

## **Preemptive Rights**

### ***Duke Energy Holding***

The Duke Energy Holding shareholders do not have preemptive rights. Thus, if additional shares of Duke Energy Holding common stock were issued, the current holders of Duke Energy Holding common stock would own a proportionately smaller interest in a larger number of outstanding shares of common stock to the extent that they do not participate in the additional issuance.

### ***Duke Energy***

The Duke Energy shareholders do not have preemptive rights. Thus, if additional shares of Duke Energy common stock, Duke Energy Serial Preferred Stock, Duke Energy Preferred Stock, Duke Energy Preferred Stock A or Duke Energy Preference Stock were issued, the current holders of such shares, to the extent that they do not participate in the additional issuance, would own a proportionately smaller interest in a larger number of outstanding capital stock.

### ***Cinergy***

The Cinergy shareholders do not have preemptive rights. Thus, if additional shares of Cinergy common stock were issued, the current holders of Cinergy common stock would own a proportionately smaller interest in a larger number of outstanding shares of common stock to the extent that they do not participate in the additional issuance.

## **Cumulative Voting Rights**

### ***Duke Energy Holding***

Holders of Duke Energy Holding do not have cumulative voting rights.

### ***Duke Energy***

Holders of Duke Energy common stock do not have cumulative voting rights.

### ***Cinergy***

Holders of Cinergy common stock do not have cumulative voting rights.

## **Dividends and Stock Repurchases**

### ***Duke Energy Holding***

The DGCL provides that, subject to any restrictions in a corporation's certificate of incorporation, dividends may be declared from the corporation's surplus, or, if there is no surplus, from its net profits for the fiscal year in which the dividend is declared and for the preceding fiscal year. Dividends may not be declared out of net profits, however, if the corporation's capital has been diminished to an amount less than the aggregate amount of all capital represented by the issued and outstanding stock of all classes having a preference upon the distribution of assets until the deficiency in the amount of capital represented by the issued and outstanding stock of all classes having a preference upon the distribution of assets is repaired. Furthermore, the DGCL generally provides that a corporation may redeem or repurchase its shares only if the redemption or repurchase would not impair the capital of the corporation. Subject to the rights, if any, of the holders of any class or series of preferred stock or any class or series of stock having a preference over or the right to participate with the common stock with respect to the payment of dividends, Duke Energy Holding's certificate of incorporation places no additional restrictions on the ability of its board of directors to declare dividends or redeem or repurchase shares of its capital stock.

### ***Duke Energy***

Subject to any restrictions in a North Carolina corporation's articles of incorporation, the corporation's board of directors may declare dividends so long as after giving effect to each dividend declaration, (i) the corporation can pay its debts as they become due, and (ii) the corporation's total assets are greater than the sum of its liabilities plus the amount that would be needed to satisfy the liquidation preference of any shares that are superior to the shares receiving the dividend. Duke Energy's articles of incorporation also restrict the board's ability to declare dividends unless dividends have been paid on the Preferred Stock, the Serial Preferred Stock and the Preference Stock and the company has made provision for payments due under the requirements of any sinking fund for the purchase or redemption of shares of any series of Preference Stock.

### ***Cinergy***

The provisions of the DGCL with respect to dividends and redemptions and repurchases of stock as described above, apply to Cinergy. Cinergy's certificate of incorporation places no additional restrictions on the ability of its board of directors to declare dividends, or redeem or repurchase shares of its capital stock.

## **Dissenters' or Appraisal Rights**

### ***Duke Energy Holding***

The DGCL provides that a shareholder may dissent from, and receive payment in cash for, the fair value of his or her shares as appraised by the Delaware Chancery Court in the event of, certain mergers and consolidations. However, shareholders do not have appraisal rights if the shares of stock they hold, at the record date for determination of shareholders entitled to vote at the meeting of shareholders to act upon the merger or consolidation, or on the record date with respect to action by written consent, are either:

- listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc.; or
- held of record by more than 2,000 shareholders.

Further, no appraisal rights are available to shareholders of the surviving corporation if the mergers did not require the vote of the shareholders of the surviving corporation.

Notwithstanding the foregoing, appraisal rights are available if shareholders are required by the terms of the merger agreement to accept for their shares anything other than:

- shares of stock of the surviving corporation;
- shares of stock of another corporation that are listed on a national securities exchange, designated as a national market system security as described above, or held of record by more than 2,000 shareholders;
- cash instead of fractional shares of stock; or
- any combination of the above.

Appraisal rights are also available under the DGCL in certain other circumstances including:

- in certain parent-subsidary corporation mergers; and
- in certain circumstances where the certificate of incorporation so provides.

### ***Duke Energy***

A shareholder of a North Carolina corporation participating in certain major corporate transactions may, under varying circumstances, be entitled to appraisal rights pursuant to which such shareholder may receive cash in the amount of the fair market value of his or her shares in lieu of the consideration the shareholder would otherwise receive in the transaction. Under the North Carolina statute, dissenters' rights are also available for certain amendments to a company's articles of incorporation and for a conversion of the corporation to another form of business entity. The North Carolina statute provides an exception to the dissenters' rights provisions for many, but not all, transactions involving public companies. That exception for shareholders of public companies, however, does not apply in the case of certain amendments of the companies' articles of incorporation or conversion. For a fuller discussion of the procedures for exercising dissenters' rights under the North Carolina statute, see "The Mergers—Dissenters' or Appraisal Rights" beginning on page 112.

### ***Cinergy***

The provisions of the DGCL with respect to appraisal rights, as described above, apply to Cinergy.

## **Record Date for Determining Shareholders Entitled to Vote**

### ***Duke Energy Holding***

As permitted under the DGCL, the Duke Energy Holding by-laws provide that in order that the corporation may determine the shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, the board of directors may fix a record date, which record date will not precede the date upon which the resolution fixing the record date is adopted by the board of directors, and which record date will not be more than 60 nor less than 10 days before the date of such meeting.

### ***Duke Energy***

As permitted under the NCBCA, the Duke Energy by-laws provide that the board of directors may fix a future date as the record date for one or more voting groups in order to determine the shareholders entitled to notice of a shareholders meeting, to demand a special meeting, to vote, or to take any other action. Such record date may not be more than 70 days before the meeting or action requiring a determination of shareholders.

### ***Cinergy***

As permitted under the DGCL, the Cinergy by-laws provide that in order that the corporation may determine the shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, the board of directors may fix a record date, which record date will not be more than 60 nor less than 10 days before the date of such meeting.

## **Notice of Shareholder Meetings**

### ***Duke Energy Holding***

As permitted under the DGCL, Duke Energy Holding's by-laws provide that, unless otherwise provided by law, Duke Energy Holding must notify shareholders between 10 and 60 days before any annual or special meeting of the time and place of the meeting. A notice of a special meeting must state the purpose or purposes for which the special meeting is called. Notices may be given by electronic transmission to the fullest extent permitted by the DGCL in a form of electronic transmission to which the shareholder has consented.

### ***Duke Energy Corporation***

As permitted under the NCBCA, Duke Energy's by-laws provide that the corporation must notify shareholders between 10 and 60 days before any annual or special meeting of the place, date and hour of the meeting. The notice must briefly describe the purpose or purposes of an annual or special meeting.

### ***Cinergy***

As permitted under the DGCL, Cinergy's by-laws provide that written or electronically transmitted notice, stating the place, day and hour of the meeting of shareholders and the purpose or purposes for which the meeting is called, shall be delivered by Cinergy between 10 and 60 days before the date of the meeting to each shareholder of record entitled to vote at such meeting.

## **Advance Notice of Shareholder Nominations for Directors and Shareholder Proposals**

### ***Duke Energy Holding***

Under the Duke Energy Holding by-laws, a shareholder who is a holder of record and is entitled to vote at an annual meeting of shareholders may bring business before the meeting and nominate persons for election to the board of directors, subject to the rights of holders of any class or series of Preferred Stock, by giving notice as described below. The shareholder must give written notice to the Secretary of Duke Energy Holding, by mail or personal delivery at the principal executive offices of Duke Energy Holding, not less than 90 days nor more than 120 days prior to the anniversary date of the immediately preceding annual meeting, except that in the event that the date of the annual meeting is more than 30 days before or more than 60 days after such anniversary date, notice by the shareholder to be timely must be received not later than the tenth day following the day on which notice of the date of the annual meeting was mailed or public announcement of the date of the meeting is first made by Duke Energy Holding, whichever first occurs and, in the case of an election of directors to be held at a special meeting of Duke Energy Holding shareholders, not earlier than the 90<sup>th</sup> day prior to such special meeting and not later than the later of the 60<sup>th</sup> day prior to such special meeting or the tenth day following the day on which public announcement of the date of the special meeting and of the nominees to be elected at such meeting is first made. A public announcement of an adjournment of an annual meeting will not start a new time period for the giving of notice. A notice must set forth a brief description of the business desired to be brought before the meeting and the reasons for conducting such business at the annual meeting, and if such business includes a proposal to amend the organizational documents of the company, a text of the proposed amendment; the name and address, as they appear on the company's books, of the shareholder proposing such business; the class and number of shares of the company that the shareholder owns beneficially; any material interest of the shareholder in such business; and, if the shareholder intends to solicit proxies in support of the proposal, a representation to that effect. A notice with respect to a nomination of a person for election to the board of directors must set forth the name and address of the shareholder who intends to make the nomination, a representation that the shareholder intends to appear at the meeting to make the nomination, a description of all arrangements or understandings between the shareholder, the nominee and any other person with respect to the nomination, such other information as would be required to be included in a proxy statement filed with the SEC had the nomination been made by the Duke Energy Holding board of directors, the consent of each nominee to serve as a director if elected and if the shareholder intends to solicit proxies in support of the nomination, a representation to that effect. If the shareholder does not appear or send a qualified representative to present the proposal at the annual meeting, the company need not present such proposal for a vote, notwithstanding that proxies in respect of such vote may have been received by the company. Only persons nominated in accordance with the above provisions are eligible to serve on the Duke Energy Holding board of directors.

### *Duke Energy*

Duke Energy's by-laws establish procedures that shareholders must follow to nominate persons for election to the board of directors or to propose business to be considered at an annual meeting of the shareholders. The shareholder making the nomination or proposal must be a shareholder at the time the notice described below is delivered to the company and must also be entitled to vote at the meeting of shareholders. The shareholder must deliver written notice to the Secretary of Duke Energy between 90 and 120 days before the first anniversary of the preceding year's annual meeting. If the date of the annual meeting is more than 30 days before or more than 60 days after such anniversary date, however, the shareholder's notice must be delivered not earlier than the close of business on the 120th day prior to such annual meeting and not later than the close of business on the later of the 90th day prior to such annual meeting or the 10th day following the day on which public announcement of the date of the meeting is first made by the corporation. The proposal notice must set forth a brief description of the business desired to be brought before the meeting, the reasons for conducting such business at the meeting and any material interest in such business of such shareholder and the beneficial owner, if any, on whose behalf the proposal is made. The nomination notice must also set forth certain information about the person submitting the notice, including the shareholder's name and address and the class and number of Duke Energy shares that the shareholder owns of record and beneficially. In addition, if the number of directors to be elected is increased and there is no public announcement by Duke Energy naming all of the nominees for director or specifying the size of the increased board of directors at least 100 days prior to the first anniversary of the preceding year's annual meeting, a shareholder's notice of a nomination with respect to new positions created by such increase will be considered timely if delivered not later than 10 days following the day on which the public announcement is first made by Duke Energy.

### *Cinergy*

For a shareholder to properly nominate a person for election to the board of directors, the shareholder must provide notice in writing to the Secretary of Cinergy received at the principle office of Cinergy not less than 50 days prior to the meeting; provided, however, that if less than 60 days notice or prior public disclosure of the date of the meeting is given to shareholders or made public, to be timely notice by a shareholder must be so received not later than the close of business on the tenth day following the day on which such notice of the date of the meeting was mailed or such public disclosure was made. Such shareholder's notice to the Secretary shall set forth: (a) as to each person whom the shareholder proposes to nominate for election as director: (i) the name, age, business address, and residence address of such person; (ii) the principal occupation or employment of such person; (iii) the class and number of any shares of capital stock of Cinergy that are beneficially owned by such person; and (iv) any other information relating to such person that is required to be disclosed in solicitations for proxies for the election of directors pursuant to any then existing rules or regulations promulgated under the Securities Exchange Act of 1934, as amended; and (b) as to the shareholder giving notice: (i) the name and record address of such shareholder; (ii) the class and number of shares of capital stock of Cinergy that are beneficially owned by such shareholder, and (iii) the period of time such shareholder has held such shares. Cinergy may require any proposed nominee to furnish such other information as may reasonably be required by Cinergy to determine the eligibility of such proposed nominee to serve as a director. No person otherwise eligible for election as a director shall be eligible for election as a director unless nominated as set forth herein.

For business to be properly brought before an annual meeting by a shareholder, such shareholder must have given timely notice in writing to the Secretary of Cinergy. To be timely, a shareholder's notice must be presented to the Secretary not less than 90 days nor more than 120 days prior to the anniversary date of the immediately preceding annual meeting of shareholders; provided, however, that in the event the annual meeting is called for a date that is not within 30 days before or after such

anniversary date, notice by the shareholder in order to be timely must be so received not later than the close of business on the 10th day following the day on which such notice of the date of the annual meeting was mailed or such public disclosure of the date of the annual meeting was made, whichever first occurs. To be in proper written form, a shareholder's notice to the Secretary must set forth as to each matter such shareholder proposes to bring before the annual meeting: a brief description of the business desired to be brought before the annual meeting and the reasons for conducting such business at the annual meeting; the name and record address of such shareholder; the class or series and number of shares of capital stock of the Corporation which are owned beneficially or of record by such shareholder; a description of all arrangements or understandings between such shareholder and any other person or persons (including their names) in connection with the proposal of such business by such shareholders and any material interest of such shareholder in such business; and a representation that such shareholder intends to appear in person or by proxy at the annual meeting to bring such business before the meeting.

### **Shareholder Inspection of Corporate Records**

#### ***Duke Energy Holding***

The DGCL provides any shareholder with the right to inspect the company's stock ledger, shareholder lists and other books and records for a purpose reasonably related to the person's interest as a shareholder. A complete list of the shareholders entitled to vote at a shareholders meeting must be available for shareholder inspection at least 10 days before the meeting.

#### ***Duke Energy***

Under the NCBCA, the list of shareholders must be available for inspection by any shareholder beginning 2 business days after notice of the shareholders meeting is given. This could result in the list becoming available as few as 8 days prior to the meeting if notice of the meeting is given 10 days before the meeting.

#### ***Cinergy***

The provisions of the DGCL, with respect to shareholder inspection of corporate records, as described above, apply to Cinergy.

### **Interested Director Transactions**

#### ***Duke Energy Holding***

The DGCL generally permits transactions involving a corporation and an interested director of that corporation if: (i) the material facts as to the director's or officer's relationship or interest and as to the transaction are disclosed or are known to the board of directors or a committee thereof, and the board of directors or committee in good faith authorizes the transaction by the affirmative vote of a majority of the disinterested directors, even though the disinterested directors represent less than a quorum; or (ii) the material facts as to the director's or officer's relationship or interest and as to the transaction are disclosed or are known to the shareholders entitled to vote thereon, and the transaction is specifically approved in good faith by vote of the shareholders; or (iii) the transaction is fair to the corporation. The DGCL allows loans to officers and employees whenever, in the judgment of the directors, such loan may reasonably be expected to benefit the corporation.

#### ***Duke Energy***

The NCBCA generally permits transactions involving a North Carolina corporation and an interested director of that corporation if: (i) the material facts of the transaction and the director's

interest are disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorizes, approves or ratifies the transaction; (ii) the material facts of the transaction and the director's interest are disclosed or known to the shareholders entitled to vote and they authorize, approve, or ratify the transaction; or (iii) the transaction is fair to the corporation. The NCBCA prohibits loans to directors or the guaranteeing of their obligations by a North Carolina corporation unless approved by a majority vote of disinterested shareholders or unless the corporation's board of directors determines that the loan or guarantee benefits the corporation and either approves the specific loan or guarantee or a general plan of loans and guarantees by the corporation.

### *Cinergy*

The provisions of the DGCL, with respect to interested director transactions, as described above, apply to Cinergy.

## **LEGAL MATTERS**

The validity of the Duke Energy Holding common stock offered by this joint proxy statement/prospectus will be passed upon for Duke Energy Holding by Skadden, Arps, Slate, Meagher & Flom LLP.

## **EXPERTS**

The consolidated financial statements, the related financial statement schedule, and management's report on the effectiveness of internal control over financial reporting incorporated in this joint proxy statement/prospectus by reference from the Duke Energy Corporation Annual Report on Form 10-K for the year ended December 31, 2004 have been audited by Deloitte & Touche LLP, an independent registered public accounting firm, as stated in their reports (which reports (1) express an unqualified opinion on the financial statements and financial statement schedule and includes an explanatory paragraph regarding the adoption of new accounting pronouncements and an explanatory paragraph regarding agreements in February 2005 to sell Texas Eastern Products Pipeline Company LLC to Enterprise GP Holdings L.P. and to transfer a 19.7% interest in Duke Energy Field Services to ConocoPhillips, (2) express an unqualified opinion on management's assessment regarding the effectiveness of internal control over financial reporting, and (3) express an unqualified opinion on the effectiveness of internal control over financial reporting), which are incorporated herein by reference, and have been so incorporated in reliance upon the reports of such firm given upon their authority as experts in accounting and auditing.

The consolidated financial statements, the related financial statement schedule, and management's report on the effectiveness of internal control over financial reporting incorporated in this joint proxy statement/prospectus by reference from the Cinergy Corp. Annual Report on Form 10-K for the year ended December 31, 2004 have been audited by Deloitte & Touche LLP, an independent registered public accounting firm, as stated in their reports (which reports (1) express an unqualified opinion on the financial statements and financial statement schedule and include an explanatory paragraph referring to the Cinergy's change effective in January 1, 2003 in its accounting method for asset retirement obligations; change effective January 1, 2003 in its accounting for stock-based compensation; and change effective July 1, 2003 in its accounting for the consolidation of variable-interest entities, (2) express an unqualified opinion on management's assessment regarding the effectiveness of internal control over financial reporting, and (3) express an unqualified opinion on the effectiveness of internal control over financial reporting), which are incorporated herein by reference, and have been so incorporated in reliance upon the reports of such firm given upon their authority as experts in accounting and auditing.

## SHAREHOLDER PROPOSALS

### Duke Energy

Proposals on matters appropriate for shareholder consideration consistent with the regulations of the SEC submitted by shareholders for inclusion in the proxy statement and form of proxy for the 2006 Annual Meeting of Shareholders must be received by Duke Energy's Corporate Secretary on or before December 1, 2005. Also, under the by-laws of Duke Energy, shareholders must give advance notice of nominations for director or other business to be addressed at the annual meeting not later than the close of business on February 11, 2006 and not earlier than January 12, 2006.

### Cinergy

Proposals on matters appropriate for shareholder consideration consistent with the regulations of the SEC submitted by shareholders for inclusion in the proxy statement and form of proxy for the 2006 Annual Meeting of Shareholders must be received at Cinergy's principal executive offices on or before November 29, 2005. Also, under the by-laws of Cinergy, shareholders must give advance notice of nominations for director or other business to be addressed at the 2006 Annual Meeting of Shareholders and such notice must be mailed and received not later than February 4, 2006 and not earlier than January 5, 2006. Advanced notice of nominations for director must be received at Cinergy's principal executive offices no later than 50 days prior to the 2006 Annual Meeting of Shareholders. The above dates and time periods are subject to change under certain circumstances.

## OTHER MATTERS

As of the date of this joint proxy statement/prospectus, neither the Duke Energy board of directors nor the Cinergy board of directors knows of any matter that will be presented for consideration at the Duke Energy special meeting or the Cinergy special meeting other than as described in this joint proxy statement/prospectus. Pursuant to the NCBCA, no business other than that stated in the notice may be transacted at the Duke Energy special meeting.

## WHERE YOU CAN FIND MORE INFORMATION

Duke Energy Holding filed a registration statement on Form S-4 on June 30, 2005, to register with the SEC the Duke Energy Holding common stock to be issued to Duke Energy and Cinergy shareholders in the mergers. This joint proxy statement/prospectus is a part of that registration statement and constitutes a prospectus of Duke Energy Holding in addition to being a joint proxy statement/prospectus of Duke Energy and Cinergy. As allowed by SEC rules, this joint proxy statement/prospectus does not contain all the information you can find in Duke Energy Holding's registration statement or the exhibits to the registration statement. Duke Energy and Cinergy file annual, quarterly and special reports, proxy statements and other information with the SEC. You may read and copy any reports, statements or other information that Duke Energy and Cinergy file with the SEC at the SEC's public reference room at the following location:

Public Reference Room  
100 F Street, N.E.  
Room 1580  
Washington, DC 20549

Please call the SEC at 1-800-SEC-0330 for further information on the public reference room. These SEC filings are also available to the public from commercial document retrieval services and at the Internet web site maintained by the SEC at "<http://www.sec.gov>." Reports, proxy statements and other information concerning Duke Energy and Cinergy may also be inspected at the offices of the New York Stock Exchange, which is located at 20 Broad Street, New York, New York 10005.



The SEC allows Duke Energy, Cinergy and Duke Energy Holding to “incorporate by reference” information into this joint proxy statement/prospectus, which means that the companies can disclose important information to you by referring you to other documents filed separately with the SEC. The information incorporated by reference is considered part of this joint proxy statement/prospectus, except for any information superseded by information contained directly in this joint proxy statement/prospectus or in later filed documents incorporated by reference in this joint proxy statement/prospectus.

This joint proxy statement/prospectus incorporates by reference the documents listed below that Duke Energy and Cinergy have previously filed with the SEC. These documents contain important business and financial information about Duke Energy and Cinergy that is not included in or delivered with this joint proxy statement/prospectus.

<u>Duke Energy Filings (File No. 1-4928)</u>	<u>Period</u>
Annual Report on Form 10-K	Fiscal Year ended December 31, 2004
Quarterly Report on Form 10-Q	Quarter ended March 31, 2005
Current Reports on Form 8-K	Filed February 2, 24 and 28, 2005; March 2 and 24, 2005; April 22, 2005; and May 4, 9, 12 and 17 2005; and June 2, 2005

<u>Cinergy Filings (File No. 1-11299)</u>	<u>Period</u>
Annual Report on Form 10-K	Fiscal Year ended December 31, 2004
Quarterly Report on Form 10-Q	Quarter ended March 31, 2005
Current Reports on Form 8-K	Filed February 7, 2005; May 10 and 31, 2005

To the extent that any information contained in any Current Report on Form 8-K, or any exhibit thereto, was furnished, rather than filed with, the SEC, such information or exhibit is specifically not incorporated by reference in this document.

This joint proxy statement/prospectus also incorporates by reference all additional documents that may be filed by Duke Energy and Cinergy with the SEC under Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act between the date of this joint proxy statement/prospectus and the date of the Cinergy special meeting and the date of the Duke Energy special meeting, as applicable. These include periodic reports, such as Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q and Current Reports on Form 8-K, as well as proxy statements (other than portions of those documents not deemed to be filed).

Cinergy has supplied all information relating to Cinergy; Duke Energy has supplied all information relating to Duke Energy; and Duke Energy and Cinergy have jointly supplied all information contained or incorporated by reference in this joint proxy statement/prospectus relating to Duke Energy Holding.

Duke Energy and Cinergy shareholders can obtain any document incorporated by reference in this document from the companies without charge, excluding all exhibits, except that if the companies have specifically incorporated by reference an exhibit in this joint proxy statement/prospectus, the exhibit will

also be provided without charge by requesting them in writing or by telephone from the appropriate company at the following addresses:

**Duke Energy Corporation**  
526 South Church Street  
Charlotte, North Carolina 28202  
(800) 488-3853  
Attention: Investor Relations

**Cinergy Corp.**  
139 East Fourth Street  
Cincinnati, Ohio 45202  
(800) 262-3000 Ext. 1235  
Attention: Investor Relations

If you would like to request documents, please do so by [ • ] [ • ], 2005, in order to receive them before your special meeting. You may also obtain these documents from our respective websites at [www.duke-energy.com/investors](http://www.duke-energy.com/investors) or [www.cinergy.com/investors](http://www.cinergy.com/investors) or at the SEC's internet site [www.sec.gov](http://www.sec.gov) by clicking on the "Search for Company Filings" link, then clicking on the "Company & Other Filers" link, and then entering the company's name in the field.

You should rely only on the information contained or incorporated by reference in this joint proxy statement/prospectus. We have not authorized anyone to provide you with information that is different from what is contained in this joint proxy statement/prospectus. Therefore, if anyone does give you information of this sort, you should not rely on it. If you are in a jurisdiction where offers to exchange or sell, or solicitations of offers to exchange or purchase, the securities offered by this document or the solicitation of proxies is unlawful, or if you are a person to whom it is unlawful to direct these types of activities, then the offer presented in this document does not extend to you. This joint proxy statement/prospectus is dated [ • ] [ • ], 2005. You should not assume that the information contained in this joint proxy statement/prospectus is accurate as of any date other than that date. Neither the mailing of this joint proxy statement/prospectus to Duke Energy and Cinergy shareholders nor the issuance of Duke Energy Holding common stock in the mergers create any implication to the contrary.

**AGREEMENT AND PLAN OF MERGER**

**by and among**

**DUKE ENERGY CORPORATION,**

**CINERGY CORP.,**

**DEER HOLDING CORP.,**

**DEER ACQUISITION CORP.**

**and**

**COUGAR ACQUISITION CORP.**

Dated as of May 8, 2005

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AGREEMENT AND PLAN OF MERGER, dated as of May 8, 2005 (this "Agreement"), by and among DUKE ENERGY CORPORATION, a North Carolina corporation ("Duke"), CINERGY CORP., a Delaware corporation ("Cinergy"), DEER HOLDING CORP., a Delaware corporation (the "Company") and a wholly-owned subsidiary of Duke, DEER ACQUISITION CORP., a North Carolina corporation and a wholly-owned subsidiary of the Company ("Merger Sub A"), and COUGAR ACQUISITION CORP., a Delaware corporation and a wholly-owned subsidiary of the Company ("Merger Sub B").

WHEREAS the respective Boards of Directors of Duke, Cinergy, the Company, Merger Sub A and Merger Sub B have approved the consummation of the business combination provided for in this Agreement, pursuant to which Merger Sub A and Merger Sub B will merge, respectively, with and into Duke and Cinergy, respectively, whereby, subject to the terms of Article II, each share of common stock, no par value per share, of Duke (including, except as the context otherwise requires, the associated Duke Rights as defined in Section 3.02(b), the "Duke Common Stock") and each share of common stock, par value \$.01 per share, of Cinergy (the "Cinergy Common Stock") will be converted into the right to receive the Merger Consideration (as defined in Section 2.01) (such transactions are referred to herein individually as the "Duke Merger" and the "Cinergy Merger", respectively, and collectively as the "Mergers"), as a result of which the holders of Duke Common Stock and Cinergy Common Stock will together own all of the outstanding shares of common stock, no par value per share, of the Company (the "Company Common Stock") (and the Company will, in turn, own all of the outstanding shares of common stock, no par value per share, of the surviving corporation in the Duke Merger (the "Surviving Duke Common Stock") and all of the outstanding shares of common stock, par value \$.01 per share, of the surviving corporation in the Cinergy Merger (the "Surviving Cinergy Common Stock"));

WHEREAS the respective Boards of Directors of Duke, the Company and Merger Sub A have approved the conversion of Duke into a limited liability company organized under the laws of the State of North Carolina ("Duke Power LLC") as provided for in this Agreement, whereby, subject to the terms and conditions of this Agreement, the outstanding shares of Surviving Duke Common Stock shall be converted into membership interests of Duke Power LLC;

WHEREAS the respective Boards of Directors of Duke and the Company have approved the distribution by Duke to the Company of Duke Capital LLC ("Duke Capital"), a Delaware limited liability company and wholly-owned subsidiary of Duke, and the Restructuring Transactions (as defined below);

WHEREAS the respective Boards of Directors of Duke and Cinergy have each determined that the Mergers and the other transactions contemplated hereby are consistent with, and in furtherance of, the best interests of their respective corporations and shareholders and each of Duke's and Cinergy's respective business strategies and goals;

WHEREAS Duke and Cinergy desire to make certain representations, warranties, covenants and agreements in connection with the Mergers and the transactions contemplated by this Agreement and also to prescribe various conditions to the Mergers and the Restructuring Transactions; and

WHEREAS, for United States federal income tax purposes, it is intended that the Duke Merger and the Duke Conversion (as defined below) (together, the "Duke Reorganization") shall qualify as a reorganization under Section 368(a) of the Internal Revenue Code of 1986, as amended (the "Code") and that the Cinergy Merger shall qualify as a reorganization within the meaning of Section 368(a) of the Code, and this Agreement is intended to be, and is hereby, adopted as a plan of reorganization within the meaning of Section 368(a) of the Code.

NOW, THEREFORE, in consideration of the foregoing and of the representations, warranties, covenants and agreements contained in this Agreement, the parties agree as follows:

## ARTICLE I

### The Mergers and the Restructuring Transactions

Section 1.01 *The Duke Merger.* Upon the terms and subject to the conditions set forth in this Agreement, at the Duke Effective Time (as defined in Section 1.06), Merger Sub A shall be merged with and into Duke in accordance with the North Carolina Business Corporation Act (the “NCBCA”). Duke shall be the surviving corporation in the Duke Merger and shall continue its corporate existence under the laws of the State of North Carolina and shall succeed to and assume all of the rights and obligations of Duke and Merger Sub A in accordance with the NCBCA. As a result of the Duke Merger, Duke shall become a wholly-owned subsidiary of the Company.

Section 1.02 *The Duke Conversion.* Upon the terms and subject to the conditions set forth in this Agreement, immediately following the effectiveness of the Duke Merger, Duke may convert to a limited liability company (the “Duke Conversion”) pursuant to a plan of conversion adopted pursuant to Section 55-11A-11 of the NCBCA and Section 57C-9A-02 of the North Carolina Limited Liability Company Act (the “NCLLCA”). Following the Duke Conversion, Duke Power LLC will be a limited liability company all of whose membership or other equity interests are held by the Company.

Section 1.03 *The Restructuring Transactions.*

(a) Immediately following the effectiveness of the Duke Conversion, Duke Power LLC may, and may cause its subsidiaries to, effect the transactions set forth on Section 1.03(a) of the Duke Disclosure Letter (as defined in Section 3.02(a)).

(b) Immediately following the consummation of the transactions set forth on Section 1.03(a) of the Duke Disclosure Letter, Duke Power LLC may distribute to the Company the membership interests in Duke Capital (the “Duke Capital Transfer”). Following the Duke Capital Transfer, Duke Capital will be a direct wholly-owned subsidiary of the Company.

(c) Immediately following the effectiveness of the Duke Capital Transfer, the Company may cause Duke Capital to effect the transactions set forth on Section 1.03(c) of the Duke Disclosure Letter (the Duke Conversion, the Duke Capital Transfer and the transactions set forth on Section 1.03(a) and Section 1.03(c) of the Duke Disclosure Letter are referred to herein as the “Restructuring Transactions”). Duke shall provide prior notice to Cinergy of any Restructuring Transactions it proposes to effect. Immediately after the Duke Effective Time, all shares of Company Common Stock owned by Duke shall be cancelled.

Section 1.04 *The Cinergy Merger.* Upon the terms and subject to the conditions set forth in this Agreement, immediately following the latest of consummation of the Duke Merger or any Restructuring Transactions, at the Cinergy Effective Time (as defined in Section 1.06), Merger Sub B shall be merged with and into Cinergy in accordance with the Delaware General Corporation Law (the “DGCL”). Cinergy shall be the surviving corporation in the Cinergy Merger and shall continue its corporate existence under the laws of the State of Delaware and shall succeed to and assume all of the rights and obligations of Cinergy and Merger Sub B in accordance with the DGCL. As a result of the Cinergy Merger, Cinergy shall become a wholly-owned subsidiary of the Company.

Section 1.05 *Closing.* The closing of the Mergers and the Restructuring Transactions (the “Closing”) will take place at 10:00 a.m., local time, on a date to be specified by the parties (the “Closing Date”), which shall be no later than the second business day after satisfaction or waiver of the conditions set forth in Article VI, (other than those conditions that by their terms are to be satisfied at the Closing, but subject to the satisfaction or waiver of such conditions at such time) unless another



time or date is agreed to by the parties hereto. The Closing shall be held at such location in The City of New York as is agreed to by the parties hereto.

Section 1.06 *Effective Time of the Duke and Cinergy Mergers.* Subject to the provisions of this Agreement, (i) with respect to the Duke Merger, as soon as practicable after 10:00 a.m., local time, on the Closing Date the parties thereto shall file articles of merger (the "Duke Articles of Merger") executed in accordance with, and containing such information as is required by, Section 55-11-05 of the NCBCA with the Secretary of State of the State of North Carolina and on or after the Closing Date shall make all other filings or recordings required under the NCBCA, (ii) with respect to the Duke Conversion, as soon as practicable on the Closing Date following the Duke Effective Time, Duke shall file articles of organization of Duke Power LLC (the "Duke Power Articles of Organization") and articles of conversion (the "Duke Articles of Conversion") executed in accordance with, and containing such information as is required by, Section 55-11A-12 of the NCBCA and Section 57C-9A-02 of the NCLLCA with the Secretary of State of the State of North Carolina and on or after the Closing Date shall make all other filings or recordings required under the NCBCA and the NCLLCA, and (iii) with respect to the Cinergy Merger, immediately following the consummation of the Restructuring Transactions, the parties thereto shall file a certificate of merger (the "Cinergy Certificate of Merger") executed in accordance with, and containing such information as is required by, the relevant provisions of Section 251 of the DGCL with the Secretary of State of the State of Delaware and on or after the Closing Date shall make all other filings or recordings required under the DGCL. The Duke Merger shall become effective at such time as the Duke Articles of Merger are duly filed with the Secretary of State of the State of North Carolina (the time the Duke Merger becomes effective being hereinafter referred to as the "Duke Effective Time"), the Duke Conversion shall become effective at such time as the Duke Articles of Conversion and the Duke Power Articles of Organization are duly filed with the Secretary of State of the State of North Carolina (the time the Duke Conversion becomes effective being hereinafter referred to as the "Conversion Effective Time"), and the Cinergy Merger shall become effective at such time as the Cinergy Certificate of Merger is duly filed with the Secretary of State of the State of Delaware (the time the Cinergy Merger becomes effective being hereinafter referred to as the "Cinergy Effective Time"). The latest time to occur of the Duke Effective Time, the Conversion Effective Time and the Cinergy Effective Time shall hereinafter be referred to as the "Effective Time."

Section 1.07 *Effects of the Mergers and the Conversion.* The Duke Merger, the Cinergy Merger and the Duke Conversion shall generally have the effects set forth in this Agreement and the applicable provisions of the NCBCA, the DGCL and the NCLLCA respectively.

Section 1.08 *Organizational Documents of Duke, Cinergy and the Company.*

(a)

(i) At the Duke Effective Time, (a) the articles of incorporation of Duke, as in effect immediately prior to the Duke Effective Time, shall be the articles of incorporation of Duke as the surviving corporation in the Duke Merger and (b) the by-laws of Duke, as in effect immediately prior to the Duke Effective Time, shall be the by-laws of Duke as the surviving corporation in the Duke Merger, in each case until superseded by the Duke Power Articles of Organization filed as part of the Duke Conversion; and

(ii) At the Conversion Effective Time, the parties shall (i) file the Duke Power LLC Articles of Organization in a form mutually acceptable to the parties hereto and (ii) cause Duke Power LLC to adopt an operating agreement mutually acceptable to the parties hereto; and

(iii) At the Cinergy Effective Time, (A) the certificate of incorporation of Merger Sub B, as in effect immediately prior to the Cinergy Effective Time, shall be the certificate of incorporation of Cinergy as the surviving corporation in the Cinergy Merger until thereafter changed or amended as

provided therein or by applicable law and (B) the by-laws of Merger Sub B, as in effect immediately prior to the Cinergy Effective Time, shall be the by-laws of Cinergy as the surviving corporation in the Cinergy Merger, until thereafter changed or amended as provided therein, in the certificate of incorporation of Cinergy or by applicable law.

(b) The parties shall take all appropriate action so that, at the Duke Effective Time, (i) the certificate of incorporation of the Company shall be in the form attached as Exhibit A hereto and (ii) the by-laws of the Company shall be in the form attached as Exhibit B hereto. Each of Duke and Cinergy shall take all actions necessary to cause the Company, Merger Sub A and Merger Sub B to take any actions necessary in order to consummate the Mergers, the Restructuring Transactions and the other transactions contemplated hereby.

*Section 1.09 Directors and Officers of Duke and Cinergy.*

(a) The directors of Merger Sub A at the Duke Effective Time shall, from and after the Duke Effective Time, be the directors of Duke as the surviving corporation in the Duke Merger until their successors have been duly elected or appointed and qualified.

(b) Subject to Section 1.10, the officers of Duke at the Duke Effective Time shall, from and after the Duke Effective Time, continue to be the officers of Duke as the surviving corporation in the Duke Merger until their successors have been duly elected or appointed and qualified.

(c) The directors of Duke at the Conversion Effective Time shall, from and after the Conversion Effective Time, be the managers of Duke Power LLC until their successors have been duly elected or appointed and qualified.

(d) Subject to Section 1.10, the officers of Duke at the Conversion Effective Time shall, from and after the Conversion Effective Time, continue to be the officers of Duke Power LLC until their successors have been duly elected or appointed and qualified.

(e) The directors of Merger Sub B at the Cinergy Effective Time shall, from and after the Cinergy Effective Time, be the directors of Cinergy as the surviving corporation in the Cinergy Merger until their successors have been duly elected or appointed and qualified.

(f) Subject to Section 1.10, the officers of Cinergy at the Cinergy Effective Time shall, from and after the Cinergy Effective Time, continue to be the officers of Cinergy as the surviving corporation in the Cinergy Merger until their successors have been duly elected or appointed and qualified.

*Section 1.10 Directors and Officers of the Company.* Exhibit C hereto sets forth (i) as of the Effective Time, subject to the By-Laws of the Company effective as of the Effective Time, the number of directors constituting the Board of Directors of the Company and the number of Duke Directors (as defined in Exhibit B hereto) and the number of Cinergy Directors (as defined in Exhibit B hereto), (ii) as of the Effective Time, the Chairman of the Board of Directors of the Company and the President and Chief Executive Officer of the Company, and (iii) the manner in which certain senior officers of the Company as of the Effective Time will be selected after the date hereof and prior to the Effective Time. Certain of the responsibilities of the Chairman of the Board of Directors of the Company are set forth on Exhibit C hereto. The material terms of the changes to the existing employment agreement of the President and Chief Executive Officer of Cinergy to be in effect as of the Effective Time in his employment agreement with the Company as the President and Chief Executive Officer of the Company are set forth on Exhibit D hereto. The parties shall use their commercially reasonable efforts to cause an amended employment agreement reflecting such terms to be executed by the Company and the Chief Executive Officer of the Company as promptly as practicable after the date hereof.

*Section 1.11 Post-Merger Operations.* Following the Effective Time, the Company shall conduct its operations in accordance with the following:

(a) Name. At the Effective Time, the Company's name shall be changed to "Duke Energy Corporation."

(b) Principal Corporate Offices. The Company shall maintain its headquarters and principal corporate offices in Charlotte, North Carolina. Each of Duke Power LLC, The Cincinnati Gas & Electric Company, PSI Energy, Inc. and The Union Light, Heat and Power Company shall maintain its utility headquarters in its present location.

(c) Charities. The parties agree that provision of charitable contributions and community support in their respective service areas serves a number of their important corporate goals. During the two-year period immediately following the Cinergy Effective Time, the Company and its subsidiaries taken as a whole intend to continue to provide charitable contributions and community support within the service areas of the parties and each of their respective subsidiaries in each service area at levels substantially comparable to the levels of charitable contributions and community support provided, directly or indirectly, by Duke and Cinergy within their respective service areas during the two-year period immediately prior to the Effective Time.

Section 1.12 *Transition Committee*. The parties shall create a special transition committee (the "Transition Committee") that shall be co-chaired by the Chief Executive Officer of Duke and the Chief Executive Officer of Cinergy and shall be composed of such chief executive officers and two other designees of Duke and one other designee of Cinergy. After the date hereof and prior to the Effective Time, the Transition Committee shall examine various alternatives regarding the manner in which to best organize and manage the business of the Company after the Cinergy Effective Time, subject to applicable law.

## ARTICLE II

### Effects of the Mergers on the Capital Stock of the Constituent Corporations; Exchange of Certificates

Section 2.01 *Effect on Capital Stock*. (a) At the Duke Effective Time, by virtue of the Duke Merger and without any action on the part of the holder of any shares of Duke Common Stock or any capital stock of Merger Sub A:

(i) Cancellation of Certain Duke Common Stock. Each share of Duke Common Stock that is owned by Duke, Cinergy or the Company shall automatically be canceled and retired and shall cease to exist, and no consideration shall be delivered in exchange therefore.

(ii) Conversion of Duke Common Stock. Subject to Section 2.02(e), each issued and outstanding share of Duke Common Stock (other than shares to be canceled in accordance with Section 2.01(a)(i) and Dissenting Shares (as defined in Section 2.03)) shall be converted into the right to receive 1 (the "Duke Ratio") fully paid and nonassessable share of Company Common Stock (such aggregate amount, the "Duke Merger Consideration"). As of the Duke Effective Time, all such shares of Duke Common Stock shall no longer be outstanding and shall automatically be canceled and retired and shall cease to exist, and each holder of a certificate representing any such shares of Duke Common Stock shall cease to have any rights with respect thereto, except the right to receive the shares of Company Common Stock (and cash in lieu of fractional shares of Company Common Stock) to be issued or paid in consideration therefore upon the surrender of such certificate in accordance with Section 2.02, without interest and the right to receive dividends and other distributions in accordance with Section 2.02.

(iii) Conversion of Merger Sub A Common Stock. The aggregate of all shares of the capital stock of Merger Sub A issued and outstanding immediately prior to the Duke Effective Time (of which, as of the date of this Agreement, 100 shares of common stock, par value \$.01 per share, are

issued and outstanding, each entitling the holder thereof to vote on the approval of this Agreement) shall be converted into 100 shares of Surviving Duke Common Stock.

(b) At the Cinergy Effective Time, by virtue of the Cinergy Merger and without any action on the part of any holder of Cinergy Common Stock or any capital stock of Merger Sub B:

(i) Cancellation of Certain Cinergy Common Stock. Each share of Cinergy Common Stock that is owned by Cinergy, Duke or the Company shall automatically be canceled and retired and shall cease to exist, and no consideration shall be delivered in exchange therefore.

(ii) Conversion of Cinergy Common Stock. Subject to Section 2.02(e), each issued and outstanding share of Cinergy Common Stock (other than shares to be canceled in accordance with Section 2.01(b)(i)) shall be converted into the right to receive 1.56 (the "Cinergy Ratio") fully paid and nonassessable shares of Company Common Stock (such aggregate amount, the "Cinergy Merger Consideration," and, together with the Duke Merger Consideration, the "Merger Consideration"). As of the Cinergy Effective Time, all such shares of Cinergy Common Stock shall no longer be outstanding and shall automatically be canceled and retired and shall cease to exist, and each holder of a certificate representing any such shares of Cinergy Common Stock shall cease to have any rights with respect thereto, except the right to receive the shares of Company Common Stock (and cash in lieu of fractional shares of Company Common Stock) to be issued or paid in consideration therefore upon the surrender of such certificate in accordance with Section 2.02, without interest and the right to receive dividends and other distributions in accordance with Section 2.02.

(iii) Conversion of Merger Sub B Common Stock. The aggregate of all shares of the capital stock of Merger Sub B issued and outstanding immediately prior to the Cinergy Effective Time (of which, as of the date of this Agreement, 100 shares of common stock, without par value, are issued and outstanding, each entitling the holder thereof to vote on the approval of this Agreement) shall be converted into the right to receive 100 shares of Surviving Cinergy Common Stock.

(c) Duke Preferred Stock and Preferred Stock A. Prior to the Duke Effective Time, each issued and outstanding share of Preferred Stock, par value \$100 per share ("Duke Preferred Stock"), of Duke and each issued outstanding share of Preferred Stock A, par value \$25 per share ("Duke Preferred Stock A"), of Duke shall be redeemed in accordance with Section 4.07.

(d) Exchangeable Shares of Duke Energy Canada Exchangeco, Inc. As of the Duke Effective Time, each issued and outstanding exchangeable share (the "Exchangeable Shares") of Duke Energy Canada Exchangeco, Inc. ("Exchangeco"), a corporation incorporated under the laws of Canada and an indirect subsidiary of Duke, shall become exchangeable for one share of Company Common Stock and one share of Company Common Stock shall be issuable upon a redemption or retraction of each Exchangeable Share, in each case in accordance with the terms of the provisions relating to the Exchangeable Shares as of immediately prior to the Duke Effective Time. In addition, following the Effective Time, the Company shall execute such assignment and assumption agreements and documentation as are necessary to cause the Company to be bound by the terms and provisions of the Support Agreement among Duke, Duke Canada Call Co. and Exchangeco dated March 14, 2002, and the Voting and Exchange Trust Agreement among Duke, Exchangeco and Computer share Trust Company of Canada, dated March 14, 2002.

Section 2.02 *Exchange of Certificates.*

(a) Exchange Agent. As of the Effective Time, the Company shall enter into an agreement with such bank or trust company as may be mutually agreed by Duke and Cinergy (the "Exchange Agent"), which agreement shall provide that the Company shall deposit with the Exchange Agent as of the Effective Time, for the benefit of the holders of shares of Duke Common Stock and Cinergy Common Stock, for exchange in accordance with this Article II, through the Exchange Agent, certificates

representing the shares of Company Common Stock (such shares of Company Common Stock, together with any dividends or distributions with respect thereto with a record date after the Cinergy Effective Time, being hereinafter referred to as the "Exchange Fund") representing the Merger Consideration.

(b) Exchange Procedures. As soon as reasonably practicable after the Effective Time, the Exchange Agent shall mail to each holder of record of a certificate or certificates that immediately prior to the Effective Time represented outstanding shares of Duke Common Stock or Cinergy Common Stock (the "Certificates") whose shares were converted into the right to receive shares of Company Common Stock pursuant to Section 2.01, (i) a letter of transmittal (which shall specify that delivery shall be effected, and risk of loss and title to the Certificates shall pass, only upon delivery of the Certificates to the Exchange Agent and shall be in such form and have such other provisions as Duke and Cinergy may reasonably specify) and (ii) instructions for use in surrendering the Certificates in exchange for certificates representing whole shares of Company Common Stock, cash in lieu of fractional shares pursuant to Section 2.02(e) and any dividends or other distributions payable pursuant to Section 2.02(c). Upon surrender of a Certificate for cancellation to the Exchange Agent, together with such letter of transmittal, duly executed, and such other documents as may reasonably be required by the Exchange Agent, the holder of such Certificate shall be entitled to receive in exchange therefore a certificate representing that number of whole shares of Company Common Stock that such holder has the right to receive pursuant to the provisions of this Article II, certain dividends or other distributions in accordance with Section 2.02(c) and cash in lieu of any fractional share of Company Common Stock in accordance with Section 2.02(e), and the Certificate so surrendered shall forthwith be canceled. In the event of a transfer of ownership of Duke Common Stock or Cinergy Common Stock that is not registered in the transfer records of Duke or Cinergy, as the case may be, a certificate representing the proper number of shares of Company Common Stock may be issued to a person other than the person in whose name the Certificate so surrendered is registered if such Certificate shall be properly endorsed or otherwise be in proper form for transfer and the person requesting such issuance shall pay any transfer or other taxes required by reason of the issuance of shares of Company Common Stock to a person other than the registered holder of such Certificate or establish to the satisfaction of the Company that such tax has been paid or is not applicable. Until surrendered as contemplated by this Section 2.02, each Certificate shall be deemed at any time after the Duke Effective Time or the Cinergy Effective Time, as the case may be, to represent only the right to receive upon such surrender the Merger Consideration, which the holder thereof has the right to receive in respect of such Certificate pursuant to the provisions of this Article II, certain dividends or other distributions in accordance with Section 2.02(c) and cash in lieu of any fractional share of Duke Common Stock or Cinergy Common Stock, as the case may be, in accordance with Section 2.02(e). No interest shall be paid or will accrue on the Merger Consideration or any cash payable to holders of Certificates pursuant to the provisions of this Article II.

(c) Distributions with Respect to Unexchanged Shares. No dividends or other distributions with respect to Company Common Stock shall be declared or paid with a record date on or after the Duke Effective Time and on or prior to the Effective Time. No dividends or other distributions with respect to Company Common Stock with a record date after the Effective Time shall be paid to the holder of any unsurrendered Certificate with respect to the shares of Company Common Stock issuable hereunder in respect thereof and no cash payment in lieu of fractional shares shall be paid to any such holder pursuant to Section 2.02(e), and all such dividends, other distributions and cash in lieu of fractional shares of Company Common Stock shall be paid by the Company to the Exchange Agent and shall be included in the Exchange Fund, in each case until the surrender of such Certificate in accordance with this Article II. Subject to the effect of applicable escheat or similar laws, following surrender of any such Certificate there shall be paid to the holder of the certificate representing whole shares of Company Common Stock issued in exchange therefore, without interest, (i) promptly after the time of such surrender, the amount of dividends or other distributions with a record date after the Effective Time theretofore paid with respect to such whole shares of Company Common Stock and the

amount of any cash payable in lieu of a fractional share of Company Common Stock to which such holder is entitled pursuant to Section 2.02(e) and (ii) at the appropriate payment date, the amount of dividends or other distributions with a record date after the Effective Time but prior to such surrender and with a payment date subsequent to such surrender payable with respect to such whole shares of Company Common Stock.

(d) No Further Ownership Rights in Duke Common Stock or Cinergy Common Stock. All shares of Company Common Stock issued upon the surrender for exchange of Certificates in accordance with the terms of this Article II (including any cash paid pursuant to this Article II) shall be deemed to have been issued (and paid) in full satisfaction of all rights pertaining to the shares of Duke Common Stock or Cinergy Common Stock, as the case may be, theretofore represented by such Certificates, subject, however, to Duke's and Cinergy's respective obligations to pay any dividends or make any other distributions with a record date prior to the Duke Effective Time or the Cinergy Effective Time, as the case may be, that may have been declared or made by Duke or Cinergy, as the case may be, on such shares of Duke Common Stock or Cinergy Common Stock that remain unpaid at the Duke Effective Time or the Cinergy Effective Time, as the case may be, and there shall be no further registration of transfers on the stock transfer books of Duke or Cinergy of the shares of Duke Common Stock and Cinergy Common Stock, respectively, that were outstanding immediately prior to the Duke Effective Time or the Cinergy Effective Time, as the case may be. If, after the Duke Effective Time or the Cinergy Effective Time, as the case may be, Certificates are presented to the Company, Duke, Cinergy or the Exchange Agent for any reason, they shall be canceled and exchanged as provided in this Article II, except as otherwise provided by law.

(e) No Fractional Shares.

(i) No certificates or scrip representing fractional shares of Company Common Stock shall be issued upon the surrender for exchange of Certificates, no dividend or distribution of the Company shall relate to such fractional share interests and such fractional share interests will not entitle the owner thereof to vote or to any rights of a shareholder of the Company.

(ii) As promptly as practicable following the Cinergy Effective Time, the Exchange Agent shall determine the excess of (A) the number of whole shares of Company Common Stock delivered to the Exchange Agent by the Company pursuant to Section 2.02(a) representing the Cinergy Merger Consideration over (B) the aggregate number of whole shares of Company Common Stock to be distributed to former holders of Cinergy Common Stock pursuant to Section 2.02(b) (such excess being herein called the "Cinergy Excess Shares"). Following the Cinergy Effective Time, the Exchange Agent shall, on behalf of former shareholders of Cinergy, sell the Cinergy Excess Shares at then-prevailing prices on the New York Stock Exchange, Inc. ("NYSE"), all in the manner provided in Section 2.02(e)(iii). As promptly as practicable following the Duke Effective Time, the Exchange Agent shall determine the excess, if any, of (A) the number of whole shares of Company Common Stock delivered to the Exchange Agent by the Company pursuant to Section 2.02(a) representing the Duke Merger Consideration over (B) the aggregate number of whole shares of Company Common Stock to be distributed to former holders of Duke Common Stock pursuant to Section 2.02(b) (such excess being herein called the "Duke Excess Shares"). Following the Duke Effective Time, the Exchange Agent shall, on behalf of former shareholders of Duke, sell the Duke Excess Shares at then-prevailing prices on the NYSE, all in the manner provided in Section 2.02(e)(iv).

(iii) The sale of the Cinergy Excess Shares by the Exchange Agent shall be executed on the NYSE through one or more member firms of the NYSE and shall be executed in round lots to the extent practicable. The Exchange Agent shall use reasonable efforts to complete the sale of the Cinergy Excess Shares as promptly following the Effective Time as, in the Exchange Agent's sole judgment, is practicable consistent with obtaining the best execution of such sales in light of

prevailing market conditions. Until the net proceeds of such sale or sales have been distributed to the holders of Certificates formerly representing Cinergy Common Stock, the Exchange Agent shall hold such proceeds in trust for holders of Cinergy Common Stock (the “Cinergy Common Shares Trust”). Cinergy shall pay all commissions, transfer taxes and other out-of-pocket transaction costs, including the expenses and compensation of the Exchange Agent incurred in connection with such sale of the Cinergy Excess Shares. The Exchange Agent shall determine the portion of the Cinergy Common Shares Trust to which each former holder of Cinergy Common Stock is entitled, if any, by multiplying the amount of the aggregate net proceeds composing the Cinergy Common Shares Trust by a fraction, the numerator of which is the amount of the fractional share interest to which such former holder of Cinergy Common Stock is entitled (after taking into account all shares of Cinergy Common Stock held at the Cinergy Effective Time by such holder) and the denominator of which is the aggregate amount of fractional share interests to which all former holders of Cinergy Common Stock are entitled.

(iv) The sale of the Duke Excess Shares by the Exchange Agent shall be executed on the NYSE through one or more member firms of the NYSE and shall be executed in round lots to the extent practicable. The Exchange Agent shall use reasonable efforts to complete the sale of the Duke Excess Shares as promptly following the Effective Time as, in the Exchange Agent’s sole judgment, is practicable consistent with obtaining the best execution of such sales in light of prevailing market conditions. Until the net proceeds of such sale or sales have been distributed to the holders of Certificates formerly representing Duke Common Stock, the Exchange Agent shall hold such proceeds in trust for holders of Duke Common Stock (the “Duke Common Shares Trust”). Duke shall pay all commissions, transfer taxes and other out-of-pocket transaction costs, including the expenses and compensation of the Exchange Agent incurred in connection with such sale of the Duke Excess Shares. The Exchange Agent shall determine the portion of the Duke Common Shares Trust to which each former holder of Duke Common Stock is entitled, if any, by multiplying the amount of the aggregate net proceeds composing the Duke Common Shares Trust by a fraction, the numerator of which is the amount of the fractional share interest to which such former holder of Duke Common Stock is entitled (after taking into account all shares of Duke Common Stock held at the Duke Effective Time by such holder) and the denominator of which is the aggregate amount of fractional share interests to which all former holders of Duke Common Stock are entitled.

(v) As soon as practicable after the determination of the amount of cash, if any, to be paid to holders of Certificates formerly representing Duke Common Stock or Cinergy Common Stock, as the case may be, with respect to any fractional share interests, the Exchange Agent shall make available such amounts to such holders of Certificates formerly representing Duke Common Stock or Cinergy Common Stock, as the case may be, subject to and in accordance with the terms of Section 2.02(c).

(f) Termination of Exchange Fund. Any portion of the Exchange Fund that remains undistributed to the holders of the Certificates for six months after the Effective Time shall be delivered to the Company, upon demand, and any holders of the Certificates who have not theretofore complied with this Article II shall thereafter look only to the Company for payment of their claim for Merger Consideration, any dividends or distributions with respect to Company Common Stock and any cash in lieu of fractional shares of Company Common Stock.

(g) No Liability. None of the Company, Duke, Cinergy or the Exchange Agent or any of their respective directors, officers, employees and agents shall be liable to any person in respect of any shares of Company Common Stock, any dividends or distributions with respect thereto, any cash in lieu of fractional shares of Company Common Stock or any cash from the Exchange Fund, in each case delivered to a public official pursuant to any applicable abandoned property, escheat or similar law. If any Certificate shall not have been surrendered prior to two years after the Cinergy Effective Time (or

immediately prior to such earlier date on which any Cinergy Merger Consideration, any dividends or distributions payable to the holder of such Certificate or any cash payable to the holder of such Certificate formerly representing Cinergy Common Stock pursuant to this Article II, would otherwise escheat to or become the property of any Governmental Authority (as defined in Section 3.01(d)), any such Cinergy Merger Consideration, dividends or distributions in respect of such Certificate or such cash shall, to the extent permitted by applicable law, become the property of the Company, free and clear of all claims or interest of any person previously entitled thereto. If any Certificate shall not have been surrendered prior to two years after the Duke Effective Time (or immediately prior to such earlier date on which any Duke Merger Consideration, any dividends or distributions payable to the holder of such Certificate or any cash payable to the holder of such Certificate formerly representing Duke Common Stock pursuant to this Article II, would otherwise escheat to or become the property of any Governmental Authority), any such Duke Merger Consideration, dividends or distributions in respect of such Certificate or such cash shall, to the extent permitted by applicable law, become the property of the Company, free and clear of all claims or interest of any person previously entitled thereto.

(h) Investment of Exchange Fund. The Exchange Agent shall invest any cash included in the Exchange Fund, as directed by the Company, on a daily basis. Any interest and other income resulting from such investments shall be paid to the Company.

(i) Withholding Rights. The Company and the Exchange Agent shall be entitled to deduct and withhold from any consideration payable pursuant to this Agreement to any Person who was a holder of Duke Common Stock or Cinergy Common Stock, as the case may be, immediately prior to the Duke Effective Time or the Cinergy Effective Time, as the case may be, such amounts as the Company and the Exchange Agent may be required to deduct and withhold with respect to the making of such payment under the Code or any other provision of applicable federal, state, local or foreign tax law. To the extent that amounts are so withheld by the Company or the Exchange Agent and duly paid over to the applicable taxing authority, such withheld amounts shall be treated for all purposes of this Agreement as having been paid to the Person to whom such consideration would otherwise have been paid.

(j) Lost, Stolen or Destroyed Certificates. If any Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the person claiming such Certificate to be lost, stolen or destroyed and, if required by the Company, the posting by such person of a bond in such reasonable amount as the Company may direct as indemnity against any claim that may be made against it with respect to such Certificate, the Exchange Agent shall issue in exchange for such lost, stolen or destroyed Certificate, the Merger Consideration and, if applicable, any unpaid dividends and distributions on shares of Company Common Stock deliverable in respect thereof and any cash in lieu of fractional shares, in each case pursuant to this Agreement.

(k) Adjustments to Prevent Dilution. In the event that Duke changes the number of shares of Duke Common Stock or securities convertible or exchangeable into or exercisable for shares of Duke Common Stock, Cinergy changes the number of shares of Cinergy Common Stock or securities convertible or exchangeable into or exercisable for shares of Cinergy Common Stock, issued and outstanding prior to the Effective Time, or the Company changes the number of shares of Company Common Stock or securities convertible or exchangeable into or exercisable for shares of Company Common Stock issued and outstanding after the Duke Effective Time and prior to the Cinergy Effective Time, in each case as a result of a reclassification, stock split (including a reverse stock split), stock dividend or distribution, recapitalization, merger, subdivision, issuer tender or exchange offer, or other similar transaction, except to the extent any of the foregoing actions are expressly permitted by this Agreement, the Cinergy Ratio shall be equitably adjusted.



(l) **Uncertificated Shares.** In the case of outstanding shares of Cinergy Common Stock or Duke Common Stock that are not represented by Certificates, the parties shall make such adjustments to this Section 2.02 as are necessary or appropriate to implement the same purpose and effect that this Section 2.02 has with respect to shares of Cinergy Common Stock and Duke Common Stock that are represented by Certificates.

**Section 2.03 Dissenting Shares.** Any holder of shares of Duke Common Stock who shall have exercised rights to dissent with respect to the Duke Merger in accordance with the NCBCA and who has properly exercised such holder's rights to demand payment of the "fair value" of the holder's shares of Duke Common Stock (the "Dissenting Shares") as provided in the NCBCA (the "Dissenting Shareholder") shall thereafter have only such rights, if any, as are provided a Dissenting Shareholder in accordance with the NCBCA and shall have no rights to receive the Merger Consideration pursuant to Section 2.01 (provided, that nothing contained herein shall limit such Dissenting Shareholder's rights to the payment of all declared and unpaid dividends on Duke Common Stock); provided, however, that if a Dissenting Shareholder shall fail to properly demand payment (in accordance with the NCBCA) or shall have effectively withdrawn or lost such rights to relief as a Dissenting Shareholder under the NCBCA, then such Dissenting Shareholder's Dissenting Shares automatically shall cease to be Dissenting Shares and shall be converted into and represent only the right to receive, upon surrender of the Certificate representing the Dissenting Shares, the Merger Consideration pursuant to Section 2.01 and declared and unpaid dividends or other distributions as provided in Section 2.02(b) and Section 2.02(c). Duke shall give Cinergy and the Company prompt notice of any demands received by Duke prior to the Duke Effective Time, any attempted withdrawals of such demands and any other instruments served pursuant to the NCBCA and received by Duke relating to Duke's shareholders rights of dissent under the NCBCA, and Duke and Cinergy shall cooperate with respect to all negotiations and proceedings with respect to such demands.

### **ARTICLE III**

#### **Representations and Warranties**

**Section 3.01 Representations and Warranties of Cinergy.** Except as set forth in the letter dated the date of this Agreement and delivered to Duke by Cinergy concurrently with the execution and delivery of this Agreement (the "Cinergy Disclosure Letter") or, to the extent the qualifying nature of such disclosure is readily apparent therefrom, as set forth in the Cinergy SEC Reports (as defined in Section 3.01(e)) filed on or after January 1, 2004 and prior to the date hereof, Cinergy represents and warrants to Duke as follows:

(a) **Organization and Qualification.**

(i) Each of Cinergy and its subsidiaries is duly organized, validly existing and in good standing (with respect to jurisdictions that recognize the concept of good standing) under the laws of its jurisdiction of organization and has full power and authority to conduct its business as and to the extent now conducted and to own, use and lease its assets and properties, except for such failures to be so organized, existing and in good standing (with respect to jurisdictions that recognize the concept of good standing) or to have such power and authority that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect (as defined in Section 8.03) on Cinergy. Each of Cinergy and its subsidiaries is duly qualified, licensed or admitted to do business and is in good standing (with respect to jurisdictions that recognize the concept of good standing) in each jurisdiction in which the ownership, use or leasing of its assets and properties, or the conduct or nature of its business, makes such qualification, licensing or admission necessary, except for such failures to be so qualified, licensed or admitted and in good standing (with respect to jurisdictions that recognize the concept of good standing) that, individually or in the aggregate, have not had and could not reasonably be expected

to have a material adverse effect on Cinergy. Section 3.01(a) of the Cinergy Disclosure Letter sets forth as of the date of this Agreement the name and jurisdiction of organization of each subsidiary of Cinergy.

(ii) Section 3.01(a) of the Cinergy Disclosure Letter sets forth a description as of the date of this Agreement, of all Cinergy Joint Ventures, including (x) the name of each such entity and (y) a brief description of the principal line or lines of business conducted by each such entity. For purposes of this Agreement:

(A) "Joint Venture" of a person or entity shall mean any person that is not a subsidiary of such first person, in which such first person or one or more of its subsidiaries owns directly or indirectly an equity interest, other than equity interests held for passive investment purposes that are less than 5% of each class of the outstanding voting securities or equity interests of such second person;

(B) "Cinergy Joint Venture" shall mean any Joint Venture of Cinergy or any of its subsidiaries in which the net book value as of December 31, 2004 of Cinergy's or its subsidiaries' interest exceeds \$35,000,000; and

(C) "Duke Joint Venture" shall mean any Joint Venture of Duke or any of its subsidiaries in which the invested capital associated with Duke's or its subsidiaries' interest exceeds \$100,000,000.

(iii) Except for interests in the subsidiaries of Cinergy, the Cinergy Joint Ventures and interests acquired after the date of this Agreement without violating any covenant or agreement set forth herein. Cinergy does not directly or indirectly own any equity or similar interest in, or any interest convertible into or exchangeable or exercisable for, any equity or similar interest in, any person, in which the net book value as of December 31, 2004 of such interest individually exceeds \$35,000,000.

(b) Capital Stock.

(i) The authorized capital stock of Cinergy consists of:

(A) 600,000,000 shares of Cinergy Common Stock, of which 198,360,398 shares were issued and outstanding as of May 6, 2005; and

(B) 10,000,000 shares of preferred stock, par value \$.01 per share, none of which were issued and outstanding as of the date of this Agreement.

As of March 31, 2005, 138,862 shares of Cinergy Common Stock were held in the treasury of Cinergy. As of the date of this Agreement, 5,837,978 shares of Cinergy Common Stock were subject to outstanding Cinergy Employee Stock Options (as defined in Section 5.06(a)) and 6,914,109 additional shares of Cinergy Common Stock were reserved for issuance pursuant to the Cinergy Corp. 1996 Long-Term Incentive Compensation Plan, Stock Option Plan, Employee Stock Purchase and Savings Plan, UK Sharesave Scheme, Retirement Plan for Directors, Directors' Deferred Compensation Plan, Directors' Equity Compensation Plan and any other compensatory plan, program or arrangement under which shares of Cinergy Common Stock are reserved for issuance (collectively, the "Cinergy Employee Stock Option Plans"). All of the issued and outstanding shares of Cinergy Common Stock are, and all shares reserved for issuance will be, upon issuance in accordance with the terms specified in the instruments or agreements pursuant to which they are issuable, duly authorized, validly issued, fully paid and nonassessable. Except as disclosed in this Section 3.01(b), as of the date of this Agreement there are no outstanding subscriptions, options, warrants, rights (including stock appreciation rights), preemptive rights or other contracts, commitments, understandings or arrangements, including any right of conversion or exchange under any outstanding security, instrument or agreement (together, "Options"),

obligating Cinergy or any of its subsidiaries to issue or sell any shares of capital stock of Cinergy or to grant, extend or enter into any Option with respect thereto.

(ii) Except as permitted by this Agreement, all of the outstanding shares of capital stock of each subsidiary of Cinergy are duly authorized, validly issued, fully paid and nonassessable and are owned, beneficially and of record, by Cinergy or a subsidiary, free and clear of any liens, claims, mortgages, encumbrances, pledges, security interests, equities and charges of any kind (each a "Lien"), except for any of the foregoing that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy. There are no (A) outstanding Options obligating Cinergy or any of its subsidiaries to issue or sell any shares of capital stock of any subsidiary of Cinergy or to grant, extend or enter into any such Option or (B) voting trusts, proxies or other commitments, understandings, restrictions or arrangements in favor of any person other than Cinergy or a subsidiary wholly-owned, directly or indirectly, by Cinergy with respect to the voting of or the right to participate in dividends or other earnings on any capital stock of any subsidiary of Cinergy.

(iii) Cinergy is a "registered holding company" as defined under Section 2(a)(12) of the Public Utility Holding Company Act of 1935, as amended (the "1935 Act").

(iv) As of the date of this Agreement, no bonds, debentures, notes or other indebtedness of Cinergy or any of its subsidiaries having the right to vote (or which are convertible into or exercisable for securities having the right to vote) (collectively, "Cinergy Voting Debt") on any matters on which Cinergy shareholders may vote are issued or outstanding nor are there any outstanding Options obligating Cinergy or any of its subsidiaries to issue or sell any Cinergy Voting Debt or to grant, extend or enter into any Option with respect thereto.

(c) Authority. Cinergy has full corporate power and authority to enter into this Agreement, to perform its obligations hereunder and, subject to obtaining Cinergy Shareholder Approval (as defined in Section 3.01(p)), to consummate the transactions contemplated hereby. The execution, delivery and performance of this Agreement by Cinergy and the consummation by Cinergy of the transactions contemplated hereby have been duly and validly adopted and approved by the Board of Directors of Cinergy, the Board of Directors of Cinergy has recommended approval of this Agreement by the shareholders of Cinergy and directed that this Agreement be submitted to the shareholders of Cinergy for their approval, and no other corporate proceedings on the part of Cinergy or its shareholders are necessary to authorize the execution, delivery and performance of this Agreement by Cinergy and the consummation by Cinergy of the Cinergy Merger and the other transactions contemplated hereby, other than obtaining Cinergy Shareholder Approval. This Agreement has been duly and validly executed and delivered by Cinergy and constitutes a legal, valid and binding obligation of Cinergy enforceable against Cinergy in accordance with its terms.

(d) No Conflicts; Approvals and Consents.

(i) The execution and delivery of this Agreement by Cinergy do not, and the performance by Cinergy of its obligations hereunder and the consummation of the Mergers and the other transactions contemplated hereby will not, conflict with, result in a violation or breach of, constitute (with or without notice or lapse of time or both) a default under, result in or give to any person any right of payment or reimbursement, termination, cancellation, modification or acceleration of, or result in the creation or imposition of any Lien upon any of the assets or properties of Cinergy or any of its subsidiaries or any of the Cinergy Joint Ventures under, any of the terms, conditions or provisions of (A) the certificates or articles of incorporation or by-laws (or other comparable organizational documents) of Cinergy or any of its subsidiaries or any of the Cinergy Joint Ventures, or (B) subject to the obtaining of Cinergy Shareholder Approval and the taking of the actions described in paragraph (ii) of this Section 3.01(d) and obtaining the Duke Required Statutory Approvals (as defined in Section 3.02(d)(ii)), (x) any statute, law, rule,

regulation or ordinance (together, “laws”), or any judgment, order, writ or decree (together, “orders”), of any Federal, state, local or foreign government or any court of competent jurisdiction, administrative agency or commission or other governmental authority or instrumentality, domestic, foreign or supranational (each, a “Governmental Authority”) applicable to Cinergy or any of its subsidiaries or any of the Cinergy Joint Ventures or any of their respective assets or properties, or (y) any note, bond, mortgage, security agreement, agreement, indenture, franchise, concession, contract, lease or other instrument to which Cinergy or any of its subsidiaries or any of the Cinergy Joint Ventures is a party or by which Cinergy or any of its subsidiaries or any of the Cinergy Joint Ventures or any of their respective assets or properties is bound, excluding from the foregoing clauses (x) and (y) such items that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy.

(ii) Except for (A) compliance with, and filings under, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations thereunder (the “HSR Act”); (B) the filing with and, to the extent required, the declaration of effectiveness by the Securities and Exchange Commission (the “SEC”) of (1) a proxy statement relating to the approval of this Agreement by Cinergy’s shareholders (such proxy statement, together with the proxy statement relating to the approval of this Agreement by Duke’s shareholders, in each case as amended or supplemented from time to time, the “Joint Proxy Statement”) pursuant to the Securities Exchange Act of 1934, as amended, and the rules and regulations thereunder (the “Exchange Act”), (2) the registration statement on Form S-4 prepared in connection with the issuance of Company Common Stock in the Mergers (the “Form S-4”) and (3) such reports under the Exchange Act as may be required in connection with this Agreement and the transactions contemplated hereby; (C) the filing of documents with various state securities authorities that may be required in connection with the transactions contemplated hereby; (D) such filings with and approvals of the NYSE to permit the shares of Company Common Stock that are to be issued pursuant to Article II to be listed on the NYSE; (E) the registration, consents, approvals and notices required under the 1935 Act; (F) notice to, and the consent and approval of, the Federal Energy Regulatory Commission (the “FERC”) under Section 203 of the Federal Power Act, as amended (the “Power Act”), or an order under the Power Act disclaiming jurisdiction over the transactions contemplated hereby; (G) the filing of an application to, and consent and approval of, and issuance of any required licenses and license amendments by, the Nuclear Regulatory Commission (the “NRC”) under the Atomic Energy Act of 1954, as amended (the “Atomic Energy Act”); (H) the filing of the Cinergy Certificate of Merger and other appropriate merger documents required by the DGCL with the Secretary of State of the State of Delaware and appropriate documents with the relevant authorities of other states in which Cinergy is qualified to do business; (I) compliance with and such filings as may be required under applicable Environmental Laws (as defined in Section 3.01(n)); (J) to the extent required, notice to and the approval of (1) the Public Utilities Commission of Ohio (“PUCO”), (2) the Indiana Utility Regulatory Commission (“IURC”), (3) the Kentucky Public Service Commission (“KPSC”), (4) the North Carolina Utilities Commission (“NCUC”), and (5) the Public Service Commission of South Carolina (“PSCSC” and, collectively with PUCO, IURC, KPSC, and NCUC, the “Applicable PSCs”); (K) required pre-approvals (the “FCC Pre-Approvals”) of license transfers with the Federal Communications Commission (the “FCC”); (L) such other items as disclosed in Section 3.01(d) of the Cinergy Disclosure Letter; and (M) compliance with, and filings under, antitrust or competition laws of any foreign jurisdiction, including the Competition Act (Canada), Investment Canada Act and other applicable Canadian federal and provincial regulatory requirements (the items set forth above in clauses (A) through (H) and (J), collectively, the “Cinergy Required Statutory Approvals”), no consent, approval, license, order or authorization (“Consents”) or action of, registration, declaration or filing with or notice to any Governmental Authority is necessary or required to be obtained or made in connection with the execution and delivery of this Agreement

by Cinergy, the performance by Cinergy of its obligations hereunder or the consummation of the Mergers and the other transactions contemplated hereby, other than such items that the failure to make or obtain, as the case may be, individually or in the aggregate, could not reasonably be expected to have a material adverse effect on Cinergy.

(e) SEC Reports, Financial Statements and Utility Reports.

(i) Cinergy and its subsidiaries have filed each form, report, schedule, registration statement, registration exemption, if applicable, definitive proxy statement and other document (together with all amendments thereof and supplements thereto) required to be filed by Cinergy or any of its subsidiaries pursuant to the Securities Act of 1933, as amended, and the rules and regulations thereunder (the "Securities Act") or the Exchange Act with the SEC since January 1, 2002 (as such documents have since the time of their filing been amended or supplemented, the "Cinergy SEC Reports"). As of their respective dates, after giving effect to any amendments or supplements thereto, the Cinergy SEC Reports (A) complied as to form in all material respects with the requirements of the Securities Act or the Exchange Act, if applicable, as the case may be, and, to the extent in effect and applicable, the Sarbanes-Oxley Act of 2002 ("SOX"), and (B) did not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading.

(ii) Each of the principal executive officer of Cinergy and the principal financial officer of Cinergy (or each former principal executive officer of Cinergy and each former principal financial officer of Cinergy, as applicable) has made all certifications required by Rule 13a-14 or 15d-14 under the Exchange Act or Sections 302 and 906 of SOX and the rules and regulations of the SEC promulgated thereunder with respect to the Cinergy SEC Reports. For purposes of the preceding sentence, "principal executive officer" and "principal financial officer" shall have the meanings given to such terms in SOX. Since the effectiveness of SOX, neither Cinergy nor any of its subsidiaries has arranged any outstanding "extensions of credit" to directors or executive officers within the meaning of Section 402 of SOX.

(iii) The audited consolidated financial statements and unaudited interim consolidated financial statements (including, in each case, the notes, if any, thereto) included in the Cinergy SEC Reports (the "Cinergy Financial Statements") complied as to form in all material respects with the published rules and regulations of the SEC with respect thereto, were prepared in accordance with United States generally accepted accounting principles ("GAAP") applied on a consistent basis during the periods involved (except as may be indicated therein or in the notes thereto and except with respect to unaudited statements as permitted by Form 10-Q of the SEC) and fairly present (subject, in the case of the unaudited interim financial statements, to normal, recurring year-end audit adjustments that were not or are not expected to be, individually or in the aggregate, materially adverse to Cinergy) the consolidated financial position of Cinergy and its consolidated subsidiaries as of the respective dates thereof and the consolidated results of their operations and cash flows for the respective periods then ended.

(iv) All filings (other than immaterial filings) required to be made by Cinergy or any of its subsidiaries since January 1, 2002, under the 1935 Act, the Power Act, the Communications Act of 1934 and applicable state laws and regulations, have been filed with the SEC, the FERC, the Department of Energy (the "DOE"), the FCC or any applicable state public utility commissions (including, to the extent required, PUCO, IURC and KPSC), as the case may be, including all forms, statements, reports, agreements (oral or written) and all documents, exhibits, amendments and supplements appertaining thereto, including all rates, tariffs, franchises, service agreements and related documents and all such filings complied, as of their respective dates, with all applicable requirements of the applicable statute and the rules and regulations thereunder, except for filings

the failure of which to make or the failure of which to make in compliance with all applicable requirements of the applicable statute and the rules and regulations thereunder, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy.

(v) The management of Cinergy has (x) designed disclosure controls and procedures (as defined in Rule 13a-15(e) of the Exchange Act), or caused such disclosure controls and procedures to be designed under their supervision, to ensure that material information relating to Cinergy, including its consolidated subsidiaries, is made known to the management of Cinergy by others within those entities, and (y) has disclosed, based on its most recent evaluation of internal control over financial reporting (as defined in Rule 13a-15(f) of the Exchange Act), to Cinergy's outside auditors and the audit committee of the Board of Directors of Cinergy (A) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect Cinergy's ability to record, process, summarize and report financial information and (B) any fraud, whether or not material, that involves management or other employees who have a significant role in Cinergy's internal control over financial reporting. Since December 31, 2004, any material change in internal control over financial reporting required to be disclosed in any Cinergy SEC Report has been so disclosed.

(vi) Since December 31, 2004, (x) neither Cinergy nor any of its subsidiaries nor, to the knowledge of the Executive Officers (for the purposes of this Section 3.01(e)(vi), as such term is defined in Section 3b-7 of the Exchange Act) of Cinergy, any director, officer, employee, auditor, accountant or representative of Cinergy or any of its subsidiaries has received or otherwise obtained knowledge of any material complaint, allegation, assertion or claim, whether written or oral, regarding the accounting or auditing practices, procedures, methodologies or methods of Cinergy or any of its subsidiaries or their respective internal accounting controls relating to periods after December 31, 2004, including any material complaint, allegation, assertion or claim that Cinergy or any of its subsidiaries has engaged in questionable accounting or auditing practices (except for any of the foregoing after the date hereof which have no reasonable basis), and (y) to the knowledge of the Executive Officers of Cinergy, no attorney representing Cinergy or any of its subsidiaries, whether or not employed by Cinergy or any of its subsidiaries, has reported evidence of a material violation of securities laws, breach of fiduciary duty or similar violation, relating to periods after December 31, 2004, by Cinergy or any of its officers, directors, employees or agents to the Board of Directors of Cinergy or any committee thereof or to any director or Executive Officer of Cinergy.

(f) Absence of Certain Changes or Events. Since December 31, 2004, through the date hereof, there has not been any change, event or development that, individually or in the aggregate, has had or could reasonably be expected to have a material adverse effect on Cinergy.

(g) Absence of Undisclosed Liabilities. Except for matters reflected or reserved against in the balance sheet (or notes thereto) as of December 31, 2004, included in the Cinergy Financial Statements, as of the date of this Agreement, neither Cinergy nor any of its subsidiaries has any liabilities or obligations (whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due) of any nature that would be required by GAAP to be reflected on a consolidated balance sheet of Cinergy and its consolidated subsidiaries (including the notes thereto), except liabilities or obligations (i) that were incurred in the ordinary course of business consistent with past practice since December 31, 2004, or (ii) that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy.

(h) Legal Proceedings. Except for environmental matters, which are the subject of Section 3.01(n), as of the date of this Agreement, (i) there are no actions, suits, arbitrations or proceedings pending or, to the knowledge of Cinergy, threatened against, relating to or affecting, nor to

the knowledge of Cinergy are there any Governmental Authority investigations or audits pending or threatened against, relating to or affecting, Cinergy or any of its subsidiaries or any of the Cinergy Joint Ventures or any of their respective assets and properties that, in each case, individually or in the aggregate, have had or could reasonably be expected to have a material adverse effect on Cinergy, and (ii) neither Cinergy nor any of its subsidiaries is subject to any order of any Governmental Authority that, individually or in the aggregate, has had or could reasonably be expected to have a material adverse effect on Cinergy.

(i) Information Supplied. None of the information supplied or to be supplied by Cinergy for inclusion or incorporation by reference in (i) the Form S-4 will, at the time the Form S-4 is filed with the SEC, at any time it is amended or supplemented or at the time it becomes effective under the Securities Act, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) the Joint Proxy Statement will, at the date it is first mailed to Cinergy's shareholders or Duke's shareholders or at the time of the Cinergy Shareholders Meeting (as defined in Section 5.01) or the Duke Shareholders Meeting (as defined in Section 5.01), contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they are made, not misleading. The Joint Proxy Statement will comply as to form in all material respects with the requirements of the Exchange Act and the rules and regulations thereunder, except that no representation is made by Cinergy with respect to statements made or incorporated by reference therein based on information supplied by or on behalf of Duke for inclusion or incorporation by reference in the Joint Proxy Statement.

(j) Permits; Compliance with Laws and Orders. Cinergy, its subsidiaries and the Cinergy Joint Ventures hold all permits, licenses, certificates, authorizations and approvals of all Governmental Authorities ("Permits") necessary for the lawful conduct of their respective businesses, except for failures to hold such Permits that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy. Cinergy, its subsidiaries and the Cinergy Joint Ventures are in compliance with the terms of their Permits, except failures so to comply that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy. Cinergy, its subsidiaries and the Cinergy Joint Ventures are not in violation of or default under any law or order of any Governmental Authority, except for such violations or defaults that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy. Cinergy is, and has been, in compliance in all material respects with (i) the provisions of SOX applicable to it on or prior to the date hereof and has implemented such programs and has taken all reasonable steps necessary to ensure Cinergy's future compliance (not later than the relevant statutory and regulatory deadlines therefore) with all provisions of SOX which shall become applicable to Cinergy after the date hereof and (ii) the applicable listing standards and corporate governance rules and regulations of the NYSE. This Section 3.01(j) does not relate to matters with respect to taxes, such matters being the subject of Section 3.01(k), Environmental Laws, such matters being the subject of Section 3.01(n) and benefits plans, such matters being the subject of Section 3.01(l).

(k) Taxes. Except as has not had, and could not reasonably be expected to have, a material adverse effect on Cinergy:

(i) Each of Cinergy and its subsidiaries has timely filed, or has caused to be timely filed on its behalf, all Tax Returns (as defined below) required to be filed by it, and all such Tax Returns are true, complete and accurate. All Taxes (as defined below) shown to be due and owing on such Tax Returns have been timely paid.

(ii) The most recent financial statements contained in the Cinergy SEC Reports filed prior to the date of This Agreement reflect, in accordance with GAAP, an adequate reserve for all Taxes

payable by Cinergy and its subsidiaries for all taxable periods through the date of such financial statements.

(iii) There is no audit, examination, deficiency, refund litigation, proposed adjustment or matter in controversy with respect to any Taxes or Tax Return of Cinergy or its subsidiaries, to the knowledge of Cinergy, neither Cinergy nor any of its subsidiaries has received written notice of any claim made by a governmental authority in a jurisdiction where Cinergy or any of its subsidiaries, as applicable, does not file a Tax Return, that Cinergy or such subsidiary is or may be subject to income taxation by that jurisdiction, no deficiency with respect to any Taxes has been proposed, asserted or assessed against Cinergy or any of its subsidiaries, and no requests for waivers of the time to assess any Taxes are pending.

(iv) The federal income Tax Returns of Cinergy and its subsidiaries have been examined by and settled with the Internal Revenue Service ("IRS") (or the applicable statutes of limitation have lapsed) for all years through 1990. All material assessments for Taxes due with respect to such completed and settled examinations or any concluded litigation have been fully paid.

(v) There are no outstanding written agreements, consents or waivers to extend the statutory period of limitations applicable to the assessment of any Taxes or deficiencies against Cinergy or any of its subsidiaries, and no power of attorney granted by either Cinergy or any of its subsidiaries with respect to any Taxes is currently in force.

(vi) Neither Cinergy nor any of its subsidiaries is a party to any agreement providing for the allocation or sharing of Taxes imposed on or with respect to any individual or other Person (other than (I) such agreements with customers, vendors, lessors or the like entered into in the ordinary course of business and (II) agreements with or among Cinergy or any of its subsidiaries), and neither Cinergy nor any of its subsidiaries (A) has been a member of an affiliated group (or similar state, local or foreign filing group) filing a consolidated U.S. federal income Tax Return (other than the group the common parent of which is Cinergy) or (B) has any liability for the Taxes of any person (other than Cinergy or any of its subsidiaries) (I) under Treasury Regulation ss. 1.1502-6 (or any similar provision of state, local or foreign law), or (II) as a transferee or successor.

(vii) There are no material Liens for Taxes (other than for current Taxes not yet due and payable) on the assets of Cinergy and its subsidiaries.

(viii) Neither Cinergy nor any of its subsidiaries has taken or agreed to take any action or knows of any fact, agreement, plan or other circumstance that is reasonably likely to prevent or impede either the Duke Reorganization from qualifying as a reorganization under Section 368(a) of the Code or the Cinergy Merger from qualifying as a reorganization under Section 368(a) of the Code.

For purposes of this Agreement:

"Taxes" means any and all federal, state, local, foreign or other taxes of any kind (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any governmental authority, including, without limitation, taxes or other charges on or with respect to income, franchises, windfall or other profits, gross receipts, property, sales, use, capital stock, payroll, employment, unemployment, social security, workers' compensation, or net worth, and taxes or other charges in the nature of excise, withholding, ad valorem or value added.

"Tax Return" means any return, report or similar statement (including the schedules attached thereto) required to be filed with respect to Taxes, including, without limitation, any information return, claim for refund, amended return, or declaration of estimated Taxes.



(l) Employee Benefit Plans; ERISA.

(i) Except for such matters that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy, (A) all Cinergy Employee Benefit Plans (as defined below) are in compliance with all applicable requirements of law, including ERISA (as defined below) and the Code, and (B) there does not now exist, nor do any circumstances exist that could result in, any Controlled Group Liability that would be a liability of Cinergy or any of its subsidiaries following the Closing. The only material employment agreements, severance agreements or severance policies applicable to Cinergy or any of its subsidiaries are the agreements and policies disclosed in Section 3.01(l)(i) of the Cinergy Disclosure Letter.

(ii) As used herein:

(A) "Controlled Group Liability" means any and all liabilities (i) under Title IV of ERISA, (ii) under Section 302 of ERISA, (iii) under Sections 412 and 4971 of the Code, and (iv) as a result of a failure to comply with the continuation coverage requirements of Section 601 et seq. of ERISA and Section 4980B of the Code.

(B) "Cinergy Employee Benefit Plan" means any Plan entered into, established, maintained, sponsored, contributed to or required to be contributed to by Cinergy or any of its subsidiaries for the benefit of the current or former employees or directors of Cinergy or any of its subsidiaries and existing on the date of this Agreement or at any time subsequent thereto and, in the case of a Plan (as defined below) that is subject to Part 3 of Title I of the Employee Retirement Income Security Act of 1974, as amended, and the rules and regulations thereunder ("ERISA"), Section 412 of the Code or Title IV of ERISA, at any time during the five-year period preceding the date of this Agreement with respect to which Cinergy or any of its subsidiaries has or could reasonably be expected to have any present or future actual or contingent liabilities;

(C) "Plan" means any employment, bonus, incentive compensation, deferred compensation, long term incentive, pension, profit sharing, retirement, stock purchase, stock option, stock ownership, stock appreciation rights, phantom stock, leave of absence, layoff, vacation, day or dependent care, legal services, cafeteria, life, health, medical, accident, disability, workmen's compensation or other insurance, severance, separation, termination, change of control or other benefit plan, agreement, practice, policy, program, scheme or arrangement of any kind, whether written or oral, including any "employee benefit plan" within the meaning of Section 3(3) of ERISA; and

(iii) No event has occurred, and there exists no condition or set of circumstances in connection with any Cinergy Employee Benefit Plan, that has had or could reasonably be expected to have a material adverse effect on Cinergy.

(iv) Section 3.01(l)(iv) of the Cinergy Disclosure Letter identifies each Cinergy Employee Benefit Plan that provides, upon the occurrence of a change in the ownership or effective control of Cinergy or its subsidiaries or a change in the ownership of all or a substantial portion of the assets of Cinergy or its subsidiaries, either alone or upon the occurrence of any additional or subsequent events and whether or not applicable to the transactions contemplated by this Agreement, for (A) and acceleration of the time of payment of or vesting in, or an increase in the amount of, compensation or benefits due any current or former employee, director or officer of Cinergy or its subsidiaries, (B) any forgiveness of indebtedness or obligation to fund benefits with respect to any such employee, director or officer, or (C) an entitlement of any such employee, director or officer to severance pay, unemployment compensation or any other payment or other benefit.

(m) Labor Matters. As of the date hereof, neither Cinergy nor any of its subsidiaries is a party to, bound by or in the process of negotiating any collective bargaining agreement or other labor agreement with any union or labor organization. As of the date of this Agreement, there are no disputes, grievances or arbitrations pending or, to the knowledge of Cinergy, threatened between Cinergy or any of its subsidiaries and any trade union or other representatives of its employees and there is no charge or complaint pending or threatened in writing against Cinergy or any of its subsidiaries before the National Labor Relations Board (the "NLRB") or any similar Governmental Authority, except in each case as, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy, and, to the knowledge of Cinergy, as of the date of this Agreement, there are no material organizational efforts presently being made involving any of the employees of Cinergy or any of its subsidiaries. From December 31, 2002, to the date of this Agreement, there has been no work stoppage, strike, slowdown or lockout by or affecting employees of Cinergy or any of its subsidiaries and, to the knowledge of Cinergy, no such action has been threatened in writing, except in each case as, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy. Except as, individually or in the aggregate, has not had and could not reasonably be expected to have a material adverse effect on Cinergy: (A) there are no litigations, lawsuits, claims, charges, complaints, arbitrations, actions, investigations or proceedings pending or, to the knowledge of Cinergy, threatened between or involving Cinergy or any of its subsidiaries and any of their respective current or former employees, independent contractors, applicants for employment or classes of the foregoing; (B) Cinergy and its subsidiaries are in compliance with all applicable laws, orders, agreements, contracts and policies respecting employment and employment practices, including, without limitation, all legal requirements respecting terms and conditions of employment, equal opportunity, workplace health and safety, wages and hours, child labor, immigration, discrimination, disability rights or benefits, facility closures and layoffs, workers' compensation, labor relations, employee leaves and unemployment insurance; and (C) since January 1, 2002, neither Cinergy nor any of its subsidiaries has engaged in any "plant closing" or "mass layoff", as defined in the Worker Adjustment Retraining and Notification Act or any comparable state or local law (the "WARN Act"), without complying with the notice requirements of such laws.

(n) Environmental Matters.

(i) Each of Cinergy, its subsidiaries and the Cinergy Joint Ventures has been and is in compliance with all applicable Environmental Laws (as hereinafter defined), except where the failure to be in such compliance, individually or in the aggregate, has not had and could not reasonably be expected to have a material adverse effect on Cinergy.

(ii) Each of Cinergy, its subsidiaries and the Cinergy Joint Ventures has obtained all environmental Permits (collectively, the "Environmental Permits") necessary for the construction of their facilities and the conduct of their operations as of the date of this Agreement, as applicable, and all such Environmental Permits are in good standing or, where applicable, a renewal application has been timely filed and is pending agency approval, and Cinergy, its subsidiaries and the Cinergy Joint Ventures are in compliance with all terms and conditions of the Environmental Permits, except where the failure to obtain such Environmental Permits, of such Permits to be in good standing or, where applicable, of a renewal application to have been timely filed and be pending or to be in such compliance, individually or in the aggregate, has not had and could not reasonably be expected to have a material adverse effect on Cinergy.

(iii) There is no Environmental Claim (as herein after defined) pending:

(A) against Cinergy or any of its subsidiaries or any of the Cinergy Joint Ventures;

(B) to the knowledge of Cinergy, against any person or entity whose liability for such Environmental Claim has been retained or assumed either contractually or by operation of law by Cinergy or any of its subsidiaries or any of the Cinergy Joint Ventures; or

(C) against any real or personal property or operations that Cinergy or any of its subsidiaries or any of the Cinergy Joint Ventures owns, leases or manages, in whole or in part, or, to the knowledge of Cinergy, formerly owned, leased or managed, in whole or in part, except in the case of clause (A), (B) or (C) for such Environmental Claims that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy.

(iv) To the knowledge of Cinergy, there have not been any Releases (as hereinafter defined) of any Hazardous Material (as herein after defined) that would be reasonably likely to form the basis of any Environmental Claim against Cinergy or any of its subsidiaries or any of the Cinergy Joint Ventures, in each case, except for such Releases that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy.

(v) As used in this Section 3.01(n) and in Section 3.02(n):

(A) "Environmental Claim" means any and all administrative, regulatory or judicial actions, suits, orders, demands, demand letters, directives, claims, liens, investigations, proceedings or notices of noncompliance, liability or violation (written or oral) by any person or entity (including any Governmental Authority) alleging potential liability (including potential responsibility or liability for enforcement, investigatory costs, cleanup costs, governmental response costs, removal costs, remedial costs, natural resources damages, property damages, personal injuries or penalties) arising out of, based on or resulting from

(1) the presence or Release into the environment of any Hazardous Materials at any location;

(2) circumstances forming the basis of any actual or alleged violation of, or liability under, any Environmental Law or Environmental Permit; or

(3) any and all claims by any-third party seeking damages, contribution, indemnification, cost recovery, compensation or injunctive relief resulting from the presence or Release of, or exposure to, any Hazardous Materials;

(B) "Environmental Laws" means all domestic or foreign Federal, state and local laws, principles of common law and orders relating to pollution, the environment (including ambient air, surface water, groundwater, land surface or subsurface strata) or protection of human health as it relates to the environment including laws relating to the presence or Release of Hazardous Materials, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of, or exposure to, Hazardous Materials;

(C) "Hazardous Materials" means (a) any petroleum or petroleum products, radioactive materials, asbestos in any form that is or could become friable, urea formaldehyde foam insulation, and polychlorinated biphenyls; and (b) any chemical, material, substance or waste that is now prohibited, limited or regulated under any Environmental Law; and

(D) "Release" means any actual or threatened release, spill, emission, leaking, injection, deposit, disposal, discharge, dispersal, leaching or migration into the atmosphere, soil, surface water, groundwater or property.

(o) No Ownership of Nuclear Power Plants. None of Cinergy, any of its subsidiaries or any Cinergy Joint Venture owns, directly or indirectly, any interest in any nuclear generation station or manages or operates any nuclear generation station.

(p) Vote Required. Assuming the accuracy of the representation and warranty contained in Section 3.02(r), the affirmative vote of the holders of record of at least a majority of the outstanding shares of Cinergy Common Stock, with respect to the approval of this Agreement (the “Cinergy Shareholder Approval”), is the only vote of the holders of any class or series of the capital stock of Cinergy or its subsidiaries required to approve this Agreement, the Cinergy Merger and the other transactions contemplated hereby.

(q) Opinion of Financial Advisor. Cinergy has received the opinion of Merrill Lynch, Pierce, Fenner & Smith Incorporated, dated the date of this Agreement, to the effect that, as of the date of this Agreement, the Cinergy Exchange Ratio is fair from a financial point of view to the holders of Cinergy Common Stock.

(r) Ownership of Duke Capital Stock. Neither Cinergy or any of its subsidiaries or other affiliates beneficially owns any shares of Duke capital stock.

(s) Section 203 of the DGCL Not Applicable; Other Statutes. Cinergy has taken all necessary actions, if any, so that the provisions of Section 203 of the DGCL will not, before the termination of this Agreement, apply to this Agreement, the Cinergy Merger or the other transactions contemplated hereby. No “fair price”, “merger moratorium”, “control share acquisition”, or other anti-takeover or similar statute or regulation applies or purports to apply to this Agreement, the Cinergy Merger or the other transactions contemplated hereby.

(t) Joint Venture Representations. Each representation or warranty made by Cinergy in this Section 3.01 relating to a Cinergy Joint Venture that is neither operated nor managed by Cinergy or a Cinergy subsidiary shall be deemed made only to the knowledge of Cinergy.

(u) Insurance. Except for failures to maintain insurance or self-insurance that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Cinergy, from January 1, 2004, through the date of this Agreement, each of Cinergy and its subsidiaries has been continuously insured with financially responsible insurers or has self-insured, in each case in such amounts and with respect to such risks and losses as are customary for companies in the United States conducting the business conducted by Cinergy and its subsidiaries during such time period. Neither Cinergy nor any of its subsidiaries has received any notice of cancellation or termination with respect to any insurance policy of Cinergy or any of its subsidiaries, except with respect to any cancellation or termination that, individually or in the aggregate, has not had and could not reasonably be expected to have a material adverse effect on Cinergy.

(v) Trading. Cinergy has established risk parameters, limits and guidelines in compliance with the risk management policy approved by Cinergy’s Board of Directors (the “Cinergy Trading Guidelines”) to restrict the level of risk that Cinergy and its subsidiaries are authorized to take with respect to, among other things, the net position resulting from all physical commodity transactions, exchange-traded futures and options transactions, over-the-counter transactions and derivatives thereof and similar transactions (the “Net Cinergy Position”) and monitors compliance by Cinergy and its subsidiaries with such risk parameters. Cinergy has provided the Cinergy Trading Guidelines to Duke prior to the date of this Agreement. As of the date of this Agreement, (i) the Net Cinergy Position is within the risk parameters that are set forth in the Cinergy Trading Guidelines and (ii) the exposure of Cinergy and its subsidiaries with respect to the Net Cinergy Position resulting from all such transactions is not material to Cinergy and its subsidiaries taken as a whole. From December 31, 2004 to the date of this Agreement, neither Cinergy nor any of its subsidiaries has, in accordance with its mark to market

accounting policies, experienced an aggregate net loss in its trading and related operations that would be material to Cinergy and its subsidiaries taken as a whole.

Section 3.02 *Representations and Warranties of Duke*. Except as set forth in the letter dated the date of this Agreement and delivered to Cinergy by Duke concurrently with the execution and delivery of this Agreement (the "Duke Disclosure Letter") or, to the extent the qualifying nature of such disclosure is readily apparent therefrom, as set forth in the Duke SEC Reports (as defined in Section 3.02(e)) filed on or after January 1, 2004 and prior to the date hereof, Duke represents and warrants to Cinergy as follows:

(a) Organization and Qualification.

(i) Each of Duke and its subsidiaries is duly organized, validly existing and in good standing (with respect to jurisdictions that recognize the concept of good standing) under the laws of its jurisdiction of organization and has full power and authority to conduct its business as and to the extent now conducted and to own, use and lease its assets and properties, except for such failures to be so organized, existing and in good standing (with respect to jurisdictions that recognize the concept of good standing) or to have such power and authority that, individually or in the aggregate, have not had and could not be reasonably expected to have a material adverse effect (as defined in Section 8.03) on Duke. Each of Duke and its subsidiaries is duly qualified, licensed or admitted to do business and is in good standing (with respect to jurisdictions that recognize the concept of good standing) in each jurisdiction in which the ownership, use or leasing of its assets and properties, or the conduct or nature of its business, makes such qualification, licensing or admission necessary, except for such failures to be so qualified, licensed or admitted and in good standing (with respect to jurisdictions that recognize the concept of good standing) that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke. Section 3.02(a) of the Duke Disclosure Letter sets forth as of the date of this Agreement the name and jurisdiction of organization of each subsidiary of Duke. Each of the Company, Merger Sub A and Merger Sub B is a newly formed corporation and has engaged in no activities except as contemplated by this Agreement.

(ii) Section 3.02(a) of the Duke Disclosure And authority forth a description as of the date of this Agreement, of all Duke Joint Ventures, including (x) the name of each such entity and (y) a brief description of the principal line or lines of business conducted by each such entity.

(iii) Except for interests in the subsidiaries of Duke, the Duke Joint Ventures and interests acquired after the date of this Agreement without violating any covenant or agreement set forth herein, Duke does not directly or indirectly own any equity or similar interest in, or any interest convertible into or exchangeable or exercisable for, any equity or similar interest in, any person, in which the invested capital associated with such interest individually as of the date of this Agreement exceeds \$100,000,000.

(b) Capital Stock.

(i) The authorized capital stock of Duke consists of:

(A) 2,000,000,000 shares of Duke Common Stock, of which 926,431,621 shares were outstanding as of the close of business on May 6, 2005;

(B) 1,500,000 shares of Preference Stock, par value \$100 per share ("Duke Preference Stock"), none of which were outstanding as of the date of this Agreement;

(C) 20,000,000 shares of Serial Preferred , no par value, none of which were outstanding as of the date of this Agreement;

(D) 12,500,000 shares of Duke Preferred Stock, of which 1,234,984 shares were outstanding as of the date of this Agreement, issued in the following series:

- (1) 175,000 shares of 4.5% Cumulative Preferred Stock, Series C;
- (2) 300,000 shares of 7.85% Cumulative Preferred Stock, Series S;
- (3) 249,989 shares of 7.0% Cumulative Preferred Stock, Series W; and
- (4) 299,995 shares of 7.04% Cumulative Preferred Stock, Series Y; and

(E) 10,000,000 shares of Duke Preferred Stock A, of which 1,257,185 shares were outstanding as of the date of this Agreement, issued as 6.375% Cumulative Preferred Stock A.

As of the date of this Agreement, no shares of Duke Common Stock are held in the treasury of Duke. As of the date of this Agreement, (x) 1,500,000 shares of Duke Preference Stock are designated Series A Participating Preference Stock (the “Duke Series A Preference Stock”) and are reserved for issuance in accordance with the Rights Agreement dated as of December 17, 1998, as amended, by and between Duke and The Bank of New York, as Rights Agent, pursuant to which Duke has issued rights (the “Duke Rights”) to purchase such shares of Duke Series A Preference Stock and (y) 26,635,301 shares of Duke Common Stock were subject to outstanding Duke Employee Stock Options (as defined in Section 5.06(b)), and 24,294,199 additional shares of Duke Common Stock were reserved for issuance pursuant to the Duke Power Company Stock Incentive Plan and the Duke 1998 Long-Term Incentive Plan and any other compensatory plan, program or arrangement under which shares of Duke Common Stock are reserved for issuance (collectively, the “Duke Option Plans”). All of the issued and outstanding shares of Duke Common Stock are, and all shares reserved for issuance will be, upon issuance in accordance with the terms specified in the instruments or agreements pursuant to which they are issuable, duly authorized, validly issued, fully paid and nonassessable. Except as disclosed in this Section 3.02(b), on the date of this Agreement there are no outstanding Options obligating Duke or any of its subsidiaries to issue or sell any shares of capital stock of Duke or to grant, extend or enter into any Option with respect thereto.

(ii) Except as permitted by this Agreement, all of the outstanding shares of capital stock of each subsidiary of Duke are duly authorized, validly issued, fully paid and nonassessable and are owned, beneficially and of record, by Duke or a subsidiary, free and clear of any Liens, except for any of the foregoing that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke. All of the outstanding shares of capital stock of the Company, Merger Sub A and Merger Sub B are duly authorized, validly issued, fully paid and nonassessable and are owned, beneficially and of record, by Duke (in the case of shares of capital stock of the Company) or by the Company (in the case of capital stock of Merger Sub A and Merger Sub B). The shares of the Company owned by Duke, and the shares of each of Merger Sub A and Merger Sub B owned by the Company, are owned free and clear of any Lien. There are no (A) outstanding Options obligating Duke or any of its subsidiaries to issue or sell any shares of capital stock of any subsidiary of Duke or to grant, extend or enter into any such Option or (B) voting trusts, proxies or other commitments, understandings, restrictions or arrangements in favor of any person other than Duke or a subsidiary wholly-owned, directly or indirectly, by Duke with respect to the voting of or the right to participate in dividends or other earnings on any capital stock of any subsidiary of Duke.

(iii) As of the date of this Agreement, none of the subsidiaries of Duke or the Duke Joint Ventures is a “public utility company”, a “holding company”, a “subsidiary company” or an “affiliate” of any holding company within the meaning of Section 2(a)(5), 2(a)(7), 2(a)(8) or 2(a)(11) of the 1935 Act, respectively. None of Duke, its subsidiaries and the Duke Joint Ventures is registered under the 1935 Act.

(iv) As of the date of this Agreement, no bonds, debentures, notes or other indebtedness of Duke or any of its subsidiaries having the right to vote (or which are convertible into or exercisable for securities having the right to vote) (collectively, "Duke Voting Debt") on any matters on which Duke shareholders may vote are issued or outstanding nor are there any outstanding Options obligating Duke or any of its subsidiaries to issue or sell any Duke Voting Debt or to grant, extend or enter into any Option with respect thereto.

(v) Each share of Company Common Stock to be issued in either the Duke Merger or the Cinergy Merger shall be duly authorized, validly issued, fully paid and nonassessable and free and clear of any Liens.

(c) Authority. Duke has full corporate power and authority to enter into this Agreement, to perform its obligations hereunder and, subject to obtaining Duke Shareholder Approval (as defined in Section 3.02(p)), to consummate the transactions contemplated hereby. The execution, delivery and performance of this Agreement by Duke and the consummation by Duke of the transactions contemplated hereby have been duly and validly adopted and approved by the Board of Directors of Duke, the Board of Directors of Duke has recommended approval of this Agreement by the shareholders of Duke and directed that this Agreement be submitted to the shareholders of Duke for their approval, and no other corporate proceedings on the part of Duke or its shareholders are necessary to authorize the execution, delivery and performance of this Agreement by Duke and the consummation by Duke of the Duke Merger, the Duke Conversion, the Restructuring Transactions and the other transactions contemplated hereby, other than obtaining Duke Shareholders Approval. This Agreement has been duly and validly executed and delivered by Duke and constitutes a legal, valid and binding obligation of Duke enforceable against Duke in accordance with its terms.

(d) No Conflicts; Approvals and Consents.

(i) The execution and delivery of this Agreement by Duke do not, and the performance by Duke of its obligations hereunder and the consummation of the Mergers, the Duke Conversion, the Restructuring Transactions and the other transactions contemplated hereby will not, conflict with, result in a violation or breach of, constitute (with or without notice or lapse of time or both) a default under, result in or give to any person any right of payment or reimbursement, termination, cancellation, modification or acceleration of, or result in the creation or imposition of any Lien upon any of the assets or properties of Duke or any of its subsidiaries or any of the Duke Joint Ventures under, any of the terms, conditions or provisions of (A) the certificates or articles of incorporation or by-laws (or other comparable organizational documents) of Duke or any of its subsidiaries or any of the Duke Joint Ventures, or (B) subject to the obtaining of Duke Shareholder Approval and the taking of the actions described in paragraph (ii) of this Section 3.02(d) and obtaining the Cinergy Required Statutory Approvals, (x) any laws or orders of any Governmental Authority applicable to Duke or any of its subsidiaries or any of the Duke Joint Ventures or any of their respective assets or properties, or (y) any note, bond, mortgage, security agreement, agreement, indenture, license, franchise, permit, concession, contract, lease or other instrument to which Duke or any of its subsidiaries or any of the Duke Joint Ventures is a party or by which Duke or any of its subsidiaries or any of the Duke Joint Ventures or any of their respective assets or properties is bound, excluding from the foregoing clauses (x) and (y) such items that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke.

(ii) Except for (A) compliance with, and filings under, the HSR Act; (B) the filing with, and to the extent required, the declaration of effectiveness by, the SEC of (1) the Joint Proxy Statement with the SEC pursuant to the Exchange Act, (2) the Form S-4 and (3) such reports under the Exchange Act as may be required in connection with this Agreement and the transactions contemplated hereby; (C) the filing of documents with various state securities

authorities that may be required in connection with the transactions contemplated hereby; (D) such filings with and approvals of the NYSE to permit the shares of Company Common Stock that are to be issued pursuant to Article II to be listed on the NYSE; (E) the registration, consents, approvals and notices required under the 1935 Act; (F) notice to, and the consent and approval of, FERC under Section 203 of the Power Act, or an order under the Power Act disclaiming jurisdiction over the transactions contemplated hereby; (G) the filing of an application to, and consent and approval of, and issuance of any required licenses and license amendments by, the NRC under the Atomic Energy Act; (H) the filing of the Duke Articles of Merger, the Duke Articles of Conversion and other appropriate merger documents required by the NCBCA and the NCLLCA with the Secretary of State of the State of North Carolina and appropriate documents with the relevant authorities of other states in which Duke is qualified to do business; (I) compliance with and such filings as may be required under applicable Environmental Laws; (J) to the extent required, notice to and the approval of, the Applicable PSCs; (K) the FCC Pre-Approvals; (L) such other items as disclosed in Section 3.02(d) of the Duke Disclosure Letter; and (M) compliance with, and filings under, antitrust or competition laws of any foreign jurisdiction, including the Competition Act (Canada), Investment Canada Act, and other applicable Canadian federal and provincial regulatory requirements (the items set forth above in clauses (A) through (H) and (J) collectively, the “Duke Required Statutory Approvals”), no Consents or action of, registration, declaration or filing with or notice to any Governmental Authority is necessary or required to be obtained or made in connection with the execution and delivery of this Agreement by Duke, the performance by Duke of its obligations hereunder or the consummation of the Mergers, the Duke Conversion, the Restructuring Transactions and the other transactions contemplated hereby, other than such items that the failure to make or obtain, as the case may be, individually or in the aggregate, could not reasonably be expected to have a material adverse effect on Duke.

(e) SEC Reports, Financial Statements and Utility Reports.

(i) Duke and its subsidiaries have filed each form, report, schedule, registration statement, registration exemption, if applicable, definitive proxy statement and other document (together with all amendments thereof and supplements thereto) required to be filed by Duke or any of its subsidiaries pursuant to the Securities Act or the Exchange Act with the SEC since January 1, 2002 (as such documents have since the time of their filing been amended or supplemented, the “Duke SEC Reports”). As of their respective dates, after giving effect to any amendments or supplements thereto, the Duke SEC Reports (A) complied as to form in all material respects with the requirements of the Securities Act or the Exchange Act, if applicable, as the case may be, and, to the extent in effect applicable, SOX and (B) did not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading.

(ii) Each of the principal executive officer of Duke and the principal financial officer of Duke (or each former principal executive officer of Duke and each former principal financial officer of Duke, as applicable) has made all certifications required by Rule 13a-14 or 15d-14 under the Exchange Act or Sections 302 and 906 of SOX and the rules and regulations of the SEC promulgated thereunder with respect to the Duke SEC Reports. For purposes of the preceding sentence, “principal executive officer” and “principal financial officer” shall have the meanings given to such terms in SOX. Since the effectiveness of SOX, neither Duke nor any of its subsidiaries has arranged any outstanding “extensions of credit” to directors or executive officers within the meaning of Section 402 of SOX.

(iii) The audited consolidated financial statements and unaudited interim consolidated financial statements (including, in each case, the notes, if any, thereto) included in the Duke SEC Reports (the “Duke Financial Statements”) complied as to form in all material respects with the



published rules and regulations of the SEC with respect thereto, were prepared in accordance with GAAP applied on a consistent basis during the periods involved (except as may be indicated therein or in the notes thereto and except with respect to unaudited statements as permitted by Form 10-Q of the SEC) and fairly present (subject, in the case of the unaudited interim financial statements, to normal, recurring year-end audit adjustments that were not or are not expected to be, individually or in the aggregate, materially adverse to Duke) the consolidated financial position of Duke and its consolidated subsidiaries as of the respective dates thereof and the consolidated results of their operations and cash flows for the respective periods then ended.

(iv) All filings (other than immaterial filings) required to be made by Duke or any of its subsidiaries since January 1, 2002, under the 1935 Act, the Power Act, the Atomic Energy Act, the Natural Gas Act, the Natural Gas Policy Act of 1978, the Communications Act of 1934 and applicable state laws and regulations, have been filed with the SEC, the FERC, the DOE, the NRC, the FCC or any applicable state public utility commissions (including, to the extent required, NCUC and PSCSC), as the case may be, including all forms, statements, reports, agreements (oral or written) and all documents, exhibits, amendments and supplements appertaining thereto, including all rates, tariffs, franchises, service agreements and related documents and all such filings complied, as of their respective dates, with all applicable requirements of the applicable statute and the rules and regulations thereunder, except for filings the failure of which to make or the failure of which to make in compliance with all requirements of the applicable statute and the rules and regulations thereunder, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke.

(v) The management of Duke has (x) designed disclosure controls and procedures (as defined in Rule 13a-15(e) of the Exchange Act), or caused such disclosure controls and procedures to be designed under their supervision to ensure that material information relating to Duke, including its consolidated subsidiaries, is made known to the management of Duke by others within those entities, and (y) has disclosed, based on its most recent evaluation of internal control over financial reporting (as defined in Rule 13a-15(f) of the Exchange Act), to Duke's outside auditors and the audit committee of the Board of Directors of Duke (A) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect Duke's ability to record, process, summarize and report financial information and (B) any fraud, whether or not material, that involves management or other employees who have a significant role in Duke's internal control over financial reporting. Since December 31, 2004, any material change in internal control over financial reporting required to be disclosed in any Duke SEC Report has been so disclosed.

(vi) Since December 31, 2004, (x) neither Duke nor any of its subsidiaries nor, to the knowledge of the Executive Officers (for the purpose of this Section 3.02(e)(vi), as such term is defined in Section 3b-7 of the Exchange Act) of Duke, any director, officer, employee, auditor, accountant or representative of Duke or any of its subsidiaries has received or otherwise obtained knowledge of any material complaint, allegation, assertion or claim, whether written or oral, regarding the accounting or auditing practices, procedures, methodologies or methods of Duke or any of its subsidiaries or their respective internal accounting controls relating to periods after December 31, 2004, including any material complaint, allegation, assertion or claim that Duke or any of its subsidiaries has engaged in questionable accounting or auditing practices (except for any of the foregoing after the date hereof which have no reasonable basis), and (y) to the knowledge of the Executive Officers of Duke, no attorney representing Duke or any of its subsidiaries, whether or not employed by Duke or any of its subsidiaries, has reported evidence of a material violation of securities laws, breach of fiduciary duty or similar violation, relating to periods after December 31, 2004, by Duke or any of its officers, directors, employees or agents to the Board of Directors of Duke or any committee thereof or, to any director or Executive Officer of Duke.

(f) Absence of Certain Changes or Events. Since December 31, 2004 through the date hereof, there has not been any change, event or development that, individually or in the aggregate, has had or could reasonably be expected to have a material adverse effect on Duke.

(g) Absence of Undisclosed Liabilities. Except for matters reflected or reserved against in the balance sheet (or notes thereto) as of December 31, 2004, included in the Duke Financial Statements, as of the date of this Agreement, neither Duke nor any of its subsidiaries has any liabilities or obligations (whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due) of any nature that would be required by GAAP to be reflected on a consolidated balance sheet of Duke and its consolidated subsidiaries (including the notes thereto), except liabilities or obligations (i) that were incurred in the ordinary course of business consistent with past practice since December 31, 2004, or (ii) that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke.

(h) Legal Proceedings. Except for environmental matters, which are the subject of Section 3.02(n), as of the date of this Agreement, (i) there are no actions, suits, arbitrations or proceedings pending or, to the knowledge of Duke, threatened against, relating to or affecting, nor to the knowledge of Duke are there any Governmental Authority investigations or audits pending or threatened against, relating to or affecting, Duke or any of its subsidiaries or any of the Duke Joint Ventures or any of their respective assets and properties that, in each case, individually or in the aggregate, have had or could reasonably be expected to have a material adverse effect on Duke, and (ii) neither Duke nor any of its subsidiaries is subject to any order of any Governmental Authority that, individually or in the aggregate, has had or could reasonably be expected to have a material adverse effect on Duke.

(i) Information Supplied. None of the information supplied or to be supplied by Duke for inclusion or incorporation by reference in (i) the Form S-4 will, at the time the Form S-4 is filed with the SEC, at any time it is amended or supplemented or at the time it becomes effective under the Securities Act, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) the Joint Proxy Statement will, at the date it is first mailed to Cinergy's shareholders or Duke's shareholders or at the time of the Cinergy Shareholders Meeting or the Duke Shareholders Meeting, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they are made, not misleading. The Joint Proxy Statement will comply as to form in all material respects with the requirements of the Exchange Act and the rules and regulations thereunder, except that no representation is made by Duke with respect to statements made or incorporated by reference therein based on information supplied by or on behalf of Cinergy for inclusion or incorporation by reference in the Joint Proxy Statement.

(j) Permits; Compliance with Laws and Orders. Duke, its subsidiaries and the Duke Joint Ventures hold all Permits necessary for the lawful conduct of their respective businesses, except for failures to hold such Permits that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke. Duke, its subsidiaries and the Duke Joint Ventures are in compliance with the terms of their Permits, except failures so to comply that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke. Duke, its subsidiaries and the Duke Joint Ventures are not in violation of or default under any law or order of any Governmental Authority, except for such violations or defaults that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke. Duke is, and has been, in compliance in all material respects with (i) the provisions of SOX applicable to it on or prior to the date hereof and has implemented such programs and has taken all reasonable steps necessary to ensure Duke's future compliance (not later than the relevant statutory and regulatory deadlines therefore) with all provisions of SOX which shall

become applicable to Duke after the date hereof and (ii) the applicable listing standards and corporate governance rules and regulations of the NYSE. This Section 3.02(j) does not relate to matters with respect to taxes, such matters being the subject of Section 3.02(k), Environmental Laws, such matters being the subject of Section 3.02(n), benefits plans, such matters being the subject of Section 3.02(l), and nuclear power plants, such matters being the subject of Section 3.02(o).

(k) Taxes. Except as has not had, and could not reasonably be expected to have, a material adverse affect on Duke:

(i) Each of Duke and its subsidiaries has timely filed, or has caused to be timely filed on its behalf, all Tax Returns required to be filed by it, and all such Tax Returns are true, complete and accurate. All Taxes shown to be due and owing on such Tax Returns have been timely paid.

(ii) The most recent financial statements contained in the Duke SEC Reports filed prior to the date of this Agreement reflect, in accordance with GAAP, an adequate reserve for all Taxes payable by Duke and its subsidiaries for all taxable periods through the date of such financial statements.

(iii) There is no audit, examination, deficiency, refund litigation, proposed adjustment or matter in controversy with respect to any Taxes or Tax Return of Duke or its subsidiaries, to the knowledge of Duke, neither Duke nor any of its subsidiaries has received written notice of any claim made by a governmental authority in a jurisdiction where Duke or any of its subsidiaries, as applicable, does not file a Tax Return, that Duke or such subsidiary is or may be subject to income taxation by that jurisdiction, no deficiency with respect to any Taxes has been proposed, asserted or assessed against Duke or any of its subsidiaries, and no requests for waivers of the time to assess any Taxes are pending.

(iv) The federal income Tax Returns of Duke and its subsidiaries have been examined by and settled with the IRS (or the applicable statutes of limitation have lapsed) for all years through 1994. All material assessments for Taxes due with respect to such completed and settled examinations or any concluded litigation have been fully paid.

(v) There are no outstanding written agreements, consents or waivers to extend the statutory period of limitations applicable to the assessment of any Taxes or deficiencies against Duke or any of its subsidiaries, and no power of attorney granted by either Duke or any of its subsidiaries with respect to any Taxes is currently in force.

(vi) Neither Duke nor any of its subsidiaries is a party to any agreement providing for the allocation or sharing of Taxes imposed on or with respect to any individual or other Person (other than (I) such agreements with customers, vendors, lessors or the like entered into in the ordinary course of business, and (II) agreements with or among Duke or any of its subsidiaries), and neither Duke nor any of its subsidiaries (A) has been a member of an affiliated group (or similar state, local or foreign filing group) filing a consolidated U.S. federal income Tax Return (other than the group the common parent of which is Duke) or (B) has any liability for the Taxes of any person (other than Duke or any of its subsidiaries) (I) under Treasury Regulation ss. 1.1502-6 (or any similar provision of state, local or foreign law), or (II) as a transferee or successor.

(vii) There are no material Liens for Taxes (other than for current Taxes not yet due and payable) on the assets of Duke and its subsidiaries.

(viii) Neither Duke nor any of its subsidiaries has taken or agreed to take any action or knows of any fact, agreement, plan or other circumstance that is reasonably likely to prevent or impede either the Duke Reorganization from qualifying as a reorganization under Section 368(a) of the Code or the Cinergy Merger from qualifying as a reorganization under Section 368(a) of the Code.

(l) Employee Benefit Plans; ERISA.

(i) Except for such matters that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke, (A) all Duke Employee Benefit Plans (as defined below) are in compliance with all applicable requirements of law, including ERISA (as defined below) and the Code, and (B) there does not now exist, nor do any circumstances exist that could result in, any Controlled Group Liability that would be a liability of Duke or any of its subsidiaries. The only material employment agreements, severance agreements or severance policies applicable to Duke or any of its subsidiaries are the agreements and policies disclosed in Section 3.02(1)(i) of the Duke Disclosure Letter.

(ii) As used herein:

(A) "Duke Employee Benefit Plan" means any Plan entered into, established, maintained, sponsored, contributed to or required to be contributed to by Duke or any of its subsidiaries for the benefit of the current or former employees or directors of Duke or any of its subsidiaries and existing on the date of this Agreement or at any time subsequent thereto and in the case of a Plan that is subject to Part 3 of Title I of ERISA, Section 412 of the Code or Title IV of ERISA, at any time during the five-year period preceding the date of this Agreement with respect to which Duke or any of its subsidiaries has or could reasonably be expected to have any present or future actual or contingent liabilities;

(iii) No event has occurred, and there exists no condition or set of circumstances in connection with any Duke Employee Benefit Plan, that has had or could reasonably be expected to have a material adverse effect on Duke.

(iv) Section 3.02(1)(iv) of the Duke Disclosure Letter identifies each Duke Employee Benefit Plan that provides, upon the occurrence of a change in the ownership or effective control of Duke or its subsidiaries or a change in the ownership of all or a substantial portion of the assets of Duke or its subsidiaries, either alone or upon the occurrence of any additional or subsequent events and whether or not applicable to the transactions contemplated by this Agreement, for (A) an acceleration of the time of payment of or vesting in, or an increase in the amount of, compensation or benefits due any current or former employee, director or officer of Duke or its subsidiaries, (B) any forgiveness of indebtedness or obligation to fund benefits with respect to any such employee, director or officer, or (C) an entitlement of any such employee, director or officer to severance pay, unemployment compensation or any other payment or other benefit.

(m) Labor Matters. As of the date hereof, neither Duke nor any of its subsidiaries is a party to, bound by or in the process of negotiating any collective bargaining agreement or other labor agreement with any union or labor organization. As of the date of this Agreement, there are no disputes, grievances or arbitrations pending or, to the knowledge of Duke, threatened between Duke or any of its subsidiaries and any trade union or other representatives of its employees and there is no charge or complaint pending or threatened in writing against Duke or any of its subsidiaries before the NLRB or any similar Governmental Authority, except in each case as, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke, and, to the knowledge of Duke, as of the date of this Agreement, there are no material organizational efforts presently being made involving any of the employees of Duke or any of its subsidiaries. From December 31, 2002, to the date of this Agreement, there has been no work stoppage, strike, slowdown or lockout by or affecting employees of Duke or any of its subsidiaries and, to the knowledge of Duke, no such action has been threatened in writing, except in each case as, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke. Except as, individually or in the aggregate, has not had and could not reasonably be expected to have a material adverse effect on Duke: (A) there are no litigations, lawsuits, claims, charges, complaints, arbitrations, actions, investigations or proceedings pending or, to the knowledge of Duke, threatened

between or involving Duke or any of its subsidiaries and any of their respective current or former employees, independent contractors, applicants for employment or classes of the foregoing; (B) Duke and its subsidiaries are in compliance with all applicable laws, orders, agreements, contracts and policies respecting employment and employment practices, including, without limitation, all legal requirements respecting terms and conditions of employment, equal opportunity, workplace health and safety, wages and hours, child labor, immigration, discrimination, disability rights or benefits, facility closures and layoffs, workers' compensation, labor relations, employee leaves and unemployment insurance; and (C) since January 1, 2002, neither Duke nor any of its subsidiaries has engaged in any "plant closing" or "mass layoff", as defined in the WARN Act, without complying with the notice requirements of such laws.

(n) Environmental Matters.

(i) Each of Duke, its subsidiaries and the Duke Joint Ventures has been and is in compliance with all applicable Environmental Laws, except where the failure to be in such compliance, individually or in the aggregate, has not had and could not reasonably be expected to have a material adverse effect on Duke.

(ii) Each of Duke, its subsidiaries and the Duke Joint Ventures has obtained all Environmental Permits necessary for the construction of their facilities and the conduct of their operations as of the date of this Agreement, as applicable, and all such Environmental Permits are in good standing or, where applicable, a renewal application has been timely filed and is pending agency approval, and Duke, its subsidiaries and the Duke Joint Ventures are in compliance with all terms and conditions of the Environmental Permits, except where the failure to obtain such Environmental Permits, of such Permits to be in good standing or, where applicable, of a renewal application to have been timely filed and be pending or to be in such compliance, individually or in the aggregate, has not had and could not reasonably be expected to have a material adverse effect on Duke.

(iii) There is no Environmental Claim pending

(A) against Duke or any of its subsidiaries or any of the Duke Joint Ventures;

(B) to the knowledge of Duke, against any person or entity whose liability for such Environmental Claim has been retained or assumed either contractually or by operation of law by Duke or any of its subsidiaries or any of the Duke Joint Ventures; or

(C) against any real or personal property or operations that Duke or any of its subsidiaries or any of the Duke Joint Ventures owns, leases or manages, in whole or in part, or, to the knowledge of Duke, formerly owned, leased or arranged, in whole or in part,

except in the case of clause (A), (B) or (C) for such Environmental Claims that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke.

(iv) To the knowledge of Duke, there have not been any Releases of any Hazardous Material that would be reasonably likely to form the basis of any Environmental Claim against Duke or any of its subsidiaries or any of the Duke Joint Ventures, in each case, except for such Releases that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke.

(o) Operations of Nuclear Power Plants. The operations of the nuclear generation stations owned, in whole or part, by Duke or its subsidiaries (collectively, the "Duke Nuclear Facilities") are and have been conducted in compliance with all applicable laws and Permits, except for such failures to comply that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke. Each of the Duke Nuclear Facilities maintains, and is in

material compliance with, emergency plans designed to respond to an unplanned Release therefrom of radioactive materials and each such plan conforms with the requirements of applicable law in all material respects. The plans for the decommissioning of each of the Duke Nuclear Facilities and for the storage of spent nuclear fuel conform with the requirements of applicable law in all material respects and, solely with respect to the portion of the Duke Nuclear Facilities owned, directly or indirectly, by Duke, are funded consistent with applicable law. The operations of the Duke Nuclear Facilities are not the subject of any outstanding notices of violation, any ongoing proceeding, NRC Diagnostic Team Inspections or requests for information from the NRC or any other agency with jurisdiction over such facility, except for such notices or requests for information that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke. No Duke Nuclear Facility is listed by the NRC in the Unacceptable Performance column of the NRC Action Matrix, as a part of NRC's Assessment of Licensee Performance. Liability insurance to the full extent required by law for operating the Duke Nuclear Facilities remains in full force and effect regarding such facilities, except for failures to maintain such insurance in full force and effect that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke.

(p) **Vote Required.** Assuming the accuracy of the representation and warranty contained in Section 3.01(r), the affirmative vote of the holders of record of at least a majority of the outstanding shares of Duke Common Stock, with respect to the approval of this Agreement (the "Duke Shareholder Approval"), is the only vote of the holders of any class or series of the capital stock of Duke or its subsidiaries required to approve this Agreement, the Duke Merger and the other transactions contemplated hereby.

(q) **Opinion of Financial Advisor.** Duke has received the opinion of each of UBS Securities LLC and Lazard Freres & Co. LLC dated the date of this Agreement, to the effect that, as of the date of this Agreement, the Duke Exchange Ratio is fair from a financial point of view to Duke.

(r) **Ownership of Cinergy Capital Stock.** Neither Duke nor any of its subsidiaries or other affiliates beneficially owns any shares of Cinergy capital stock.

(s) **Duke Rights Agreement.** As of the date of this Agreement, Duke or the Board of Directors of Duke, as the case may be, has (i) taken all necessary actions so that the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby will not result in a "Distribution Date" (as defined in the Duke Rights Agreement) and (ii) amended the Duke Rights Agreement to render it inapplicable to this Agreement, the Duke Merger and other transactions contemplated hereby.

(t) **Articles 9 and 9A of the NCBCA Not Applicable.** Duke has taken all necessary actions, if any, so that the provisions of Articles 9 and 9A of the NCBCA will not, before the termination of this Agreement, apply to this Agreement, the Duke Merger or the other transactions contemplated hereby. No "fair price", "merger moratorium", "control share acquisition", or other anti-takeover or similar statute or regulation applies or purports to apply to this Agreement, the Duke Merger or the other transactions contemplated hereby.

(u) **Joint Venture Representations.** Each representation or warranty made by Duke in this Section 3.02 relating to a Duke Joint Venture that is neither operated nor managed by Duke or a Duke subsidiary shall be deemed made only to the knowledge of Duke.

(v) **Insurance.** Except for failures to maintain insurance or self-insurance that, individually or in the aggregate, have not had and could not reasonably be expected to have a material adverse effect on Duke, from January 1, 2004, through the date of this Agreement, each of Duke and its subsidiaries has been continuously insured with financially responsible insurers or has self-insured, in each case in such amounts and with respect to such risks and losses as are customary for companies in the United States

conducting the business conducted by Duke and its subsidiaries during such time period. Neither Duke nor any of its subsidiaries has received any notice of cancellation or termination with respect to any insurance policy of Duke or any of its subsidiaries, except with respect to any cancellation or termination that, individually or in the aggregate, has not had and could not reasonably be expected to have a material adverse effect on Duke.

(w) Trading. Duke has established risk parameters, limits and guidelines in compliance with the risk management policy approved by Duke's Board of Directors (the "Duke Trading Guidelines") to restrict the level of risk that Duke and its subsidiaries are authorized to take with respect to, among other things, the net position resulting from all physical commodity transactions, exchange-traded futures and options transactions, over-the-counter transactions and derivatives thereof and similar transactions (the "Net Duke Position") and monitors compliance by Duke and its subsidiaries with such risk parameters. Duke has provided the Duke Trading Guidelines to Cinergy prior to the date of this Agreement. As of the date of this Agreement, (i) the Net Duke Position is within the risk parameters that are set forth in the Duke Trading Guidelines and (ii) the exposure of Duke and its subsidiaries with respect to the Net Duke Position resulting from all such transactions is not material to Duke and its subsidiaries taken as a whole. From December 31, 2004 to the date of this Agreement, neither Duke nor any of its subsidiaries has, in accordance with its mark to market accounting policies, experienced an aggregate net loss in its trading operations that would be material to Duke and its subsidiaries taken as a whole.

## ARTICLE IV

### Covenants

Section 4.01 *Covenants of Cinergy*. From and after the date of this Agreement until the Cinergy Effective Time, Cinergy covenants and agrees as to itself and its subsidiaries that (except as expressly contemplated or permitted by this Agreement, as set forth in Section 4.01 of the Cinergy Disclosure Letter, for transactions (other than those set forth in Section 4.01(d) to the extent relating to the capital stock of Cinergy) solely involving Cinergy and one or more of its direct or indirect wholly-owned subsidiaries or between two or more direct or indirect wholly-owned subsidiaries of Cinergy, or to the extent that Duke shall otherwise previously consent in writing, such consent not to be unreasonably withheld or delayed):

(a) Ordinary Course. Cinergy and each of its subsidiaries shall conduct their businesses in all material respects in the ordinary course of business consistent with past practice. Without limiting the generality of the foregoing, Cinergy and its subsidiaries shall use commercially reasonable efforts to preserve intact in all material respects their present business organizations, to maintain in effect all existing Permits, subject to prudent management of workforce and business needs, to keep available the services of their key officers and employees, to maintain their assets and properties in good working order and condition, ordinary wear and tear excepted, to preserve their relationships with Governmental Authorities, customers and suppliers and others having significant business dealings with them and to comply in all material respects with all laws, orders and Permits of all Governmental Authorities applicable to them.

(b) Charter Documents. Cinergy shall not amend or propose to amend its certificate of incorporation or, other than in a manner that would not materially restrict the operation of their businesses, its by-laws or its subsidiaries' certificate of incorporation or by-laws (or other comparable organizational documents).

(c) Dividends. Cinergy shall not, nor shall it permit any of its subsidiaries to,

(i) declare, set aside or pay any dividends on or make other distributions in respect of any of its capital stock or share capital, except:

(A) that Cinergy may continue the declaration and payment of regular quarterly cash dividends on Cinergy Common Stock, not to exceed \$0.48 per share, with usual record and payment dates for such dividends in accordance with past dividend practice; provided, that if the Cinergy Effective Time does not occur between a record date and payment date of a regular quarterly dividend, a special dividend may be declared and paid in respect of Cinergy Common Stock with respect to the quarter in which the Cinergy Effective Time occurs with a record date in such quarter and on or prior to the date on which the Cinergy Effective Time occurs, which dividend does not exceed an amount equal to the product of (i) a fraction the (x) numerator of which is equal to the number of days between the last payment date of a regular quarterly dividend and the record date of such special dividend (excluding such last payment date but including the record date of such special dividend) and (y) the denominator of which is equal to the number of days between the last payment date of a regular quarterly dividend and the same calendar day in the third month after the month in which such last payment date occurred (excluding such last payment date but including such same calendar day), multiplied by (ii) the then permitted quarterly dividend per share, and

(B) for the declaration and payment of dividends by a direct or indirect wholly-owned subsidiary solely to its parent, or by a direct or indirect partially owned subsidiary of Cinergy (provided that Cinergy or the Cinergy subsidiary receives or is to receive its proportionate share of such dividend or distribution), and

(C) for the declaration and payment of regular cash dividends with respect to preferred stock of Cinergy's subsidiaries outstanding as of the date of the Agreement or permitted to be issued under the terms of this Agreement, and

(D) to the extent advisable in the exercise of the fiduciary duties of the Board of Directors of Cinergy, for the declaration and payment of a customary share purchase rights plan, provided, that, (1) Cinergy shall provide Duke prior notice of any such declaration or payment and (2) in connection with any such declaration or payment, the Board of Directors of Cinergy and Cinergy shall cause (x) this Agreement and the transactions contemplated hereby to not result in a "Distribution Date" (as such term may be defined in any such share purchase rights plan) or similar event under such share purchase rights plan and (y) any such share purchase rights plan to be inapplicable in all respects to this Agreement, the Duke Merger, the Cinergy Merger and the other transactions contemplated hereby; and

(ii) split, combine, reclassify or take similar action with respect to any of its capital stock or share capital or issue or authorize or propose the issuance of any other securities in respect of, in lieu of or in substitution for shares of its capital stock or comprised in its share capital,

(iii) adopt a plan of complete or partial liquidation or resolutions providing for or authorizing such liquidation or a dissolution, merger, consolidation, restructuring, recapitalization or other reorganization, or

(iv) except as disclosed in Section 4.01(c)(iv) of the Cinergy Disclosure Letter, directly or indirectly redeem, repurchase or otherwise acquire any shares of its capital stock or any Option with respect thereto except:

(A) in connection with intercompany purchases of capital stock or share capital, or

(B) for the purpose of funding the Cinergy Employee Stock Option Plans or employee stock ownership or dividend reinvestment and stock purchase plans, or



(C) mandatory repurchases or redemptions of preferred stock of Cinergy's subsidiaries in accordance with the terms thereof.

(d) Share Issuances. Cinergy shall not, nor shall it permit any of its subsidiaries to issue, deliver or sell, or authorize or propose the issuance, delivery or sale of, any shares of its capital stock or any Option with respect thereto (other than (i) the issuance of Cinergy Common Stock upon the exercise of Cinergy Employee Stock Options outstanding as of the date hereof or issued after the date hereof in accordance with the terms of this Agreement in accordance with their terms, (ii) the issuance of Cinergy Common Stock in respect of other equity compensation awards granted under the Cinergy Employee Stock Option Plans outstanding as of the date hereof or issued after the date hereof in accordance with the terms of this Agreement in accordance with their terms, (iii) the issuance of Cinergy Employee Stock Options and the grant of other equity compensation awards pursuant to the Cinergy Employee Stock Option Plans in accordance with their terms providing, in aggregate, up to an additional 2,000,000 shares of Cinergy Common Stock in any 12-month period following the date hereof, provided, however, that any Cinergy Employee Stock Options and equity awards granted after the date of this Agreement shall, subject to paragraph 4 of Section 4.01(i) of the Cinergy Disclosure Letter, be granted on terms pursuant to which such Cinergy Employee Stock Options and equity awards shall not vest on the Cinergy Shareholder Approval or otherwise on the occurrence of the transactions contemplated hereby, provided, further, however, that Cinergy Employee Stock Options and equity awards granted after the date of this Agreement may vest upon termination of employment by the Company or any of its subsidiaries without "cause" or by the participants for "good reason" (each as defined in the applicable agreement), in each case, within the two-year period following the Cinergy Effective Time, and shall, at the Cinergy Effective Time, be converted into options or equity-based awards to acquire or in respect of, as applicable, Company Common Stock in the manner contemplated by Section 5.06, and (iv) the pro rata issuance by a subsidiary of its capital stock to its shareholders, provided, further, subject to Section 4.01(d) of the Cinergy Disclosure Letter, that any shares of Cinergy Common Stock that Cinergy or its subsidiaries shall contribute, directly or indirectly, to any employee benefit plan (including any plan intended to satisfy the requirements of Section 401(a) of the Code) or that Cinergy or its subsidiaries shall make subject to any dividend reinvestment or similar plan shall be shares purchased in open-market or privately negotiated transactions, but shall not constitute newly issued shares of Cinergy Common Stock), or modify or amend any right of any holder of outstanding shares of its capital stock or any Option with respect thereto other than to give effect to Section 5.06.

(e) Acquisitions; Capital Expenditures. Except for (x) acquisitions of, or capital expenditures relating to, the entities, assets and facilities identified in Section 4.01(e) of the Cinergy Disclosure Letter, (y) expenditures of amounts set forth in Cinergy's capital expenditure plan included in Section 4.01(e) of the Cinergy Disclosure Letter, and (z) capital expenditures (1) required by law or Governmental Authorities or (2) incurred in connection with the repair or replacement of facilities destroyed or damaged due to casualty or accident (whether or not covered by insurance), Cinergy shall not, nor shall it permit any of its subsidiaries to, make any capital expenditures, or acquire or agree to acquire (whether by merger, consolidation, purchase or otherwise) any person or assets, if (A) the expected gross expenditures and commitments pursuant thereto (including the amount of any indebtedness and amounts received for negative trading positions assumed) exceeds or may exceed (i) \$100,000,000, in the case of any acquisition or series of related acquisitions of any person, asset or property located in the United States, or (ii) \$50,000,000 in the case of any acquisition or series of related acquisitions of any person, asset or property located outside of the United States (each acquisition or series of related acquisitions described in (i) and (ii), a "Cinergy Threshold Acquisition"), (B) the expected gross expenditures and commitments pursuant thereto (including the amount of any indebtedness and amounts received for negative trading positions assumed) exceeds or may exceed, in the aggregate, \$100,000,000 excluding all Cinergy Threshold Acquisitions identified in Section 4.01(e) of the Cinergy Disclosure Letter or to which Duke has previously consented in writing,

(C) any such acquisition or capital expenditure constitutes any line of business that is not conducted by Cinergy, its subsidiaries or the Cinergy Joint Ventures as of the date of this Agreement or extends any line of business of Cinergy, its subsidiaries or the Cinergy Joint Ventures into any geographic region outside of the continental United States or Canada in which Cinergy, its subsidiaries or the Cinergy Joint Ventures do not conduct business as of the date of this Agreement, or (D) any such acquisition or capital expenditure is reasonably likely, individually or in the aggregate, to materially delay the satisfaction of the conditions set forth in Sections 6.02(d) or Sections 6.03(d) or prevent the satisfaction of such conditions.

(f) Dispositions. Except for (x) dispositions set forth in Section 4.01(f) of the Cinergy Disclosure Letter, (y) dispositions of obsolete equipment or assets or dispositions of assets being replaced, in each case in the ordinary course of business consistent with past practice and (z) dispositions by Cinergy or its subsidiaries of its assets in accordance with the terms of restructuring and divestiture plans mandated or approved by applicable local or state regulatory agencies, Cinergy shall not, nor shall it permit any of its subsidiaries to, sell, lease, grant any security interest in or otherwise dispose of or encumber any of its assets or properties if (A) the value of such disposition exceeds or may exceed (i) \$100,000,000, in the case of any disposition or series of related dispositions of any person, asset or property located in the United States, or (ii) \$50,000,000 in the case of any disposition or series of related dispositions of any person, asset or property located outside of the United States (each disposition or series of related dispositions described in (i) and (ii), a “Cinergy Threshold Disposition”) or (B) the aggregate value of all such dispositions, excluding all Cinergy Threshold Dispositions identified in Section 4.01(f) of the Cinergy Disclosure Letter or to which Duke has previously consented in writing, exceeds or may exceed, in the aggregate, \$100,000,000. For the purposes of this Section 4.01(f), the value of any disposition or series of related dispositions shall mean the greater of (i) the book value or (ii) the sales price, in each case of the person, asset or property which is the subject of such disposition and, in each case, together with the indebtedness and amounts paid for negative trading positions transferred by Cinergy or its subsidiaries in connection with such disposition.

(g) Indebtedness. Except as disclosed in Section 4.01(g) of the Cinergy Disclosure Letter, Cinergy shall not, nor shall it permit any of its subsidiaries to, (A) incur or guarantee any indebtedness or enter into any “keep well” or other agreement to maintain any financial condition of another person or enter into any arrangement having the economic effect of any of the foregoing (including any capital leases, “synthetic” leases or conditional sale or other title retention agreements) other than (i) short-term borrowings incurred in the ordinary course of business, (ii) letters of credit obtained in the ordinary course of business, (iii) borrowings made in connection with the refunding of existing indebtedness (x) at maturity or upon final mandatory redemption (without the need for the occurrence of any special event) or (y) at a lower cost of funds, (iv) borrowings to finance capital expenditures or acquisitions permitted pursuant to Section 4.01(e) or indebtedness assumed pursuant thereto, (v) other borrowings in an aggregate principal amount not to exceed \$150,000,000 outstanding at any time, (vi) guarantees or other credit support issued pursuant to trading or marketing positions established prior to the date of this Agreement and (vii) in addition to the guarantees or other credit support contemplated by subsection (vi) of this Section 4.01(g), additional guarantees or other credit support issued in connection with trading or marketing activities in the ordinary course of business or (B) make any loans or advances to any other person, other than (i) in the ordinary course of business consistent with past practice, (ii) to any direct or indirect wholly-owned subsidiary of Cinergy, or, in the case of a subsidiary of Cinergy, to Cinergy or (iii) as required pursuant to any obligation in effect as of the date of this Agreement.

(h) Marketing of Energy; Trading. Cinergy shall not, nor shall it permit any of its subsidiaries to, (i) permit any material change in policies governing or otherwise relating to the trading or marketing of energy other than as a result of acquisitions or capital expenditures permitted pursuant to Section 4.01(e) or to increase the existing aggregate VaR limit as established by the Risk Policy

Committee or (ii) enter into any physical commodity transactions, exchange-traded futures and options transactions, over-the-counter transactions and derivatives thereof or similar transactions other than as permitted by the Cinergy Trading Guidelines.

(i) **Employee Benefits.** Except as required by law or the terms of any collective bargaining agreement or any Cinergy Employee Benefit Plan, or as disclosed in Section 4.01(i) of the Cinergy Disclosure Letter, Cinergy shall not, nor shall it permit any of its subsidiaries to, enter into, adopt, amend or terminate any Cinergy Employee Benefit Plan, or other agreement, arrangement, plan or policy between Cinergy or one of its subsidiaries and one or more of its directors, officers or employees (other than any amendment that is immaterial or administrative in nature), or except for normal increases in the ordinary course of business consistent with past practice, increase in any manner the compensation or fringe benefits of any director, executive officer or other employee, or, except for normal payments in the ordinary course of business consistent with past practice, pay any benefit not required by any plan or arrangement in effect as of the date of this Agreement, provided, however, that the foregoing shall not restrict Cinergy or its subsidiaries from (i) entering into or making available to newly hired officers and employees or to officers and employees in the context of promotions based on job performance or workplace requirements in the ordinary course of business consistent with past practice, plans, agreements, benefits and compensation arrangements (including incentive grants) that have, consistent with past practice, been made available to newly hired or promoted officers and employees, or (ii) entering into or amending collective bargaining agreements with existing collective bargaining representatives or newly certified bargaining units regarding mandatory subjects of bargaining under applicable law, in each case in a manner consistent with past practice to the extent permitted by law.

(j) **Regulatory Status.** Except as disclosed in Section 4.01(j) of the Cinergy Disclosure Letter, Cinergy shall not, nor shall it permit any of its subsidiaries to, agree or consent to any material agreements or material modifications of existing agreements or course of dealings with any Governmental Authority in respect of the operations of their businesses outside the ordinary course of business, except (i) as required by law to renew Permits or agreements in the ordinary course of business consistent with past practice, (ii) as may be necessary or required in connection with the consummation of any acquisition permitted pursuant to Section 4.01(e), or (iii) to effect the consummation of the transactions contemplated hereby.

(k) **Accounting.** Cinergy shall not, nor shall it permit any of its subsidiaries to, make any changes in their accounting methods materially affecting the reported consolidated assets, liabilities or results of operations of Cinergy, except as required by law or GAAP.

(l) **Insurance.** Cinergy shall, and shall cause its subsidiaries to, maintain with financially responsible insurance companies (or through self-insurance, consistent with past practice) insurance in such amounts and against such risks and losses as are customary for companies engaged in their respective businesses.

(m) **Taxes.** Except as could not reasonably be expected to have a material adverse effect on Cinergy, Cinergy shall not, nor shall it permit any of its subsidiaries to, (i) settle any claim, action or proceeding relating to Taxes or (ii) make any Tax election (this clause (m) being the sole provision of this Section 4.01 governing Tax matters).

**Section 4.02 *Covenants of Duke.*** From and after the date of this Agreement until the Effective Time, Duke covenants and agrees as to itself and its subsidiaries (which shall be deemed at all times to include the Company and its subsidiaries) that (except as expressly contemplated or permitted by this Agreement, as set forth in Section 4.02 of the Duke Disclosure Letter, for transactions (other than those set forth in Section 4.01(d) to the extent relating to capital stock of Duke) solely involving Duke and one or more of its direct or indirect wholly-owned subsidiaries or between two or more direct or

indirect wholly-owned subsidiaries of Duke, or to the extent that Cinergy shall otherwise previously consent in writing, such consent not to be unreasonably withheld or delayed):

(a) Ordinary Course. Duke and each of its subsidiaries shall conduct their businesses in all material respects in the ordinary course of business consistent with past practice. Without limiting the generality of the foregoing, Duke and its subsidiaries shall use commercially reasonable efforts to preserve intact in all material respects their present business organizations, to maintain in effect all existing Permits, subject to prudent management of workforce and business needs, to keep available the services of their key officers and employees, to maintain their assets and properties in good working order and condition, ordinary wear and tear excepted, to preserve their relationships with Governmental Authorities, customers and suppliers and others having significant business dealings with them and to comply in all material respects with all laws, orders and Permits of all Governmental Authorities applicable to them.

(b) Charter Documents. Duke shall not amend or propose to amend its articles of incorporation or, other than in a manner that would not materially restrict the operation of their businesses, its by-laws or its subsidiaries' articles of incorporation or by-laws (or other comparable organizational documents).

(c) Dividends. Duke shall not, nor shall it permit any of its subsidiaries to, (i) declare, set aside or pay any dividends on or make other distributions in respect of any of its capital stock or share capital, except:

(A) that Duke may continue the declaration and payment of regular quarterly cash dividends on Duke Common Stock, not to exceed \$0.275 per share, with usual record and payment dates for such dividends in accordance with past dividend practice; provided, that (1) Duke may increase its regular quarterly cash dividend to an amount not to exceed \$0.31 per share between the date hereof and the Duke Effective Time and (2) if the Duke Effective Time does not occur between a record date and payment date of a regular quarterly dividend, a special dividend may be declared and paid in respect of Duke Common Stock with respect to the quarter in which the Duke Effective Time occurs with a record date in such quarter and on or prior to the date on which the Duke Effective Time occurs, which dividend does not exceed an amount equal to the product of (i) a fraction the (x) numerator of which is equal to the number of days between the last payment date of a regular quarterly dividend and the record date of such special dividend (excluding such last payment date but including the record date of such special dividend) and (y) the denominator of which is equal to the number of days between the last payment date of a regular quarterly dividend and the same calendar day in the third month after the month in which such last payment date occurred (excluding such last payment date but including such same calendar day), multiplied by (ii) the then permitted quarterly dividend per share, and

(B) for the declaration and payment of dividends by a direct or indirect wholly-owned subsidiary of Duke solely to its parent, or by a direct or indirect partially owned subsidiary of Duke (provided, that Duke or a Duke subsidiary receives or is to receive its proportionate share of such dividend or distribution), and

(C) for the declaration and payment of regular cash dividends with respect to preferred stock of Duke or its subsidiaries outstanding as of the date of the Agreement or permitted to be issued under the terms of this Agreement, and

(ii) split, combine, reclassify or take similar action with respect to any of its capital stock or share capital or issue or authorize or propose the issuance of any other securities in respect of, in lieu of or in substitution for shares of its capital stock or comprised in its share capital, (iii) adopt a plan of complete or partial liquidation or resolutions providing for or authorizing such liquidation or a dissolution, merger, consolidation, restructuring, recapitalization or other

reorganization, or (iv) except as disclosed in Section 4.02(c)(iv) of the Duke Disclosure Letter directly or indirectly redeem, repurchase or otherwise acquire any shares of its capital stock or any Option with respect thereto except:

(A) in connection with intercompany purchases of capital stock or share capital, or

(B) for the purpose of funding the Duke Option Plan or employee stock ownership or dividend reinvestment and stock purchase plans, or

(C) mandatory repurchases or redemptions of preferred stock of Duke or its subsidiaries in accordance with the terms thereof, or

(D) the redemptions by Duke of Duke Preferred Stock and Duke Preferred Stock A as contemplated by Section 4.07.

(d) Share Issuances. Duke shall not, nor shall it permit any of its subsidiaries to issue, deliver or sell, or authorize or propose the issuance, delivery or sale of, any shares of its capital stock or any Option with respect thereto (other than (i) the issuance of Duke Common Stock upon the exercise of Duke Employee Stock Options outstanding as of the date of hereof or issued after the date hereof in accordance with the terms of this Agreement in accordance with their terms, (ii) the issuance of Duke Common Stock in respect of other equity compensation awards granted under the Duke Option Plans outstanding as of the date hereof or issued after the date hereof in accordance with the terms of this Agreement in accordance with their terms, (iii) the issuance of Duke Employee Stock Options and the grant of other equity compensation awards pursuant to the Duke Option Plans in accordance with their terms providing, in aggregate, up to 5,000,000 shares of Duke Common Stock in any 12-month period following the date of this Agreement, provided, however, that any Duke Employee Stock Options and equity awards granted after the date of this Agreement shall be granted on terms pursuant to which such Duke Employee Stock Options and equity awards shall not vest on the Duke Shareholder Approval or otherwise on the occurrence of the transactions contemplated hereby and shall, at the Duke Effective Time, be converted into options or equity based awards to acquire or in respect of, as applicable, Company Common Stock in the manner contemplated by Section 5.06, and (iv) the pro rata issuance by a subsidiary of its capital stock to its shareholders, provided, further, that any shares of Duke Common Stock that Duke or its subsidiaries shall contribute, directly or indirectly, to any employee benefit plan (including any plan intended to satisfy the requirements of Section 401(a) of the Code) or that Duke or its subsidiaries shall make subject to any dividend reinvestment or similar plan shall be shares purchased in open-market or privately negotiated transactions, but shall not constitute newly issued shares of Duke Common Stock), or modify or amend any right of any holder of outstanding shares of its capital stock or any Option with respect thereto other than to give effect to Section 5.06.

(e) Acquisitions; Capital Expenditures. Except for (x) acquisitions of, or capital expenditures relating to, the entities, assets and facilities identified in Section 4.02(e) of the Duke Disclosure Letter, (y) expenditures of amounts set forth in Duke's capital expenditure plan included in Section 4.02(e) of the Duke Disclosure Letter, and (z) capital expenditures (1) required by law or Governmental Authorities or (2) incurred in connection with the repair or replacement of facilities destroyed or damaged due to casualty or accident (whether or not covered by insurance), Duke shall not, nor shall it permit any of its subsidiaries to, make any capital expenditures, or acquire or agree to acquire (whether by merger, consolidation, purchase or otherwise) any person or assets, if (A) the expected gross expenditures and commitments pursuant thereto (including the amount of any indebtedness and amounts received for negative trading positions assumed) exceeds or may exceed (i) \$300,000,000, in the case of any acquisition or series of related acquisitions of any person, asset or property located in the United States, or (ii) \$150,000,000 in the case of any acquisition or series of related acquisitions of any person, asset or property located outside of the United States (each acquisition or series of related acquisitions described in (i) and (ii), a "Duke Threshold Acquisition"), (B) the expected gross

expenditures and commitments pursuant thereto (including the amount of any indebtedness and amounts received for negative trading positions assumed) exceeds or may exceed, in the aggregate, \$300,000,000 excluding all Duke Threshold Acquisitions identified in Section 4.02(e) of the Duke Disclosure Letter or to which Cinergy has previously consented in writing, (C) any such acquisition or capital expenditure constitutes any line of business that is not conducted by Duke, its subsidiaries or the Duke Joint Ventures as of the date of this Agreement or extends any line of business of Duke, its subsidiaries or the Duke Joint Ventures into any geographic region outside of the continental United States or Canada in which Duke, its subsidiaries or the Duke Joint Ventures do not conduct business as of the date of this Agreement, or (D) any such acquisition or capital expenditure is reasonably likely, individually or in the aggregate, to materially delay the satisfaction of the conditions set forth in Sections 6.02(d) or Sections 6.03(d) or prevent the satisfaction of such conditions.

(f) Dispositions. Except for (x) dispositions set forth in Section 4.02(f) of the Duke Disclosure Letter, (y) dispositions of obsolete equipment or assets or dispositions of assets being replaced, in each case in the ordinary course of business consistent with past practice and (z) dispositions by Duke or its subsidiaries of its assets in accordance with the terms of restructuring and divestiture plans mandated or approved by applicable local or state regulatory agencies, Duke shall not, nor shall it permit any of its subsidiaries to, sell, lease, grant any security interest in or otherwise dispose of or encumber any of its assets or properties if (A) the value of such disposition exceeds or may exceed (i) \$300,000,000, in the case of any disposition or series of related dispositions of any person, asset or property located in the United States, or (ii) \$150,000,000 in the case of any disposition or series of related dispositions of any person, asset or property located outside of the United States (each disposition or series of related dispositions described in (i) and (ii), a “Duke Threshold Disposition”) or (B) the aggregate value of all such dispositions, excluding all Duke Threshold Dispositions identified in Section 4.02(f) of the Duke Disclosure Letter or to which Cinergy has previously consented in writing, exceeds or may exceed, in the aggregate, \$300,000,000. For the purposes of this Section 4.02(f), the value of any disposition or series of related dispositions shall mean the greater of (i) the book value or (ii) the sales price, in each case of the person, asset or property which is the subject of such disposition and, in each case, together with the indebtedness and amounts paid for negative trading positions transferred by Duke or its subsidiaries in connection with such disposition.

(g) Indebtedness. Except as disclosed in Section 4.02(g) of the Duke Disclosure Letter, Duke shall not, nor shall it permit any of its subsidiaries to, (A) incur or guarantee any indebtedness or enter into any “keep well” or other agreement to maintain any financial condition of another person or enter into any arrangement having the economic effect of any of the foregoing (including any capital leases, “synthetic” leases or conditional sale or other title retention agreements) other than (i) short-term borrowings incurred in the ordinary course of business, (ii) letters of credit obtained in the ordinary course of business, (iii) borrowings made in connection with the refunding of existing indebtedness (x) at maturity or upon final mandatory redemption (without the need for the occurrence of any special event) or (y) at a lower cost of funds, (iv) borrowings to finance capital expenditures or acquisitions permitted pursuant to Section 4.02(e) or indebtedness assumed pursuant thereto, (v) other borrowings in an aggregate principal amount not to exceed \$500,000,000 outstanding at any time, (vi) guarantees or other credit support issued pursuant to trading or marketing positions established prior to the date of this Agreement and (vii) in addition to the guarantees or other credit support contemplated by subsection (vi) of this Section 4.02(g), additional guarantees or other credit support issued in connection with trading or marketing activities in the ordinary course of business at any one time or (B) make any loans or advances to any other person, other than (i) in the ordinary course of business consistent with past practice (ii) to any direct or indirect wholly-owned subsidiary of Duke, or, in the case of a subsidiary of Duke, to Duke or (iii) as required pursuant to any obligation in effect as of the date of this Agreement.

(h) Marketing of Energy; Trading. Duke shall not, nor shall it permit any of its subsidiaries to, (i) permit any material change in policies governing or otherwise relating to the trading or marketing of energy other than as a result of acquisitions or capital expenditures permitted pursuant to Section 4.02(e) or (ii) enter into any physical commodity transactions, exchange-traded futures and options transactions, over-the-counter transactions and derivatives thereof or similar transactions other than as permitted by the Duke Trading Guidelines.

(i) Employee Benefits. Except as required by law or the terms of any collective bargaining agreement or any Duke Employee Benefit Plan, or as disclosed in Section 4.02(i) of the Duke Disclosure Letter, Duke shall not, nor shall it permit any of its subsidiaries to, enter into, adopt, amend or terminate any Duke Employee Benefit Plan, or other agreement, arrangement, plan or policy between Duke or one of its subsidiaries and one or more of its directors, officers or employees (other than any amendment that is immaterial or administrative in nature), or except for normal increases in the ordinary course of business consistent with past practice, increase in any manner the compensation or fringe benefits of any director, executive officer or other employee, or, except for normal payments in the ordinary course of business consistent with past practice, pay any benefit not required by any plan or arrangement in effect as of the date of this Agreement, provided, however, that the foregoing shall not restrict Duke or its subsidiaries from (i) entering into or making available to newly hired officers and employees or to officers and employees in the context of promotions based on job performance or work place requirements in the ordinary course of business consistent with past practice, plans, agreements, benefits and compensation arrangements (including incentive grants) that have, consistent with past practice, been made available to newly hired or promoted officers and employees, or (ii) entering into or amending collective bargaining agreements with existing collective bargaining representatives or newly certified bargaining units regarding mandatory subjects of bargaining under applicable law, in each case in a manner consistent with past practice to the extent permitted by law.

(j) Regulatory Status. Except as disclosed in Section 4.02 (j) of the Duke Disclosure Letter, Duke shall not, nor shall it permit any of its subsidiaries to, agree or consent to any material agreements or material modifications of existing agreements or course of dealings with any Governmental Authority in respect of the operations of their businesses, except (i) as required by law to renew Permits or agreements in the ordinary course of business consistent with past practice, (ii) as may be necessary or required in connection with the consummation of any acquisition permitted pursuant to Section 4.02(e), or (iii) to effect the consummation of the transactions contemplated hereby.

(k) Accounting. Duke shall not, nor shall it permit any of its subsidiaries to, make any changes in their accounting methods materially affecting the reported consolidated assets, liabilities or results of operations of Duke, except as required by law or GAAP.

(l) Insurance. Duke shall, and shall cause its subsidiaries to, maintain with financially responsible insurance companies (or through self-insurance, consistent with past practice) insurance in such amounts and against such risks and losses as are customary for companies engaged in their respective businesses.

(m) Taxes. Except as could not reasonably be expected to have a material adverse effect on Duke, Duke shall not, nor shall it permit any of its subsidiaries to, (i) settle any claim, action or proceeding relating to Taxes or (ii) make any Tax election (this clause (m) being the sole provision of this Section 4.02 governing Tax matters).

(n) Company Actions. Duke shall not permit the Company or any of its subsidiaries to take, or to commit to take, any action after the Duke Effective Time and prior to the Cinergy Effective Time, except for the actions expressly set forth in this Agreement as actions to be taken by any such person during such period.

Section 4.03 *No Solicitation by Cinergy.*

(a) Cinergy shall not, nor shall it permit any of its subsidiaries to, nor shall it authorize or permit any of its directors, officers or employees to, and shall use its reasonable best efforts to cause any investment banker, financial advisor, attorney, accountant or other representative retained by it or any of its subsidiaries not to, directly or indirectly, (i) solicit, initiate or knowingly encourage (including by way of furnishing information), or knowingly take any other action designed to facilitate, any inquiries or the making of any proposal that constitutes a Cinergy Takeover Proposal (as defined below) or (ii) participate in any negotiations or substantive discussions regarding any Cinergy Takeover Proposal; provided, however, that if, at any time prior to receipt of the Cinergy Shareholder Approval (the "Cinergy Applicable Period"), the Board of Directors of Cinergy determines in good faith, after consultation with its legal and financial advisors, that a Cinergy Takeover Proposal that was not solicited by it and that did not otherwise result from a breach (other than in immaterial respects) of this Section 4.03(a) is, or is reasonably likely to result in, a Cinergy Superior Proposal (as defined in Section 4.03(b)), and subject to providing prior written notice of its decision to take such action to Duke and compliance with Section 4.03(c), Cinergy may (x) furnish information with respect to Cinergy and its subsidiaries to the person making such proposal (and its representatives) pursuant to a customary confidentiality agreement containing terms no less favorable to Cinergy than those set forth in the Confidentiality Agreement (the "Confidentiality Agreement") dated November 10, 2004, between Cinergy and Duke (provided, that such confidentiality agreement shall not in any way restrict Cinergy from complying with its disclosure obligations under this Agreement, including with respect to such proposal, but such confidentiality agreement may allow such party to submit to Cinergy a proposal or offer relating to a transaction) and (y) participate in discussions or negotiations regarding such proposal. Cinergy, its subsidiaries and the representatives immediately shall cease and cause to be terminated any existing activities, discussions or negotiations with any parties with respect to any Cinergy Takeover Proposal. For purposes of this Agreement, "Cinergy Takeover Proposal" means any bona fide inquiry, proposal or offer from any person relating to (i) any direct or indirect acquisition or purchase of a business (a "Cinergy Material Business") that constitutes 20% or more of the net revenues, net income or the assets (including equity securities) of Cinergy and its subsidiaries, taken as a whole, (ii) any direct or indirect acquisition or purchase of 20% or more of any class of voting securities of Cinergy or 20% or more of the voting power of any class of stock of any subsidiary of Cinergy owning, operating or controlling a Cinergy Material Business, (iii) any tender offer or exchange offer that if consummated would result in any person beneficially owning 20% or more of any class of voting securities of Cinergy or 20% or more of the voting power of any class of stock of any subsidiary of Cinergy owning, operating or controlling a Cinergy Material Business, or (iv) any merger, consolidation, business combination, recapitalization, liquidation, dissolution or similar transaction involving Cinergy or any such subsidiary of Cinergy owning, operating or controlling a Cinergy Material Business, in each case other than the transactions contemplated by this Agreement.

(b) Except as contemplated by this Section 4.03, neither the Board of Directors of Cinergy nor any committee thereof shall (i) withdraw or modify, or propose publicly to withdraw or modify, in a manner adverse to Duke, the approval or recommendation by such Board of Directors or such committee of this Agreement or the Cinergy Merger, (ii) approve or recommend, or propose publicly to approve or recommend, any Cinergy Takeover Proposal, or (iii) cause Cinergy to enter into any letter of intent, agreement in principle, acquisition agreement or other similar agreement (each, a "Cinergy Acquisition Agreement") related to any Cinergy Takeover Proposal. Notwithstanding the foregoing:

(i) in response to a Cinergy Takeover Proposal that was not solicited by it and that did not otherwise result from a breach (other than in immaterial respects) of Section 4.03(a), during the Cinergy Applicable Period, the Board of Directors of Cinergy may, if it determines in good faith, after consulting with outside counsel, that the failure to take such action would be reasonably



likely to result in a breach of the Board of Directors' fiduciary obligations under applicable law, (A) withdraw or modify, or propose publicly to withdraw or modify, the approval or recommendation by such Board of Directors or any committee thereof of this Agreement or the Cinergy Merger, (B) approve or recommend, or propose to approve or recommend, any Cinergy Superior Proposal, or (C) terminate this Agreement pursuant to Section 7.01(d), but only after (1) in the case of each of clauses (B) or (C), such Board of Directors has determined in good faith that such Cinergy Takeover Proposal constitutes a Cinergy Superior Proposal, and (2) in the case of clause (C), (I) Cinergy has notified Duke in writing of the determination that such Cinergy Takeover Proposal constitutes a Cinergy Superior Proposal and (II) at least five business days following receipt by Duke of such notice, the Board of Directors of Cinergy has determined that such Cinergy Superior Proposal remains a Cinergy Superior Proposal; and

(ii) in circumstances other than as provided in Section 4.03(b)(i), during the Cinergy Applicable Period, the Board of Directors of Cinergy may, if it determines in good faith, after consulting with outside counsel, that the failure to take such action would be reasonably likely to result in a breach of the Board of Directors' fiduciary obligations under applicable law, withdraw or modify, or propose publicly to withdraw or modify, the approval or recommendation by such Board of Directors or any committee thereof of this Agreement or the Cinergy Merger, but only after (1) Cinergy has notified Duke in writing that the Board of Directors of Cinergy is prepared to make the determination set forth in this clause (ii) setting forth the reasons therefore in sufficient detail, (2) for a period of five business days following Duke's receipt of the notice set forth in clause (1) of this sentence, Cinergy negotiates with Duke in good faith to make such adjustments to the terms and conditions of this Agreement, the Mergers and the other transactions contemplated hereby as would enable the Cinergy Board of Directors to proceed with its recommendation of this Agreement, the Cinergy Merger and the other transactions contemplated hereby and (3) at the end of such five-business day period the Board of Directors of Cinergy maintains its determination described in this clause (ii) (after taking into account Duke's proposed adjustments to the terms and conditions of this Agreement, the Mergers and the other transactions contemplated hereby).

For purposes of this Agreement, "Cinergy Superior Proposal" means any written Cinergy Takeover Proposal that the Board of Directors of Cinergy determines in good faith (after consultation with a financial advisor of nationally recognized reputation) to be more favorable (taking into account (i) all financial and strategic considerations, including relevant legal, financial, regulatory and other aspects of such Cinergy Takeover Proposal and the Mergers and the other transactions contemplated by this Agreement deemed relevant by the Board of Directors, (ii) the identity of the third-party making such Cinergy Takeover Proposal, and (iii) the conditions and prospects for completion of such Cinergy Takeover Proposal) to Cinergy's shareholders than the Cinergy Merger, the Duke Merger and the other transactions contemplated by this Agreement (taking into account all of the terms of any proposal by Duke to amend or modify the terms of the Cinergy Merger and the other transactions contemplated by this Agreement), except that (x) the reference to "20%" in clauses (i), (ii) and (iii) of the definition of "Cinergy Takeover Proposal" in Section 4.03(a) shall be deemed to be a reference to "50%", (y) a "Cinergy Takeover Proposal" shall only be deemed to refer to a transaction involving Cinergy, and not any of its subsidiaries or Cinergy Material Businesses alone, and (z) the references to "or any subsidiary of Cinergy owning, operating or controlling a Cinergy Material Business" in clauses (ii), (iii) and (iv) shall be deemed to be deleted.

(c) In addition to the obligations of Cinergy set forth in paragraphs (a) and (b) of this Section 4.03, Cinergy shall as promptly as practicable advise Duke, orally and in writing, of any request for information or of any Cinergy Takeover Proposal (and in any case within 24 hours of such request or the receipt of such Cinergy Takeover Proposal), the principal terms and conditions of such request or Cinergy Takeover Proposal and the identity of the person making such request or Cinergy Takeover

Proposal. Cinergy shall keep Duke informed of the status and details (including amendments or proposed amendments) of any such request or Cinergy Takeover Proposal. Contemporaneously with any termination by Cinergy of this Agreement pursuant to Section 7.01(b)(i), Cinergy shall provide Duke with a written verification that it has complied with its obligations pursuant to this Section 4.03(c) (other than noncompliance which is immaterial).

(d) Nothing contained in this Section 4.03 shall prohibit Cinergy from (i) taking and disclosing to its shareholders a position contemplated by Rule 14e-2(a) promulgated under the Exchange Act or from making any disclosure to Cinergy's shareholders if, in the good faith judgment of the Board of Directors of Cinergy, after consultation with outside counsel, failure so to disclose would be inconsistent with its obligations under applicable law or (ii) taking actions permitted by Section 4.01(f).

Section 4.04 *No Solicitation by Duke.*

(a) Duke shall not, nor shall it permit any of its subsidiaries to, nor shall it authorize or permit any of its directors, officers or employees to, and shall use its reasonable best efforts to cause any investment banker, financial advisor, attorney, accountant or other representative retained by it or any of its subsidiaries not to, directly or indirectly, (i) solicit, initiate or knowingly encourage (including by way of furnishing information), or knowingly take any other action designed to facilitate, any inquiries or the making of any proposal that constitutes a Duke Takeover Proposal (as defined below) or (ii) participate in any negotiations or substantive discussions regarding any Duke Takeover Proposal; provided, however, that if, at any time prior to receipt of the Duke Shareholder Approval (the "Duke Applicable Period"), the Board of Directors of Duke determines in good faith, after consultation with its legal and financial advisors, that a Duke Takeover Proposal that was not solicited by it and that did not otherwise result from a breach (other than in immaterial respects) of this Section 4.04(a) is, or is reasonably likely to result in, a Duke Superior Proposal (as defined in Section 4.04(b)), and subject to providing prior written notice of its decision to take such action to Cinergy and compliance with Section 4.04(c), Duke may (x) furnish information with respect to Duke and its subsidiaries to the person making such proposal (and its representatives) pursuant to a customary confidentiality agreement containing terms no less favorable to Duke than those set forth in the Confidentiality Agreement (provided, that such confidentiality agreement shall not in any way restrict Duke from complying with its disclosure obligations under this Agreement, including with respect to such proposal, but such confidentiality agreement may allow such party to submit to Duke a proposal or offer relating to a transaction) and (y) participate in discussions or negotiations regarding such proposal. Duke, its subsidiaries and their representatives immediately shall cease and cause to be terminated any existing activities, discussions or negotiations with any parties with respect to any Duke Takeover Proposal. For purposes of this Agreement, "Duke Takeover Proposal" means any bona fide inquiry, proposal or offer from any person relating to (i) any direct or indirect acquisition or purchase of a business (a "Duke Material Business") that constitutes 20% or more of the net revenues, net income or the assets (including equity securities) of Duke and its subsidiaries, taken as a whole, (ii) any direct or indirect acquisition or purchase of 20% or more of any class of voting securities of Duke or 20% or more of the voting power of any class of stock of any subsidiary of Duke owning, operating or controlling a Duke Material Business, (iii) any tender offer or exchange offer that if consummated would result in any person beneficially owning 20% or more of any class of voting securities of Duke or 20% or more of the voting power of any class of stock of any subsidiary of Duke owning, operating or controlling a Duke Material Business, or (iv) any merger, consolidation, business combination, recapitalization, liquidation, dissolution or similar transaction involving Duke or any such subsidiary of Duke owning, operating or controlling a Duke Material Business, in each case other than the transactions contemplated by this Agreement.

(b) Except as contemplated by this Section 4.04, neither the Board of Directors of Duke nor any committee thereof shall (i) withdraw or modify, or propose publicly to withdraw or modify, in a manner adverse to Cinergy, the approval or recommendation by such Board of Directors or such committee of

this Agreement or the Duke Merger, (ii) approve or recommend, or propose publicly to approve or recommend, any Duke Takeover Proposal, or (iii) cause Duke to enter into any letter of intent, agreement in principle, acquisition agreement or other similar agreement (each, a “Duke Acquisition Agreement”) related to any Duke Takeover Proposal. Notwithstanding the foregoing:

(i) in response to a Duke Takeover Proposal that was not solicited by it and that did not otherwise result from a breach (other than in immaterial respects) of Section 4.04(a), during the Duke Applicable Period, the Board of Directors of Duke may, if it determines in good faith, after consulting with outside counsel, that the failure to take such action would be reasonably likely to result in a breach of the Board of Directors’ fiduciary obligations under applicable law, (A) withdraw or modify, or propose publicly to withdraw or modify, the approval or recommendation by such Board of Directors or any committee thereof of this Agreement or the Duke Merger, (B) approve or recommend, or propose to approve or recommend, any Duke Superior Proposal, or (C) terminate this Agreement pursuant to Section 7.01(f), but only after (1) in the case of each of clauses (B) or (C), such Board of Directors has determined in good faith that such Duke Takeover Proposal constitutes a Duke Superior Proposal, and (2) in the case of clause (C), (I) Duke has notified Cinergy in writing of the determination that such Duke Takeover Proposal constitutes a Duke Superior Proposal and (II) at least five business days following receipt by Cinergy of such notice, the Board of Directors of Duke has determined that such Duke Superior Proposal remains a Duke Superior Proposal; and

(ii) in circumstances other than as provided in Section 4.04(b)(i), during the Duke Applicable Period, the Board of Directors of Duke may, if it determines in good faith, after consulting with outside counsel, that the failure to take such action would be reasonably likely to result in a breach of the Board of Directors’ fiduciary obligations under applicable law, withdraw or modify, or propose publicly to withdraw or modify, the approval or recommendation by such Board of Directors or any committee thereof of this Agreement or the Duke Merger, but only after (1) Duke has notified Cinergy in writing that the Board of Directors of Duke is prepared to make the determination set forth in this clause (ii) setting forth the reasons therefor in sufficient detail, (2) for a period of five business days following Cinergy’s receipt of the notice set forth in clause (1) of this sentence, Duke negotiates with Cinergy in good faith to make such adjustments to the terms and conditions of this Agreement, the Mergers and the other transactions contemplated hereby as would enable the Duke Board of Directors to proceed with its recommendation of this Agreement, the Duke Merger and the other transactions contemplated hereby and (3) at the end of such five-business day period the Board of Directors of Duke maintains its determination described in this clause (ii) (after taking into account Cinergy’s proposed adjustments to the terms and conditions of this Agreement, the Mergers and the other transactions contemplated hereby).

For purposes of this Agreement, a “Duke Superior Proposal” means any written Duke Takeover Proposal that the Board of Directors of Duke determines in good faith (after consultation with a financial advisor of nationally recognized reputation) to be more favorable (taking into account (i) all financial and strategic considerations, including relevant legal, financial, regulatory and other aspects of such Duke Takeover Proposal and the Mergers and the other transactions contemplated by this Agreement deemed relevant by the Board of Directors, (ii) the identity of the third-party making such Duke Takeover Proposal, and (iii) the conditions and prospects for completion of such Duke Takeover Proposal) to Duke’s shareholders than the Duke Merger and the other transactions contemplated by this Agreement (taking into account all of the terms of any proposal by Cinergy to amend or modify the terms of the Duke Merger, the Cinergy Merger and the other transactions contemplated by this Agreement), except that (x) the reference to “20%” in clauses (i), (ii) and (iii) of the definition of “Duke Takeover Proposal” in Section 4.04(a) shall be deemed to be a reference to “50%”, (y) a “Duke Takeover Proposal” shall only be deemed to refer to a transaction involving Duke, and not any of its

subsidiaries or Duke Material Businesses alone, and (z) the references to “or any subsidiary of Duke owning, operating or controlling a Duke Material Business” in clauses(ii), (iii) and (iv) shall be deemed to be deleted.

(c) In addition to the obligations of Duke set forth in paragraphs (a) and (b) of this Section 4.04, Duke shall as promptly as practicable advise Cinergy, orally and in writing, of any request for information or of any Duke Takeover Proposal (and in any case within 24 hours of such request or the receipt of such Duke Takeover Proposal), the principal terms and conditions of such request or Duke Takeover Proposal and the identity of the person making such request or Duke Takeover Proposal. Duke shall keep Cinergy informed of the status and details (including amendments or proposed amendments) of any such request or Duke Takeover Proposal. Contemporaneously with any termination by Duke of this Agreement pursuant to Section 7.01(b)(i), Duke shall provide Cinergy with a written verification that it has complied with its obligations pursuant to this Section 4.03(c) (other than noncompliance which is immaterial).

(d) Nothing contained in this Section 4.04 shall prohibit Duke from (i) taking and disclosing to its shareholders a position contemplated by Rule 14e-2(a) promulgated under the Exchange Act or from making any disclosure to Duke’s shareholders if, in the good faith judgment of the Board of Directors of Duke, after consultation with outside counsel, failure so to disclose would be inconsistent with its obligations under applicable law or(ii) taking actions permitted by Section 4.02(f).

Section 4.05 *Other Actions.* Each of Cinergy and Duke shall use its reasonable best efforts not to, and shall use its reasonable best efforts not to permit any of their respective subsidiaries to, take any action that would, or that could reasonably be expected to, result in (i) any of these presentations and warranties of such party set forth in this Agreement that is qualified as to materiality becoming untrue, (ii) any of such representations and warranties that is not so qualified becoming untrue in any material respect, or (iii) any condition to the Mergers set forth in Article VI not being satisfied.

Section 4.06 *Coordination of Dividends.* From the date of this Agreement until the Effective Time, Duke and Cinergy shall coordinate with each other regarding the declaration and payment of dividends in respect of the shares of Cinergy Common Stock and Duke Common Stock and the record dates and payment dates relating thereto, including, if applicable, through the payment of the special dividend contemplated by Sections 4.01(c)(i)(A) and 4.02(c)(i)(A), it being the intention of Cinergy and Duke that no holder of Cinergy Common Stock, Duke Common Stock or Company Common Stock shall receive two dividends, or fail to receive one dividend, for any single calendar quarter with respect to its shares of Cinergy Common Stock or Duke Common Stock, as the case may be, and/or any shares of Company Common Stock any such holder receives in exchange therefor pursuant to the Mergers.

Section 4.07 *Redemption of Duke Preferred Stock and Duke Preferred Stock A.* Prior to the Duke Effective Time, Duke shall call for redemption all outstanding shares of Duke Preferred Stock and Duke Preferred Stock A at a redemption price equal to the amounts then required to be paid upon redemption of the applicable series of Duke Preferred Stock or Duke Preferred Stock A, as the case may be, pursuant to the term of each such series, together with all dividends accrued and unpaid to the date of such redemption. Duke shall use its reasonable best efforts to redeem all shares of Duke Preferred Stock and Duke Preferred Stock A so that no such shares shall be deemed to be outstanding as of the Duke Effective Time.

Section 4.08 *Transfer of Certain Assets.* Each of Duke, Cinergy and the Company shall, and shall cause each of their subsidiaries to, use their reasonable best efforts prior to the Closing to obtain all consents and approvals necessary to distribute at the Closing, or as soon as reasonably possible thereafter, the generation stations set forth on Section 4.08 of the Duke Disclosure Letter, (together the “Transferred Assets”) to the Company and subsequently to contribute the Transferred Assets to The Cincinnati Gas & Electric and shall effect such distribution and contribution as promptly as

practicable following the Cinergy Effective Time, subject to the receipt of all such necessary consents and approvals.

## ARTICLE V

### Additional Agreements

#### Section 5.01 *Preparation of the Form S-4 and the Joint Proxy Statement; Shareholders Meetings.*

(a) As soon as practicable following the date of this Agreement, Cinergy and Duke shall prepare and file with the SEC the Joint Proxy Statement and Cinergy, Duke and the Company shall prepare and file with the SEC the Form S-4, in which the Joint Proxy Statement will be included. Each of Cinergy, Duke and the Company shall use its reasonable best efforts to have the Form S-4 declared effective under the Securities Act as promptly as practicable after such filing. Cinergy will use its reasonable best efforts to cause the Joint Proxy Statement to be mailed to Cinergy's shareholders, and Duke will use its reasonable best efforts to cause the Joint Proxy Statement to be mailed to Duke's shareholders, in each case as promptly as practicable after the Form S-4 is declared effective under the Securities Act. Each party hereto shall also take any action required to be taken under any applicable state or provincial securities laws in connection with the issuance of Company Common Stock in the Mergers and each party shall furnish all information concerning itself and its shareholders as may be reasonably requested in connection with any such action. Each party will advise the others, promptly after it receives notice thereof, of the time when the Form S-4 has become effective or any supplement or amendment has been filed, the issuance of any stop order, the suspension of the qualification of the Company Common Stock issuable in connection with the Mergers for offering or sale in any jurisdiction, or any request by the SEC for amendment of the Joint Proxy Statement or the Form S-4 or comments thereon and responses thereto or requests by the SEC for additional information. If prior to the Effective Time any event occurs with respect to Cinergy, Duke or any subsidiary of Cinergy or Duke, respectively, or any change occurs with respect to information supplied by or on behalf of Cinergy or Duke, respectively, for inclusion in the Joint Proxy Statement or the Form S-4 that, in each case, is required to be described in an amendment of, or a supplement to, the Joint Proxy Statement or the Form S-4, Cinergy or Duke, as applicable, shall promptly notify the other and the Company of such event, and Cinergy or Duke, as applicable, shall cooperate with the Company in the prompt filing with the SEC of any necessary amendment or supplement to the Joint Proxy Statement and the Form S-4 and, as required by law, in disseminating the information contained in such amendment or supplement to Cinergy's shareholders and to Duke's shareholders.

(b) Cinergy shall, as soon as reasonably practicable following the date of this Agreement, duly call, give notice of, convene and hold a meeting of its shareholders (the "Cinergy Shareholders Meeting") for the purpose of obtaining the Cinergy Shareholder Approval. Without limiting the generality of the foregoing, Cinergy agrees that its obligations pursuant to the first sentence of this Section 5.01(b) shall not be affected by (i) the commencement, public proposal, public disclosure or communication to Cinergy of any Cinergy Takeover Proposal, (ii) the withdrawal or modification by the Board of Directors of Cinergy of its approval or recommendation of this Agreement, the Cinergy Merger or the other transactions contemplated hereby, or (iii) the approval or recommendation of any Cinergy Superior Proposal. Notwithstanding any of the events set forth in clauses (i), (ii) and (iii) of the immediately preceding sentence, in the event Cinergy fulfills its obligations pursuant to this Section 5.01(b) and the Cinergy Shareholder Approval is not obtained at the Cinergy Shareholders Meeting, Duke shall not thereafter have the right to terminate this Agreement pursuant to Sections 7.01(h)(i) as a result of the Board of Directors of Cinergy (or any committee thereof) having, pursuant to Section 4.03(b)(ii), withdrawn or modified, or proposed publicly to withdraw or modify, the approval or recommendation by such Board of Directors of this Agreement or the Cinergy Merger, provided Duke shall retain all other rights to terminate this Agreement set forth in Section 7.01.

(c) Duke shall, as soon as reasonably practicable following the date of this Agreement, duly call, give notice of, convene and hold a meeting of its shareholders (the “Duke Shareholders Meeting”) for the purpose of obtaining the Duke Shareholder Approval. Without limiting the generality of the foregoing, Duke agrees that its obligations pursuant to the first sentence of this Section 5.01(c) shall not be affected by (i) the commencement, public proposal, public disclosure or communication to Duke of any Duke Takeover Proposal, (ii) the withdrawal or modification by the Board of Directors of Duke of its approval or recommendation of this Agreement, the Duke Merger or the other transactions contemplated hereby, or (iii) the approval or recommendation of any Duke Superior Proposal. Notwithstanding any of the events set forth in clauses (i), (ii) and (iii) of the immediately preceding sentence, in the event Duke fulfills its obligations pursuant to this Section 5.01(c) and the Duke Shareholder Approval is not obtained at the Duke Shareholders Meeting, Cinergy shall not thereafter have the right to terminate this Agreement pursuant to Sections 7.01(g)(i) as a result of the Board of Directors of Duke (or any committee thereof) having, pursuant to Section 4.04(b)(ii), withdrawn or modified, or proposed publicly to withdraw or modify, the approval or recommendation by such Board of Directors of this Agreement or the Duke Merger, provided Cinergy shall retain all other rights to terminate this Agreement set forth in Section 7.01.

(d) Cinergy and Duke will use their reasonable best efforts to hold the Duke Shareholders Meeting and the Cinergy Shareholders Meeting on the same date and as soon as practicable after the date of this Agreement.

*Section 5.02 Letters of Cinergy’s Accountants.* Cinergy shall use its reasonable best efforts to cause to be delivered to Duke two letters from Cinergy’s independent accountants, one dated a date within two business days before the date on which the Form S-4 shall become effective and one dated a date within two business days before the Closing Date, each addressed to Duke, in form and substance reasonably satisfactory to Duke and customary in scope and substance for comfort letters delivered by independent public accountants in connection with registration statements similar to the Form S-4.

*Section 5.03 Letters of Duke’s Accountants.* Duke shall use its reasonable best efforts to cause to be delivered to Cinergy two letters from Duke’s independent accountants, one dated a date within two business days before the date on which the Form S-4 shall become effective and one dated a date within two business days before the Closing Date, each addressed to Cinergy, in form and substance reasonably satisfactory to Cinergy and customary in scope and substance for comfort letters delivered by independent public accountants in connection with registration statements similar to the Form S-4.

*Section 5.04 Access to Information; Effect of Review.*

(a) *Access.* Subject to the Confidentiality Agreement, to the extent permitted by applicable law, each of Cinergy and Duke shall, and shall cause each of its respective subsidiaries to, and, so long as consistent with its confidentiality obligations under its applicable agreements, shall use its respective reasonable best efforts to cause the Cinergy Joint Ventures and Duke Joint Ventures, respectively, to, afford to the other party and to the officers, employees, accountants, counsel, financial advisors and other representatives of such other party reasonable access during normal business hours during the period prior to the Effective Time to all their respective properties, books, contracts, commitments, personnel and records and, during such period, to the extent permitted by applicable law, each of Cinergy and Duke shall, and shall cause each of its respective subsidiaries to, and, so long as consistent with its confidentiality obligations under its applicable agreements, shall use its respective reasonable best efforts to cause the Cinergy Joint Ventures and Duke Joint Ventures, respectively, to, (i) confer on a regular and frequent basis with one or more representatives of the other party to discuss material operational and regulatory matters the general status of its ongoing operations, (ii) advise the other party of any change or event that has had or could reasonably be expected to have a material adverse effect on such party, and (iii) furnish promptly all other information concerning its business, properties and personnel, in each case as such other party may reasonably request; provided, however,

that no actions shall be taken pursuant to this Section 5.04(a) that would result in a waiver of the attorney/client privilege. Notwithstanding the foregoing, if a party requests access to proprietary information of the other party, the disclosure of which would have a material adverse effect on the other party if the Closing were not to occur (giving effect to the requesting party's obligations under the Confidentiality Agreement), such information shall only be disclosed to the extent reasonably agreed upon by the chief financial officers (or their designees) of Cinergy and Duke. All information exchanged pursuant to this Section 5.04(a) shall be subject to the Confidentiality Agreement.

(b) Effect of Review. No review pursuant to this Section 5.04 shall have any effect for the purpose of determining the accuracy of any representation or warranty given by any of the parties hereto to any of the other parties hereto.

*Section 5.05 Regulatory Matters; Reasonable Best Efforts.*

(a) Regulatory Approvals. Each party hereto shall cooperate and promptly prepare and file all necessary documentation, to effect all necessary applications, notices, petitions and filings, and shall use reasonable best efforts to take or cause to be taken all actions, and do or cause to be done all things in order to obtain all approvals and authorizations of all Governmental Authorities, necessary or advisable to consummate and make effective, in the most expeditious manner reasonably practicable, the Mergers and the other transactions contemplated by this Agreement, including the Cinergy Required Statutory Approvals and the Duke Required Statutory Approvals; provided, however, that Cinergy shall have primary responsibility for the preparation and filing of any related applications, filings or other materials with the PUCO, the IURC and the KPSC and, provided, further, that Duke shall have primary responsibility for the preparation and filing of any related applications, filings or other materials with the NCUC and the PSCSC. Cinergy shall have the right to review and approve in advance all characterizations of the information relating to Cinergy, on the one hand, and Duke shall have the right to review and approve in advance all characterizations of the information relating to Duke, on the other hand, in either case, that appear in any application, notice, petition or filing made in connection with the Mergers or the other transactions contemplated by this Agreement. Cinergy and Duke agree that they will consult and cooperate with each other with respect to the obtaining of all such necessary approvals and authorizations of Governmental Authorities. On or about the date which is the twelve-month anniversary of the date of this Agreement, the parties shall mutually determine in good faith whether the failure to extend the dates set forth in Section 7.01(b)(i) would be reasonably likely to result in the failure to receive required consents and approvals from Governmental Authorities in light of the facts and circumstances in existence on or about such twelve-month anniversary, and if the parties determine that such an extension is appropriate, they shall negotiate the terms and length of such extension in good faith.

(b) Further Actions. Upon the terms and subject to the conditions set forth in this Agreement, each of the parties agrees to use its reasonable best efforts to take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the other parties in doing, all things reasonably necessary or advisable to consummate and make effective, in the most expeditious manner reasonably practicable, the Mergers and the other transactions contemplated by this Agreement, including (i) the defending of any lawsuits or other legal proceedings, whether judicial or administrative, challenging this Agreement or the consummation of the transactions contemplated by this Agreement, including seeking to have any stay or temporary restraining order entered by any court or other Governmental Authority vacated or reversed, and (ii) the execution and delivery of any additional instruments necessary to consummate the transactions contemplated by this Agreement. Notwithstanding the foregoing, as used in this Section 5.05, "reasonable best efforts" shall not include nor require any party, except as set forth in Section 5.05(b) of the Duke Disclosure Letter, to (A) sell, or agree to sell, hold or agree to hold separate, or otherwise dispose or agree to dispose of any asset, in each case if such sale, separation or disposition or agreement with respect thereto (i) would, individually or in the aggregate, reasonably be expected to have a material adverse effect on the

Company, Cinergy or Duke (provided that for the purposes of determining whether a potential adverse effect would constitute a material adverse effect for the purposes of this clause (i), each of the Company, Cinergy and Duke and their respective subsidiaries, taken as a whole, shall each be deemed to be a consolidated group of entities of the size and scale of Cinergy and its subsidiaries, taken as a whole), (ii) would involve any capital stock of Duke Energy Gas Transmission Corporation or any capital stock of its subsidiaries or any of their respective assets, other than a *de minimis* amount of such assets or (iii) is of the Transferred Assets or with respect to the Transferred Assets and as a result of such sale, separation, disposition or agreement with respect thereto, thereafter the remaining Transferred Assets held by Duke or its subsidiaries would include less than 1,500 megawatts, or (B) conduct or agree to conduct its business in any particular manner if such conduct or agreement with respect thereto would, individually or in the aggregate, reasonably be expected to have a material adverse effect on the Company, Cinergy, or Duke (provided that for the purposes of determining whether a potential adverse effect would constitute a material adverse effect for the purposes of this clause (ii), each of the Company, Cinergy and Duke and their respective subsidiaries, taken as a whole, shall be deemed to be a consolidated group of entities of the size and scale of Cinergy and its subsidiaries, taken as a whole.

(c) State Anti-Takeover Statutes. Without limiting the generality of Section 5.05(b), Cinergy and Duke shall (i) take all action necessary to ensure that no state anti-takeover statute or similar statute or regulation is or becomes applicable to the Mergers, this Agreement or any of the other transactions contemplated by this Agreement and (ii) if any state anti-takeover statute or similar statute or regulation becomes applicable to the Mergers, this Agreement or any other transaction contemplated by this Agreement, take all action necessary to ensure that the Mergers and the other transactions contemplated by this Agreement may be consummated as promptly as reasonably practicable on the terms contemplated by this Agreement and otherwise to minimize the effect of such statute or regulation on the Mergers and the other transactions contemplated by this Agreement.

Section 5.06 *Stock Options; Restricted Stock and Equity Awards; Stock Plans.*

(a) (i) At the Effective Time, all outstanding stock options (the “Cinergy Employee Stock Options”) granted under the Cinergy Employee Stock Option Plans, whether vested or unvested, shall be converted into an option to acquire, on the same terms and conditions as were applicable under such Cinergy Employee Stock Option, including vesting (taking into account any acceleration of vesting that may occur as a result of the transactions contemplated hereby), a number of shares of Company Common Stock equal to the number of shares of Cinergy Common Stock subject to such Cinergy Employee Stock Option immediately before the Cinergy Effective Time multiplied by the Cinergy Ratio (rounded to the nearest whole share) at a price per share of Company Common Stock equal to the price per share under such Cinergy Stock Option divided by the Cinergy Ratio (rounded to the nearest cent) (each, as so adjusted, a “Cinergy Adjusted Option”);

(ii) Prior to the Effective Time, Cinergy shall make such other changes to the Cinergy Employee Stock Option Plans as Cinergy and Duke may agree are appropriate to give effect to the Cinergy Merger;

(iii) At the Effective Time, each restricted share of Cinergy Common Stock (“Cinergy Restricted Stock”) shall be converted into a number of restricted shares of Company Common Stock equal to the number of restricted shares of Cinergy Common Stock multiplied by the Cinergy Ratio, on the same terms and conditions as were applicable to such share of Cinergy Common Stock, including vesting (taking into account any acceleration of vesting that may occur as a result of the transactions contemplated hereby) (“Cinergy Adjusted Restricted Stock”); and

(iv) except as disclosed in Section 5.06(a) of the Cinergy Disclosure Letter, all outstanding Cinergy equity or equity-based awards other than Cinergy Employee Stock Options and Cinergy Restricted Stock (together, “Cinergy Awards”), whether vested or unvested, as of immediately



prior to the Cinergy Effective Time shall be converted into an equity or equity-based award in respect of a number of shares of Company Common Stock equal to the number of Cinergy Common Stock represented by such award multiplied by the Cinergy Ratio, on the same terms and conditions as were applicable to such Cinergy equity or equity-based award, including vesting (taking into account any acceleration of vesting that may occur as a result of the transactions contemplated hereby) (“Cinergy Adjusted Awards”).

(v) Prior to the Cinergy Effective Time, the Board of Directors of Cinergy (or, if appropriate, any committee administering the Cinergy Employee Stock Option Plans) shall adopt such resolutions or take such other actions as may be required to effect the foregoing and to ensure that the conversion pursuant to Section 2.01(b) of the Cinergy Common Stock held by any director or officer of Cinergy and the conversion pursuant to this Section 5.06(a) into Cinergy Adjusted Options of Cinergy Employee Stock Options, Cinergy Adjusted Restricted Stock of Cinergy Restricted Stock and Cinergy Adjusted Awards of Cinergy Awards held by any director or officer of Cinergy will be eligible for exemption under Rule 16b-3(e) under the Exchange Act. Notwithstanding anything in Section 5.06(a) to the contrary, to the extent that the adjustments set forth in Section 5.06(a) would otherwise result in the adjustment being treated as a new grant of stock options or deferred compensation under Section 409A of the Code, the number of shares subject to any Cinergy Adjusted Option, Cinergy Adjusted Restricted Stock or Cinergy Adjusted Awards converted pursuant to Section 5.06(a) and the exercise price per share of any Cinergy Adjusted Option converted pursuant to Section 5.06(a) shall be determined in a manner that will not result in such conversions being treated as a new grant of stock options or deferred compensation under Section 409A of the Code and most closely reflects the economics of the adjustment pursuant to Section 5.06(a).

(b) (i) At the Duke Effective Time, all outstanding stock options (the “Duke Employee Stock Options”) granted under the Duke Option Plans, whether vested or unvested, shall be converted into an option to acquire, on the same terms and conditions as were applicable under such Duke Employee Stock Option after taking into account the transactions contemplated hereby, the same number of shares of Company Common Stock at the same price per share of Company Common Stock (each, as so adjusted, a “Duke Adjusted Option”, and, together with the Cinergy Adjusted Options, the “Adjusted Options”);

(ii) Prior to the Duke Effective Time, Duke shall make such other changes to the Duke Option Plans as Cinergy and Duke may agree are appropriate to give effect to the Duke Merger;

(iii) At the Duke Effective Time, each restricted share of Duke Common Stock (the “Duke Restricted Stock”) shall be converted into a restricted share of Company Common Stock, on the same terms and conditions as were applicable to such share of Duke Common Stock after taking into account the transactions contemplated hereby (the “Duke Adjusted Restricted Stock”); and

(iv) except as disclosed in Section 5.06(b) of the Duke Disclosure Letter, all outstanding Duke equity or equity-based awards other than Duke Employee Stock Options and Duke Restricted Stock (together, “Duke Awards”), whether vested or unvested, as of immediately prior to the Duke Effective Time shall be converted into an equity or equity-based award in respect of the same number of shares of Company Common Stock, on the same terms and conditions as were applicable to such Duke equity or equity-based award after taking into account the transactions contemplated hereby (“Duke Adjusted Awards”).

(v) Prior to the Duke Effective Time, the Board of Directors of Duke (or, if appropriate, any committee administering the Duke Option Plans) shall adopt such resolutions or take such other actions as may be required to effect the foregoing and to ensure that the conversion pursuant to Section 2.01(a) of the Duke Common Stock held by any director or officer of Cinergy and the conversion pursuant to this Section 5.06(b) into Duke Adjusted Options of Duke Employee Stock

Options, Duke Adjusted Restricted Stock of Duke Restricted Stock and Duke Adjusted Awards of Duke Awards held by any director or officer of Duke will be eligible for exemption under Rule 16b-3(e) under the Exchange Act. Notwithstanding anything in Section 5.06(b) to the contrary, to the extent that the adjustments set forth in Section 5.06(b) would otherwise result in the adjustment being treated as a new grant of stock options or deferred compensation under Section 409A of the Code, the number of shares subject to any Duke Adjusted Option, Duke Adjusted Restricted Stock or Duke Adjusted Awards converted pursuant to Section 5.06(b) and the exercise price per share of any Duke Adjusted Option converted pursuant to Section 5.06(b) shall be determined in a manner that will not result in such conversions being treated as a new grant of stock options or deferred compensation under Section 409A of the Code and most closely reflects the economics of the adjustment pursuant to Section 5.06(b).

(c) Prior to the Duke Effective Time, the Board of Directors of the Company shall adopt such resolutions or take such other actions as may be required to ensure to the maximum extent permitted by law that the conversion pursuant to Section 2.01(b) of the Duke Common Stock held by any director or officer of Duke, the conversions pursuant to Section 5.06(b), the conversion pursuant to Section 2.01(a) of the Cinergy Common Stock held by any director or officer of Cinergy and the conversion pursuant to Section 5.06(a) will be eligible for exemption under Rule 16b-3(e) under the Exchange Act. Prior to the Cinergy Effective Time or the Duke Effective Time, as the case may be, Duke and Cinergy, as applicable, shall each deliver to the holders of Cinergy Employee Stock Options and Duke Employee Stock Options (collectively, the “Stock Options”) appropriate notices setting forth such holders’ rights pursuant to the respective Cinergy Employee Stock Option Plans or Duke Option Plans, as the case may be (collectively, the “Stock Plans”), and the agreements evidencing the grants of such Stock Options, and that such Stock Options and agreements shall be assumed by the Company and shall continue in effect on the same terms and conditions (subject to the adjustments required by this Section 5.06 after giving effect to the Mergers).

(d) Except as otherwise contemplated by this Agreement and except to the extent required under the respective terms of the Stock Options, all restrictions or limitations on transfer and vesting with respect to Stock Options awarded under the Stock Plans, or any other plan, program or arrangement of Cinergy, Duke or any of their subsidiaries, to the extent that such restrictions or limitations shall not have already lapsed, shall remain in full force and effect with respect to such Stock Options after giving effect to the Mergers and the assumption by the Company as set forth above.

(e) At the Cinergy Effective Time, by virtue of the Mergers, the Stock Plans shall be assumed by the Company, with the result that all obligations of Cinergy and Duke under the Stock Plans, including with respect to awards outstanding at the Effective Time under each Stock Plan, shall be obligations of the Company following the Effective Time. Prior to the Cinergy Effective Time, the Company shall take all necessary actions for the assumption of the Stock Plans, including the reservation, issuance and listing of Company Common Stock in a number at least equal to the number of shares of Company Common Stock that will be subject to Adjusted Options. As promptly as practicable following the Cinergy Effective Time, the Company shall prepare and file with the SEC a registration statement on Form S-8 (or another appropriate form) registering a number of shares of Company Common Stock determined in accordance with the preceding sentence. Such registration statement shall be kept effective (and the current status of the prospectus or prospectuses required thereby shall be maintained) at least for so long as Adjusted Options remain outstanding.

#### Section 5.07 *Employee Matters.*

(a) Following the Cinergy Effective Time, the Company will (subject to this Section 5.07 and Section 5.08), or, as applicable, will cause its subsidiaries to, honor all obligations under any contracts, agreements, collective bargaining agreements, plans (as such may be amended in accordance with this Agreement) and commitments of Cinergy and Duke and their respective subsidiaries that exist on the