggests that the applicants be required to demonstrate the prudence of the DENA asset transfer. IEU-Ohio urges the Commission to investigate the proposed transfer of DENA assets, the value of the transfer to the applicants, and any appropriate conditions, in order to ensure that customers will not be harmed. OPAE asserts that Ohio customers of CG&E should be held harmless from any costs associated with the DENA assets.

Commission Conclusion. The Commission has reviewed the RSP case, the SRT stipulation and the FPP rider currently under consideration in *In the Matter of the Regulation of the Fuel and Economy Purchased Power Component of The Cincinnati Gas & Electric Company's Market-Based Standard Service Offer*, Case No. 05-806-EL-UNC. The Commission finds that costs that may be related to the transfer of the DENA assets will not be able to be passed on to Ohio customers without the approval of the Commission. As subsequent approval would be required, the present case is not the appropriate forum in which to consider such costs.

(19) MISO and RTO Membership

Application. As part of the application, the applicants note that Cinergy is currently a member of the Midwest Independent Transmission System Operator, Inc. (MISO), a regional transmission organization (RTO), and that, after the merger, Cinergy's commitment to MISO will continue. Applicants note that the transaction will further the development of MISO because Cinergy and Duke will engage in power sales and will be purchasing transmission service to deliver power between and among their regulated public utility operating companies. They note that additional power transfers across MISO and PJM Interconnection, L.L.C. (PJM), which separate the Cinergy and Duke control areas, supports the continued success of MISO.

Staff Recommendations. In its recommendations, staff notes that CG&E is presently a member of MISO. Staff also notes that the existing Duke affiliates do not belong to any RTO. Staff supports CG&E's commitment to maintain its membership in MISO.

Comments – Applicants. The applicants do not address this issue in their comments.

Comments – Other. IEU-Ohio supports staff's recommendation with regard to Cinergy's membership in MISO, but urges the Commission to review the interaction of MISO and PJM in Ohio. IEU-Ohio raises a concern that the costs of RTO participation continue to grow and the elimination of the seams issues may not be occurring. OCC also suggests that any filing with the Federal Energy Regulatory Commission (FERC) regarding CG&E's membership in or withdrawal from an RTO should be contingent upon state regulatory approval.

Commission Conclusion. Under Section 4928.12(A), Revised Code, no entity shall own or control transmission facilities in Ohio unless the entity is a member of, and transfers control of those facilities to, one or more qualifying transmission entities. In addition, each such entity, under Section 4928.12(B), Revised Code, must meet nine requirements related to control of generation facilities, minimizing pancaked transmission rates, service reliability, governance, and insuring comparable and non-discriminatory transmission access and service. In the independent transmission plan developed in its electric transition

plan, CG&E elected to belong to MISO, which is an RTO approved by the FERC. *See In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan,* Case No. 99-1658-EL-ETP, *et al.*, Opinion and Order (August 31, 2000). At that time, CG&E determined, in part, that membership in MISO best serves service reliability and would best meet the nine requirements of Section 4928.12, Revised Code. The Commission supports Cinergy's plan to maintain its RTO membership. We believe that any change in Cinergy's RTO membership after the merger should be considered carefully and that CG&E should provide details and justification for a change in RTO to the Commission in advance of such a change. Because Ohio is somewhat unusual in that two RTOs serve Ohio, we will continue to review the interaction of MISO and PJM to ensure that congestion among RTO members is limited, transmission constraints are addressed, pancaked transmission rates are minimized, and there is an open and competitive electric generation marketplace which eliminates barriers to entry.

(20) Gas Choice

Staff Recommendations. CG&E's gas choice program is intended to promote a diversity of suppliers of natural gas and increase the competitive market for natural gas. The gas choice program permits customers to choose, as their provider of natural gas, either CG&E or another competitive natural gas marketer. To date, participation in CG&E's choice program has not exceeded five percent of residential customers. Staff recommends that, within three months after the close of the merger, CG&E should arrange a collaborative workshop, including the staff, qualified marketers and other interested parties, to discuss issued related to CG&E's gas choice program. In addition, staff recommends that CG&E should purchase receivables of qualified natural gas marketers without a discount.

Comments – Applicants. In its comments, the applicants agree that CG&E will arrange a collaborative workshop within three months after the close of the merger, to discuss issues related to its gas choice program. They also state that they agree in principle with staff's recommendations. They agree to take the necessary steps to purchase the receivables of competitive natural gas marketers without a discount, but their agreement is

conditioned upon the Commission allowing CG&E to establish gas and electric uncollectible expense recovery mechanisms (riders) consistent with similar recovery mechanisms approved by the Commission for other utility companies.

Comments – Other. IGS raises a concern with staff's recommendation, claiming that it would not resolve the gas choice program issues and urging the Commission to conduct a hearing on structural issues in the competitive marketplace. Direct Energy urges the Commission to deny the merger application unless conditions can be imposed to ensure increased customer shopping in the gas choice program. It also urges the Commission to undertake a comprehensive review of CG&E's gas choice program. IEU-Ohio claims that, if uncollectible expense riders are going to be considered in this case, the customer classes affected by the proposal should be significantly narrowed such that the riders would not apply to large transportation customers. OPAE calls for a collaborative workshop to develop improvements to the company's gas choice program.

Commission Conclusion. We note that CG&E's gas choice program has not been as successful as the Commission had anticipated and that there is a myriad of reasons for the current state of customer shopping in CG&E's service territory. We also agree with staff that there are several issues associated with CG&E's gas choice program that are of concern to those involved in the program. We believe that the most logical approach to understanding the issues and to developing alternative strategies to resolve those issues is to hold a collaborative gas workshop. We therefore direct CG&E to hold such a collaborative workshop within three months of the approval of the merger. We encourage all affected parties to participate.

CG&E shall purchase receivables of competitive natural gas and electric marketers without a discount, as recommended by staff. In addition, the Commission finds that CG&E's request for gas and electric uncollectible expense recovery riders is reasonable. The riders will allow CG&E to recover the incremental gas and electric uncollectible expenses associated with disconnected or other final accounts, above the existing mechanisms for such recovery. This result is consistent with the Commission's approval of similar riders for other Ohio utilities. *In the Matter of*

the Joint Application of The East Ohio Gas Company d.b.a. Dominion East Ohio, Columbia Gas of Ohio Inc., Vectren Energy Delivery of Ohio, Northeast Ohio Natural Gas Corp., and Oxford Natural Gas Company for Approval of an Adjustment Mechanism to Recover Uncollectible Expenses, Case No. 04-1127-GA-UNC, Finding and Order (December 17, 2003); *In the Matter of the Application of Pike Natural Gas Company for Approval, Pursuant to Section 4929.11, Revised Code, of Tariffs to Recover Uncollectible Expenses Pursuant to an Automatic Adjustment Mechanism and for Such Accounting Authority as May Be Required to Defer Uncollectible Expenses for Future Recovery Through Such Adjustment Mechanism*, Case No. 04-1339-GA-UEX *et al.*, Finding and Order (January 26, 2005) and Entry on Rehearing (March 16, 2005).

(21) With regard to other issues and recommendations raised by other commenters but not addressed in this finding and order, the Commission finds that such issues and recommendations either are unrelated to our determination of whether the transaction proposed in the application meets the statutory standard or do not warrant adoption as part of these proceedings.

(22) Section 4905.402, Revised Code, requires the Commission to approve the application if we find that the proposal "will promote public convenience and result in the provision of adequate service for a reasonable rate rental, toll, or charge." As indicated in the application, the proposed merger will result in significant benefits to CG&E's customers. The resultant company will enjoy operational synergies, will be a financially stronger company, and will control substantial generation resources. At the same time, CG&E will continue to own and operate all of its electric distribution and transmission facilities and its current commercial generating facilities. In addition, CG&E will continue to be subject to the Commission's oversight of its customer service, safety and reliability performance. The Commission therefore finds that the application for approval of the proposed merger, with the additional commitments made by the applicants in their comments, should be approved, subject to the modifications and conditions set forth in this finding and order. The Commission will notify FERC of its approval of the application and that it will not protest any application pending before FERC that relates to this merger.

(23) On December 1, 2005, CG&E filed proposed tariff pages for Commission approval. The Commission finds that the rates, the terms and conditions, and the calculations set forth in the proposed tariffs should be approved. The new tariffs shall be effective on January 1, 2006, on a services-rendered basis.

(24) On December 15, 2005, the applicants and Cincinnati, Kroger, the Schools, Ohio Energy, and Interstate filed a stipulation and recommendation (stipulation) entered into among themselves, which they claim resolves all issues in these proceedings, asking for Commission review and approval. The Commission has reviewed this filing and believes that its actual effect is to modify those entities' previously filed comments in these proceedings. The deadline for the filing of reply comments was December 8, 2005. The Commission has reviewed the substance of the document and would note that nothing therein would lead us to modify our findings in these proceedings. In addition, we would note that the document includes certain obligations by and between the applicants and Cincinnati. The document itself notes that jurisdiction over those matters would rest in the Hamilton County Court of Common Pleas. The Commission, therefore, sees no need for its approval of the stipulation.

It is, therefore,

ORDERED, That the application, with the additional commitments made by applicants in comments filed in this docket, be approved, subject to the modifications and conditions set forth in this finding and order. It is, further,

ORDERED, That CG&E's application for authority to modify its current accounting procedures to defer costs be denied. It is, further,

ORDERED, That the affiliate agreements by and between CG&E and its affiliates, as set forth in the application and in applicants' December 1, 2005, comments, be approved. It is, further,

ORDERED, That the motions for intervention filed in these proceedings be denied. It is, further,

ORDERED, That the approvals set forth in this finding and order do not constitute state action for the purposes of antitrust laws. It is not our intent to insulate CG&E from the

provisions of any state or federal laws which prohibit the restraint of free trade. It is, further,

ORDERED, That the proposed tariffs of CG&E are approved as filed on December 1, 2005. It is, further,

ORDERED, That the proposed tariffs be effective January 1, 2006, on a services-rendered basis. It is, further,

ORDERED, That CG&E is authorized to file in final form four complete copies of tariffs consistent with this finding and order. One copy shall be filed with this case docket, one copy shall be filed with the applicant's TRF docket and the remaining two copies shall be designated for distribution to the electricity division of the Commission's utilities department. The applicant shall also update its tariffs previously filed electronically with the Commission's docketing division. Such final filing shall be completed prior to January 1, 2006. It is, further,

ORDERED, That a copy of this finding and order be served upon all interested persons, persons who have entered an appearance in these proceedings, parties of record, and the Federal Energy Regulatory Commission.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

JWK/SEF;geb

Entered in the Journal
DEC 21 2005

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2005-210-E - ORDER NO. 2005-684

DECEMBER 7, 2005

IN RE:	Application of Duke Energy Corporation for Authorization to Enter into a Business Combination Transaction with Cinergy Corporation.	))))	ORDER APPROVING STIPULATIONS AND MERGER

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Application of Duke Energy Corporation (Duke or the Company) for authorization to enter into a business combination transaction (the Merger) with Cinergy Corporation (Cinergy) (together, the Companies). The Application was filed pursuant to S.C. Code Ann. Section 58-27-1300 (Supp. 2004).

The Commission's Docketing Department instructed Duke to publish a Notice of Filing and Hearing in newspapers of general circulation in the area affected by the Company's Application. The Notice of Filing and Hearing indicated the nature of the Companies' Application and advised all interested Parties desiring participation in the scheduled proceeding of the manner and time in which to file appropriate pleadings. The Companies furnished affidavits demonstrating that the Notice was duly published in accordance with the Docketing Department's instructions.

According to the Application, Duke and Cinergy have entered into an Agreement and Plan of Merger by and among Duke Energy, Cinergy, Duke Energy Holding Corp., Deer Acquisition Corp, and Cougar Acquisition Corp. The Plan of Merger sets forth a series of mergers and restructuring transactions that will implement the business combination of Duke Energy and Cinergy. The Application describes the various transactions in detail.

A joint Petition to Intervene in this matter was filed by the Electric Cooperatives of South Carolina, Inc., Central Electric Power Cooperative, Inc., and Saluda Electric Cooperative, Inc. (the Coops.). A Petition to Intervene was also filed by the South Carolina Energy Users Committee (SCEUC). Duke filed a document in opposition to the Coops.' Joint Petition.

On October 7, 2005, the Office of Regulatory Staff (ORS) filed two Stipulations in the case and stated that the Stipulations settled all issues among the parties within this docket, and no outstanding issues remained. One Stipulation was executed between the Coops. and Duke, and the other was signed by ORS, SCEUC, and Duke. These are attached hereto as Order Exhibit 1 and Order Exhibit 2 respectively.

A hearing was commenced before the Commission on October 10, 2005, at 11:00 AM in the Commission's Hearing Room, with the Honorable Randy Mitchell, Chairman, presiding. Duke Energy was represented by William F. Austin, Esquire, and Richard L. Whitt, Esquire. The Coops. were represented by Frank R. Ellerbe, III, Esquire, and Bonnie D. Shealy, Esquire. SCEUC was represented by Scott Elliott, Esquire. The Office of Regulatory Staff was represented by Shannon B. Hudson, Esquire. Ellen T. Ruff,

Group Vice President of Planning and External Relations for Duke, testified in support of the Stipulations and the Application.

Subsequent to the hearing, this Commission issued Order No. 2005-606, dated October 17, 2005, holding that certain inquiries of the parties should be made in order to assist in the determination as to whether or not the proposed merger was in the public interest. A specific list of questions was attached to the Order, and a hearing officer was appointed to coordinate with the parties concerning the provision of the requested information. On October 18, 2005, Duke provided the responses to the inquiries in the form of an affidavit from Ms. Ruff. The matter is now ready for disposition. We believe that the proposed merger is in the public interest, and we approve it. We also adopt and approve the two Stipulations.

The Stipulation between ORS, SCEUC, and Duke states that Duke shall reduce its South Carolina retail base rates for a one year period by $40 million beginning with the second month following the close of the Merger. The rate reduction shall be accomplished by a rate decrement rider to existing base rates for a one-year period on a per kWh basis. Such provisions are certainly in the public interest. Further, this Stipulation gives South Carolina a "most favored nation" status with regard to the sharing of net merger savings among the States affected by the merger, which could allow South Carolina an even greater amount of savings than the $40 million under certain circumstances. Also, fuel savings allocable to South Carolina as a result of the Merger shall flow to retail customers through the South Carolina retail fuel clause. In addition, among other things, we would note that direct expenses associated with costs to achieve

the Merger shall be excluded from retail cost of service for ratemaking purposes. Duke shall bear the burden of proof to demonstrate in its first rate case after closing of the Merger that any capital costs associated with costs to achieve the Merger that Duke seeks to recover from South Carolina retail customers are to the benefit of South Carolina retail customers. We believe that all of these and the other points in the Stipulation inure to the benefit of the South Carolina Duke electric retail customer, and, therefore, the adoption and approval of this Stipulation is in the public interest.

In addition, adoption and approval of the Stipulation between the Coops. and Duke are in the public interest. Among other things, this Stipulation states that Duke's transmission system in South Carolina will be operated in a safe and reasonable manner. Duke also agrees to support the establishment of a transmission planning process similar to that underway in North Carolina. Other provisions involve a pledge by all parties to adhere to all provisions of the Territorial Assignment Act and to engage in good faith negotiations regarding the acquisition, joint ownership, operation and/or maintenance of transmission facilities owned by Duke.

With regard to the merger, Ruff's testimony stated that Duke and Cinergy entered into an Agreement and Plan of Merger on May 8, 2005, which was amended on July 11, 2005, to include provisions allowing for the rollover of the respective companies' dividend retirement plans. Under the Merger Agreement, the proposed Merger will be accomplished via an all-stock transaction. Through a series of mergers, conversions, and reorganizations, Duke Power, Duke Capital LLC, Duke Energy Shared Services, LLC and Cinergy will become wholly-owned subsidiaries of a new Delaware holding

company to be named "Duke Energy Corporation" (New Duke Energy). Holders of Duke Energy common stock will receive New Duke Energy common stock on a one-for-one basis, and holders of Cinergy common stock will receive 1.56 shares of New Duke energy common stock for each share of Cinergy common stock held. After completion of the Merger, Duke Energy shareholders will own approximately 76% of the New Duke Energy holding company stock, and Cinergy shareholders will own approximately 24% of the New Duke Energy holding company stock.

II. ADOPTION OF STIPULATIONS AND APPROVAL OF MERGER

Based on the Stipulations, the testimony and exhibits presented, and the responses to the questions contained in Order No. 2005-606, the Commission adopts, as a comprehensive compromise settlement on all issues, all terms and provisions of the two Stipulations as just and reasonable and in the public interest. Further, the Merger is approved as being in the public interest, subject to the terms of the approved Stipulations among the parties.

III. DECREE

Wherefore, it is ordered:

1. That the Settlement entered into by all of the Parties, as embodied in the two Stipulations, is adopted as just and reasonable and in the public interest.

2. That the Merger, subject to the terms of the two Stipulations, is approved as being in the public interest.

3. That this Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Randy Mitchell, Chairman

ATTEST:

G. O'Neal Hamilton, Vice Chairman

(SEAL)

Attachments to Order

STIPULATIONS

to be attached as
Hearing Exhibit No. 1
and No. 2

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2005-210-E

In Re:

Application of Duke Energy Corporation for Authorization to Enter into a Business Combination Transaction with Cinergy Corporation

STIPULATION

WHEREAS Intervenors The Electric Cooperatives of SC, Inc., Central Electric Power Cooperative, Inc. and Saluda River Electric Cooperative (herein collectively "Cooperatives") have petitioned to intervene in the captioned proceeding stating their intent to protect their interests in connection with the proposed merger being considered in this docket; and

WHEREAS Duke Energy Corporation ("Duke") has opposed the intervention of the Cooperatives; and

WHEREAS the Cooperatives and Duke have reached agreement on certain items as set forth below in order to resolve matters in dispute between them in this docket.

NOW THEREFORE, the Cooperatives and Duke agree to the following:

1. Duke agrees that its transmission system in the state of South Carolina will be operated and maintained in a safe and reliable manner.

2. In accordance with applicable FERC procedures, Duke will consent to the anticipated assignment of the following agreements from New Horizon Electric Cooperative Inc. to its designee: Service Agreement for Network

Integration Transmission Service dated October 30, 2000, as amended and Network Operating Agreement dated October 30, 2000, as amended.

3. Duke agrees that it will support the establishment of a transmission planning process similar to the planning process underway in North Carolina which is sponsored by the North Carolina Utilities Commission that will provide a meaningful opportunity for stakeholders such as Cooperatives to participate in plans to meet the future needs of serving the native load in South Carolina.

4. Duke and Cooperatives agree that they will adhere to all provisions of the Territorial Assignment Act of the South Carolina Code as well as Act 179 of 2004. With respect to Act 179, the Cooperatives and Duke agree that the document titled "Statement" and dated November 17, 2003, attached as exhibit A to this stipulation is an accurate description of the intent and effect of that Act.

5. Duke states that it does not at present have any plans to seek confidential treatment of retail service contracts which it must file with the Public Service Commission. Duke acknowledges further that, should its plans change such that it does seek such treatment in the future, Cooperatives (including individual members of The Electric Cooperatives of South Carolina, Inc.) shall have the right to apply to the Public Service Commission to obtain the right to review such contracts pursuant to appropriate protective orders. Duke will not contest the standing of Cooperatives, including the individual members, to make such application.

6. Duke agrees to engage in good faith negotiations with the Cooperatives regarding the acquisition, joint ownership, operation and/or maintenance of transmission facilities owned by Duke. Any such negotiations shall commence after the closing of the Merger and any agreement reached by the Parties on such acquisition, joint ownership, operation and/or maintenance shall be subject to any required approvals including approvals required by the Federal Energy Regulatory Commission, the South Carolina Public Service Commission, and/or the North Carolina Utilities Commission.

7. Duke will withdraw its opposition to the intervention of Cooperatives in this docket and Cooperatives will not oppose the approval sought by Duke for its proposed merger with Cinergy Corp.

8. Duke shall pre-file the prepared direct testimony of Ellen T. Ruff, Group Vice President, Duke Power, Planning and External Relations, consistent with and in support of this Stipulation. The Parties agree to stipulate to such testimony so that the Commission may admit it into the record without objection or cross-examination by any of the Parties.

9. The Parties agree that Ms. Ruff's testimony and this Stipulation shall be sufficient to support the Commission's approval of Duke's application in this docket, and no other party may offer additional evidence.

10. Duke shall withdraw the pre-filed direct testimonies (including any exhibits) of Dr. Ruth G. Shaw, James E. Rogers, and Myron L. Caldwell filed on August 29, 2005.

11. This Stipulation contains the complete agreement of the Parties. There are no other terms and condition to which the Parties have agreed. All discussions among the Parties have been integrated into the terms of this Stipulation.

12. If the Commission should decline to approve the Stipulation in its entirety, then any party desiring to do so, may withdraw from the Stipulation without penalty, within three (3) days of receiving notice of the any such decision, by providing written notice of withdrawal via electronic mail to all parties in that time period.

13. This Stipulation shall be interpreted according to South Carolina Law.

14. Each party acknowledges its consent and agreement to this Stipulation by authorizing its counsel to affix his or her signature to this Stipulation where indicated below. Counsel's signature represents his or her representation that his or her client has authorized the execution of the Stipulation. Facsimile signatures and email signatures shall be as effective as original signatures to bind any party. This document may be signed in counterparts, with the various signature pages, combined with the body of this document constituting an original and provable copy of this Stipulation.

15. The commitments and agreements contained in this Stipulation are conditioned on the closing of the merger between Duke and Cinergy Corp.

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Counsel for The Electric Cooperatives of SC, Inc., Central Electric Power Cooperative, Inc. and Saluda River Electric Cooperative

Date: October 6, 2005

Exhibit A

STATEMENT
November 17, 2003

The Electric Cooperatives of South Carolina, The Municipal Association of South Carolina, The South Carolina Association of Municipal Power Systems, Piedmont Municipal Power Authority, and the Investor-Owned Utilities (SCANA, Progress Energy, and Duke Power) submit this memorandum to explain the intended effect of the Electric Cooperatives Act of 2004.

1. PROCEDURAL BACKGROUND

In late 2001, the Electric Cooperatives ("cooperatives") approached Senator McConnell and Senator Moore regarding the current legislative limitations placed upon the cooperatives by their 1930s-era empowering act. Under the cooperatives' enabling legislation, cooperatives may be organized for the purpose of supplying electricity in rural areas. Section 33-49-20(1) of the South Carolina Code defines a "rural area" as "any area not included within the boundaries of an incorporated or unincorporated city, town, village or borough having a population in excess of 2,500 persons." In other words, except for certain circumstances, a cooperative may not extend service to a premise in a town with a population over 2,500. This is known as the "Hamlet Rule" or the "2500 Rule."

The cooperatives prepared a proposal addressing the cooperatives' Hamlet Rule concerns. Shortly thereafter, the cooperatives provided proposed legislation eliminating the rural designation and repealing the Hamlet Rule. At the direction of Senators McConnell and Moore, Senate Judiciary Committee staff attorney Mike Coulck asked for the investor-owned utilities' ("IOUs") and municipalities' input to ensure that all electric suppliers were able to address their concerns with how the cooperative proposal may or may not affect current service rights. Specifically, the electric suppliers were asked to propose language that would address their concerns regarding the cooperatives' proposed Hamlet Rule legislation. Over the past year, representatives of the electric suppliers and the municipalities have met numerous times to compare and compromise legislative

proposals. Despite the electric suppliers encountering several impasses concerning compromise language at the early stages of this project, the electric suppliers have agreed on a legislative proposal that adequately addresses all electric suppliers' concerns.

2. OVERVIEW

The purpose of the bill is to alter the legal powers of electric cooperatives so as to remove the present limitation on service rights of cooperatives outside of rural areas while at the same time protecting the service rights of IOUs and municipally-owned electrical utilities ("electric cities"). The bill would: (1) eliminate the concept of "rural areas" in connection with the service rights of cooperatives; (2) change the name "rural electric cooperative" to "electric cooperative;" (3) permit cooperatives to serve new customers within their previously assigned territory or previously unassigned territory after annexation or incorporation into a municipality, subject to the consent of the municipality; and (4) protect the rights of IOUs to serve within their previously assigned territory or previously unassigned territory after annexation or incorporation into a municipality, subject to the consent of the municipality. The bill would not empower cooperatives to serve new customers after annexation or incorporation into an electric city unless expressly approved by the municipality and its commission or board of public works, if any. Additionally, the bill would not alter existing cooperative service rights with regard to annexations occurring prior to the effective date of this bill. The constitutional and statutory powers of municipalities would be expressly protected, but not enlarged.

3. THE CONTENTS OF THE BILL

Under current law, cooperatives are restricted from serving in municipalities of greater than 2,500 population, subject to specified exceptions, by operation of the existing

definition of "rural areas." The bill would abolish the "rural" designation and the 2,500-population limit, thus abolishing the Hamlet or 2,500 Rule. The bill conveys equal status relative to the service rights of electric cooperatives and IOUs to serve new premises in future annexed or incorporated areas. After annexation or incorporation, a cooperative would have the authority to serve in areas that had previously been assigned to it by the Public Service Commission pursuant to the Territorial Assignment Act, subject to the consent of the municipality. A cooperative would not have authority to serve in an area which had been assigned to an IOU prior to annexation or incorporation. An IOU would no longer have the authority to serve in territory that had been assigned to a cooperative prior to annexation or incorporation. Both cooperatives and IOUs would have the authority to serve in areas that had been unassigned prior to annexation or incorporation, subject to the consent of the municipality. As in the current statute, a cooperative has statutory-implied consent, except in electric cities, to extend new service in the permitted parts of the newly annexed or incorporated area until the municipality acts.

The bill protects current service rights in municipal limits as they exist on the date of the enactment of this bill. If an electric supplier can legally serve within the existing municipal limits on the effective date of the Act, the Act does not affect such rights. The bill does not affect existing service to any premises by an IOU, cooperative, or electric city. The bill allows an electric supplier to take over service to premises already being served by another electric supplier only under the limited circumstances and subject to procedures existing in current law.

4. IMPACT OF CORRIDORS

Under S.C. Code Ann. § 58-27-620(1)(d), electric suppliers have the exclusive right

to serve within 300 feet of their electric lines as such lines existed on July 1, 1969, in areas outside of municipalities. Where existing electric lines of electric suppliers parallel or overlap, special rules apply. Those areas within 300 feet of such lines are called corridors.

Under this bill, the service rights of an electric supplier within its previously assigned territory after annexation or incorporation would include all corridors lying within the boundaries of the assigned territory as if the corridors were a part of the assigned territory. As under present law, corridor rights under the Territorial Assignment Act will have no effect after annexation or incorporation.

5. OTHER PROVISIONS

(1) The bill would not affect the statutory powers of the Public Service Authority or transmission cooperatives. (2) The bill is prospective in application. The change in the powers of cooperatives and IOUs only apply within areas annexed or incorporated after the effective date of the bill. (3) The bill would exempt electric cities from its application by withholding from cooperatives any legal authority to provide any new service within such cities after annexation or incorporation unless expressly permitted to do so by ordinance of the municipal council and contractual consent of the board or commission of public works, if any. (4) The bill expressly recognizes and protects, but does not expand, the constitutional, home rule, and police powers of municipalities. The bill does not directly restrict municipal authority but only would restrict the powers of cooperatives and IOUs to accept service rights in certain annexed or newly incorporated areas. (5) The bill contains a non-severability clause. If any part of the bill is found unconstitutional, the entire bill falls.

6. CONCLUSION

It is the collective opinion of the interested parties that the enactment of this bill

would serve the public interest by modernizing the statutory method established for service rights for electric suppliers and establishing parity of rights after annexation for electric cooperatives and IOUs while at the same time protecting the service rights of electric cities and preserving the constitutional and statutory powers of all municipalities.

I:\s-jud\correspondence\8002.Electric Cooperatives Act of 2004.vvs.doc

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO: 2005-210-E

October 6, 2005

IN RE:

Application of	)	
Duke Energy Corporation for	)	**STIPULATION**
Authorization to Enter into a	)	
Business Combination Transaction	)	
with Cinergy Corporation	)	

This Stipulation sets forth the agreement among the Office of Regulatory Staff of South Carolina ("ORS"), South Carolina Energy Users Committee ("SCEUC"), and Duke Energy Corporation ("Duke"), collectively referred to as the "Parties", as to an appropriate resolution of issues in the above-captioned proceedings. The above-captioned proceeding has been established by the Public Service Commission of South Carolina ("Commission") pursuant to the Application of Duke for authorization to enter into a business combination transaction with Cinergy Corp. (the "Merger"), which was filed with the Commission on July 15, 2005, in Docket No: 2005-210-E. The Parties have engaged in discussions to determine if a settlement of the issues would be in their best interests, and have each determined that their interests and the public interest would be best served by settling all issues pending in the above-captioned case under the terms and conditions set forth below.

The Parties will, as soon as possible after execution of this Stipulation, file it with the Commission, together with the prepared direct testimony of Ellen T. Ruff, Group Vice President, Duke Power, Planning and External Relations, and a request that the

Commission consider the Stipulation and such other matters as the Commission may determine at a hearing (presently scheduled for October 10, 2005 (the "Hearing")).

The stipulated agreements are as follows:

1. Sharing of Net Merger Savings

A. Duke shall reduce its South Carolina retail base rates for a one year period by $40 million beginning with the second month following the close of the Merger. The rate reduction shall be accomplished by a rate decrement rider to existing base rates for a one-year period on a per kWh basis.

B. Following approval of the Merger by the state commissions of North Carolina, and Ohio, and approval of the affiliate agreements filed with the Indiana Utility Regulatory Commission in connection with the Merger, any sharing mechanisms pursuant to which merger savings are shared with retail customers in each of these states will be reviewed to identify the utility whose electric retail customers will receive the largest percentage of the net merger savings to be achieved over the first five years after closing of the merger allocated to that utility. If the application of that percentage to the net savings allocable to South Carolina retail would result in a greater savings sharing than $40 million, then the rate reduction described in Section 1.A. above for South Carolina retail customers will be increased to match the application of that percentage to the net savings allocable to South Carolina retail. Application of this methodology is intended to ensure that South Carolina retail customers receive the benefit of a "most favored nation" status with regard to the sharing of net merger savings among the states named above. In no event will the application of the methodology cause South Carolina's $40 million share of savings to be reduced.

C. In addition to the $40 million shared savings discussed above, any fuel savings allocable to South Carolina as a result of the Merger shall flow to retail customers through the South Carolina retail fuel clause.

D. The base rate reduction described in Sections 1.A and 1.B is conditioned on the Commission's approval and issuance of an accounting order ("Accounting Order") that permits Duke to amortize the impact of the merger savings rate decrement over a five year period beginning with the year the decrement is implemented. The Parties shall support Duke's request to the Commission for an Accounting Order.

E. The impact of the rate decrement, costs to achieve and cost savings allocable to South Carolina shall be reflected in Duke's quarterly surveillance reports as realized.

2. Following the close of the Merger, Duke shall transition its current pro forma capital structure used for quarterly surveillance reports to a pro forma capital structure consisting of 55% equity and 45% long-term debt by December 31, 2007. The starting point for the transition shall be the equity percentage used in the most recent quarterly surveillance report filed in South Carolina prior to the closing of the Merger.

3. After December 31, 2007, the 55% equity, 45% long-term debt capital structure shall remain in effect and be used in Duke's quarterly surveillance reports until changed by action of the Commission, either upon a general rate case, or petition by Duke, the ORS or other parties. The Company will include the actual capital structure of Duke for informational purposes in the quarterly surveillance reports.

4. Duke shall extend its sharing of non-firm Bulk Power Marketing profits through Advance SC LLC for an additional three years or until a general rate case, whichever occurs first. The additional three year time period shall include profits realized through December 31, 2010.

5. Direct expenses associated with costs to achieve the Merger shall be excluded from retail cost of service for ratemaking purposes. Duke shall bear the burden of proof to demonstrate in its first rate case after closing of the Merger that any capital costs associated with costs to achieve the Merger that Duke seeks to recover from South Carolina retail customers are to the benefit of South Carolina retail customers.

6. Any increase in debt rates because of downgrading as a result of the Merger shall be proformed out for retail ratemaking purposes.

7. For its South Carolina operations, Duke shall abide by its North Carolina Code of Conduct, including any Merger related amendments to the Code of Conduct approved by the North Carolina Utilities Commission.

8. Duke shall pre-file the prepared direct testimony of Ellen T. Ruff, Group Vice President, Duke Power, Planning and External Relations, in support of this Stipulation. The Parties agree to stipulate to such testimony so that the Commission may admit it into the record without objection or cross-examination by any of the Parties.

9. The Parties agree that Ms. Ruff's testimony and this Stipulation shall be sufficient to support the Commission's approval of Duke's application in this docket, and no other party may offer additional evidence.

10. Duke shall withdraw the pre-filed direct testimonies (including any exhibits) of Dr. Ruth G. Shaw, James E. Rogers, and Myron L. Caldwell filed on August 29, 2005.

11. The commitments and agreements contained in this Stipulation are conditioned on the closing of the merger between Duke and Cinergy Corp.

12. This Stipulation contains the complete agreement of the Parties. There are no other terms and condition to which the Parties have agreed. All discussions among the Parties have been integrated into the terms of this Stipulation.

13. This Stipulation reflects a balancing of many important interests affected by Duke's Application in this docket. The Parties recognize that this Stipulation, if adopted by the Commission, would represent a fair, reasonable and full resolution of all issues in the above-captioned proceeding. The Parties agree to cooperate in good faith with one another in recommending to the Commission that this Stipulation be accepted and approved by the Commission as in the public interest. The Parties agree to use their reasonable efforts to defend and support any Commission order approving this Stipulation.

14. This Stipulation shall not constrain, inhibit or impair any party's positions held in future proceedings. The Parties expressly agree that the positions taken in this Stipulation, the acceptance of the Stipulation, and their participation in the same shall have no precedential effect in any future proceeding involving any of the Parties. The Parties expressly reserve the right to assert any and all positions in future proceedings, even if contrary to a position taken in this stipulation.

15. If the Commission should decline to approve the Stipulation in its entirety, then any party desiring to do so, may withdraw from the Stipulation without penalty, within three (3) days of receiving notice of the any such decision, by providing written notice of withdrawal via electronic mail to all parties in that time period.

16. This Stipulation shall be interpreted according to South Carolina Law.

17. Each party acknowledges its consent and agreement to this Stipulation by authorizing its counsel to affix his or her signature to this Stipulation where indicated below. Counsel's signature represents his or her representation that his or her client has authorized the execution of the Stipulation. Facsimile signatures and email signatures shall be as effective as original signatures to bind any party. This document may be signed in

counterparts, with the various signature pages, combined with the body of this document constituting an original and provable copy of this Stipulation.

WE AGREE:

Representing and binding the Office of Regulatory Staff:

Shannon Bowyer Hudson

Shannon Bowyer Hudson
Office of Regulatory Staff
1441 Main Street, Suite 300
Columbia, South Carolina 29201
Phone: (803) 737-0889

Date: Oct. 5, 2005