UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy	)	**Docket No.** EC05-103
Cinergy	)	

MOTION TO INTERVENE AND PROTEST

September 23, 2005

Public Citizen's Energy Program, Citizens Action Coalition of Indiana, Ohio Partners for Affordable Energy and the Southern Alliance for Clean Energy hereby provide this motion to intervene and protest the proposed merger between Duke Energy and Cinergy because the merger is not in the public interest. This intervention and protest raises a number of facts that dispute assertions made by Duke-Cinergy that can only be resolved in an evidentiary hearing and we therefore request that FERC schedule one.

Public Citizen is a nonprofit, nonpartisan consumer rights organization based in Washington, DC with 9,200 dues-paying individual members in Ohio, Indiana, Kentucky, North Carolina and South Carolina. Our Energy Program does extensive work at the federal and state levels to promote energy policies that best protect consumers.

Founded in 1974, Citizens Action Coalition of Indiana is a not-for-profit coalition of organizations and over 300,000 individual members throughout the State of Indiana. For over two decades CAC has worked to empower citizens and promote economic and environmental justice.

Ohio Partners for Affordable Energy (OPAE) is a coalition of consumers, community action agencies, service organizations, and housing agencies organized to educate consumers and policy makers on providing competition to non-industrial consumers in the restricting of Ohio's Utility industry.

The Southern Alliance for Clean Energy is a nonprofit, nonpartisan organization that promotes responsible energy choices that solve global warming problems and ensure clean, safe and healthy communities throughout the Southeast, including Kentucky, North Carolina and South Carolina.

Together, we represent consumers directly impacted by this proposed merger. Our participation in this proceeding is unique and in the public interest, and we will not be adequately represented by any other party to this proceeding.

Our intervention and protest is comprised of 9 general sections, each numbered below:

I. Secret meetings violate law, public interest

According to documents obtained by Public Citizen through the Freedom of Information Act,[1] Duke-Cinergy executives held multiple private meetings with FERC Commissioners before the companies'

[1] FOIA No. FY05-101.

July 12 filing at FERC and after the companies filed details of the merger with the U.S. Securities and Exchange Commission.

On May 23, 2005, Duke Energy CEO and Board Chairman Paul M. Anderson and Cinergy President & CEO James E. Rogers held meetings with at least two FERC Commissioners. At noon, they met with Suedeen G. Kelly. At 2pm, they met with Joseph Kelliher. The notes arranging the meeting indicate the purpose was to “discuss [the] Cinergy/Duke Energy merger.” There may have been other meetings that day with the other FERC Commissioners, but Public Citizen has yet to receive confirmation. We respectfully request confirmation of whether Anderson and Rogers met with other FERC Commissioners on May 23.

On June 28, Duke Energy invited all FERC Commissioners to a reception at the LBJ Room in the U.S. Capital. From the documents Public Citizen received through FOIA, it is unknown how many FERC Commissioners, if any, attended this private reception hosted by Duke Energy at the U.S. Capital. Again, we respectfully request confirmation of whether any FERC Commissioners attended this private Duke Energy reception. At the time of this filing, the Secratary of the U.S. Senate, Emily Reynolds, failed to disclose to Public Citizen which members of the U.S. Senate sponsored a private reception for a corporation in the U.S. Capital.

On Wednesday, July 6, James E. Rogers, Richard Osborne, Vice-President of Duke Energy, and Michael Naeve, attorney with Skadden Arps, met with FERC Commissioners. At 11:45am, the Duke-Cinergy delegation met with Joseph Kelliher and members of his staff: Larry Gasteiger, Leonard Tao and Cathy Tripodi. At 4:30, the Duke-Cinergy delegation met with Commissioner Suedeen Kelly. Again, there may have been additional meetings that day with the other FERC Commissioners, but Public Citizen has yet to receive confirmation. We respectfully request confirmation of whether the Duke-Cinergy delegation met with other FERC Commissioners on July 6.

Public Citizen requests that all participants in any and all of these meetings with FERC Commissioners—including FERC Commissioners themselves—testify under oath what was discussed at the meetings, and this testimony shall be provided as part of the public record of this proceeding.

Public Citizen makes this request because FERC Commissioners are required by the Administrative Procedure Act to record meetings if they have knowledge that the matter will be “noticed for hearing.” FERC should have known that the Duke-Cinergy merger would be “noticed for hearing” because on May 9, 2005, the companies filed an “Agreement and Plan of Merger” as an 8-k with the U.S. Securities and Exchange Commission.[2]

This official filing with the SEC of a “definitive agreement,” detailing the merger agreement between the two companies, provided the public and FERC notice that the merger was going forward and would have to be filed for approval at FERC. It therefore should have been clear to FERC Commissioners beginning on May 9, 2005 that the merger between Duke and Cinergy would have to be “noticed for hearing,” since Section 203 of the Federal Power Act requires an “opportunity for hearing.” As a result, details of the May 23, June 28 and July 6 meetings between Duke-Cinergy executives and FERC Commissioners must be part of the public record.

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[2] www.sec.gov/Archives/edgar/data/30371/000095017205001467/nyc591515.txt

Indeed, the companies announced in the accompanying press release that "the merger is conditioned upon approval by the shareholders of both companies, as well as a number of regulatory approvals or reviews by federal and state energy authorities, including…the Federal Energy Regulatory Commission."[3]

FERC's failure to record the conversations of the meetings comes after Public Citizen's March 28, 2005 filing with FERC where we raised similar concerns with private meetings held between company executives and FERC Commissioners related to the Exelon-PSEG merger.[4] Our filing attracted several high-profile media reports, which noted that "consumer groups also took issue with what they say were private meetings between the FERC commissioners and executives with Exelon and PSEG on Jan. 13"[5]; "Public Citizen and its partners contend that private pre-filing meetings on the Exelon-PSEG merger involved commissioners, violating federal law and constituting 'a slap in the face to the public and consumer advocates who were offered no such private access to the powerful, unelected government officials'…the groups say a private meeting is not legal if a commissioner believes it would be followed by the company making a filing with FERC. In this case, the groups contend, the meetings violated the law because the utilities had announced their merger deal several weeks before their prefiling meetings."[6]

Despite Public Citizen's March 2005 protest of similar private meetings held after companies announced a merger subject to FERC review, and after media reports covering Public Citizen's protest, FERC still went ahead and held private meetings and failed to record them.

FERC's failure to record these meetings occurred despite a recent Inspector General report that scolded FERC for similar abuses.

In June 2003, the U.S. Department of Energy Office of Inspector General released a report[7] on controversial *ex parte* communications, in which the Inspector General "recommend[s] that the Commission [FERC] carefully consider whether the conduct or contents of communications such as those at issue here expose Commission decision-making to avoidable legal challenge or needless controversy. To the extent the Commission intends to continue engaging in such communications in the future, we believe the Commission should carefully consider whether: (1) Such communications should be tape-recorded or concurrently transcribed, and otherwise made available to the public as soon as possible…[and] other steps should be taken to promote public confidence in Commission proceedings, including, for example, a practice of inviting members of the media or the general public to participate."

Despite these explicit recommendations by the IG, FERC has failed to adopt a single reform in response. Public Citizen received confirmation of this fact in response to a FOIA request[8] in which we asked for "all records describing any policy changes the Federal Energy Regulatory Commission implemented in response to recommendations in the" IG report. FERC's response to Public Citizen stated that no public documents exists to satisfy our request.

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[3] www.sec.gov/Archives/edgar/data/30371/000095017205001467/ny591593.txt
[4] Docket EC05-43, http://elibrary.ferc.gov/
[5] Suzette Parmley, "Exelon's $12 billion deal for PSEG is opposed by consumer groups," *The Philadelphia Inquirer*, March 29, 2005, www.philly.com/mld/inquirer/business/11253497.htm
[6] Mary O'Driscoll, "Consumer groups want to crash 'private club' of regulators," March 29, 2005, *Greenwire*.
[7] *Special Inquiry: Federal Energy Regulatory Commission Communications*, DOE/IG-0610, www.ig.doe.gov/pdf/ig-0610.pdf
[8] FOIA No. FY05-110

The public must have a detailed description of what was said by whom of these meetings because they may have served as a de facto negotiation, where parties to a hearing that Commissioners should have known would be contested explicitly discussed the merger.

We assume that FERC justifies holding these multiple private meetings with Duke-Cinergy under its rules, which prohibit "off-the-record communications" with "decisional" employees during any "contested on-the-record proceeding."[9] We assume FERC will argue that these multiple private meetings between FERC Commissioners and Duke-Cinergy executives to discuss the merger application were allowed to be "off-the-record" because the companies had not yet formally filed their merger application, and therefore there was not yet any "contested on-the-record proceeding."

But it appears as though this FERC rule, as applied in this case, conflicts with federal law. The federal Sunshine Act limits the ability of federal agencies to conduct "off-the-record" private meetings: "the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing *unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge*"[10] [emphasis added].

So the Sunshine Act is clear: if any FERC commissioner "has knowledge" that a proceeding "will be noticed" for hearing, then it is unlawful for that Commissioner to meet with the parties in private. It was evident to all FERC commissioners that a proposed merger announced on May 9, 2005 to create one of the largest energy companies in the world would be filed at FERC and noticed for hearing, as required by the Federal Power Act. Therefore, these meetings were in violation of federal law and must be included in the public record by having all participants provide testimony under oath detailing the conversations held in private.

The federal courts have recently ruled on this issue, finding that FERC's rules are not the last word on whether an *ex parte* contact is lawful. The U.S. Court of Appeals for the DC Circuit ruled that "the Sunshine Act is a statute of general applicability governing FERC and all other federal agencies within its compass. FERC has no authority whatsoever to change the terms of the Act; rather, FERC must conform its regulatory activities to comply with the overriding terms of the Sunshine Act…The key to exclusion under the Sunshine Act is not the label given the communication, but rather whether there is a possibility that the communication could effect the agency's decision in a contested on-the-record proceeding."[11]

Regardless of whether or not the Sunshine Act was violated, our due process was violated, along with our rights under the Administrative Procedure Act to an impartial decision maker, since the private meetings with interested parties have left the Commissioners biased.[12]

We also note that FERC has clear rules allowing for interested parties, such as Duke-Cinergy executives and their lawyers, to meet with FERC to resolve any questions they may have about filing for a merger application: "The Commission *staff* provides informal advice and assistance to the general public *and to prospective applicants for licenses, certificates, and other Commission authorizations*.

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[9] 18 CFR § 385.2201, www.gpoaccess.gov/cfr/
[10] 5 USC § 557(d)(1)(E), www.gpoaccess.gov/uscode/
[11] *Electric Power Supply v. FERC*, Docket 03-1182, December 10, 2004, www.cadc.uscourts.gov
[12] *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583 (D.C. Cir. 1970)

Opinions expressed by the staff do not represent the official views of the Commission, but are designed to aid the public and facilitate the accomplishment of the Commission's functions. Inquiries may be directed to the chief of the appropriate office or division."[13] [emphasis added]

Note that Public Citizen is not requesting any information about any contacts between Duke-Cinergy executives and FERC staff. We encourage company executives to utilize the process outlined in FERC's rules to discuss issues with FERC staff. But we object to such private meetings with FERC Commissioners once it is evident that the subject of the conversation—in this case, the recently announced merger between Duke and Cinergy—will be subject to a hearing.

II. Overreliance on Industry Analysts

To be completely frank, Public Citizen was not surprised to learn that Duke and Cinergy hired Dr. William H. Hieronymus to provide the documentation that the merger would not harm competition or consumers. After all, in our March 28, 2005 filing protesting the Exelon-PSEG merger, we complained that FERC relied upon the analysis of "Dr. Hieronymus for an inordinate number of merger applications" including the Exelon-PSEG merger. The fact that Duke and Cinergy have hired this same exact individual proves Public Citizen's original point: FERC overrelies on the analysis provided by a single individual who is paid handsomely by energy companies. This relationship invites disaster, as Dr. Hieronymus has personal financial incentive to provide results accommodating to the interests of the energy companies that pay his e hourly wage.

Why even have the President of the United States appoint FERC Commissioners? Since Dr. Hieronymus and his firm Charles River Associates (Charles River has also been hired—surprise!—by MidAmerican and Pacificorp to handle *their* merger review analysis for FERC) appear to have a monopoly on reviewing mergers, perhaps we should simply disband FERC and its Commissioners and install Dr. Hieronymus as Chief Overseer of All Utility Mergers.

It is an unfortunate irony that a regulatory commission like FERC that pushes for "competitive" energy markets tolerates a monopoly of consultants. The public interest is not served by having one consulting firm, and one individual in particular, conduct every major merger analysis.

FERC's reliance on prejudiced analyses stands in stark contrast to the independent analyses used by other federal anti-trust agencies, such as the Department of Justice and the Federal Trade Commission. A merger of this magnitude—creating one of the largest energy companies in the United States—should not be decided on analysis supplied by the companies.

Furthermore, FERC's reliance on industry-supplied analysts threatens to provide the public with a patchwork view of market concentration, as the different analysts, predictably, have concluded different market analyses for the same markets.[14]

Therefore, Public Citizen requests that evidentiary hearings are required in order to challenge whether the analysis provided by Dr. Hieronymus is prejudiced in favor of the companies that pay his salary.

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[13] 18 CFR § 388.104, www.gpoaccess.gov/cfr/

[14] Diana L. Moss, *Electricity Mergers, Economic Analysis, and Consistency: Why FERC Needs to Change its Approach*, January 13, 2005, The American Antitrust Institute, www.antitrustinstitute.org

III. The competition analysis is flawed as it relies upon HHI

Dr. Hieronymus' reliance on FERC's Appendix A and HHI screen to assess market power is faulty, as "HHI is far too simplistic an index to measure market power in an industry as complex as the electric industry,"[15] particularly with a merger as large as the one proposed by Duke-Cinergy. For example,[16] FERC's Appendix A analysis lacks the "causal connection between market concentration and market power…[as] there is no link between the HHI indicator or changes in market concentration, and changes in market power."

Indeed, the Midwest ISO clearly identifies the limitations of relying on HHI to detect market power:

> "Although HHI statistics can provide reliable competitive inferences for many types of products, this is not generally the case in electricity spot markets. The HHI's usefulness is limited by the fact that it reflects only the supply-side, ignoring demand-side factors that affect the competitiveness of the market. The most important demand-side factor is the level of demand. Since electricity cannot be stored economically, production must match demand on a real-time basis. When demand rises, an increasing quantity of generating capacity is utilized to satisfy the demand, leaving less capacity that can respond to higher prices in the event a large supplier withholds resources…In addition, the scope of the geographic market can change hour to hour as the loadings on the transmission network change…It is true that the DOJ and FTC evaluate the change in HHI as part of its merger analysis. However, this is only a preliminary analysis that would typically be followed by a more rigorous simulation of the likely price effects of the merger. It is also important to note the HHI analysis employed by the antitrust agencies is not intended to determine whether a supplier has market power."[17]

In order for consumers to be adequately protected under this proposed merger, FERC's Appendix A analysis must be expanded to more accurately measure market power and the damaging effect it has on wholesale, and in turn, retail, prices. Specifically, use of simulation modeling that directly measures market power, with a Price-Cost Margin Index (capturing examples of market power by documenting when prices are charged above marginal costs, or the "perfectly competitive" price); calculating the effects of generator's and power marketer's strategic behaviors to exercise market power (such as the use of strategic bidding and capacity withholding, neither of which HHI adequately measure); and additional variables, such as modeling the impact the merger will have in light of the region's specific market structure, must be included.

We therefore request that the testimony of Dr. Hieronymus be discarded and FERC staff, in direct coordination with DOJ and FTC staff, commission its own independent analysis of the merger's effect on competition including the new criteria we describe.

IV. Power marketing is excluded from market concentration analysis

Duke-Cinergy does not include power marketing in its market concentration analysis. This is an incredible oversight, given the fact that Duke and Cinergy are the 7th and 8th largest power marketers in America, respectively. Combined, the two companies would have the largest power marketing business in the United States. These power marketing sales to non-affiliates greatly expand the ability

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[15] Heidi Kroll and Richard Rosen, *A Critique of FERC's New Merger Guidelines: Implications for Analyzing Market Power, Mergers and Deregulation*, May 30, 1997, www.tellus.org

[16] Comments on the shortcomings of FERC's Appendix A analysis are summarized or quoted from: Dr. Aleksandr Rudkevich and Dr. Richard A. Rosen, *Use of Computer Simulation Models to Analyze Market Power in Electricity Markets*, Docket PL98-6, June 13, 1998, http://elibrary.ferc.gov/

[17] *2004 State of the Market Report*, Page 10, www.midwestiso.org/documents/imm/2004%20MISO%20SOM%20Report.pdf

of the merged company to command market power. Duke's trading operation is incredibly extensive, spanning the entire country.

Indeed, Duke-Cinergy have boasted that "the combined merchant and **trading and marketing** operations of Duke Energy and Cinergy will have greater scale."[18]

The recent release of Enron tapes describing that company's successful efforts to manipulate a market under the direct regulatory control of FERC implies that market power may be obtained by controlling, through power marketing, as little as 52 megawatts of generation (as opposed to owning plants outright).[19] This forces one to conclude that at certain peak hours, control over small amounts of generation can lead to large control of market power.

We therefore protest the entire market concentration analysis since it ignores the market concentration (and market power) impacts of the Duke-Cinergy power marketing business, and request that the new market concentration analysis include all power marketing activities.

V. The companies have a track record of cheating consumers

In their FERC filing, the companies claim the merger "will build on the reputations of both Duke Energy and Cinergy as responsible corporate citizens."

But Duke Energy does not have a reputation of being a responsible corporate citizen. Rather, Duke Energy has one of the worst track records of energy companies in the U.S. when it comes to manipulating markets, cheating consumers and misleading regulators (and this is saying a lot, given the pathetic state of morals in the U.S. energy industry). Duke Energy has been forced to pay $257 million to settle allegations of market manipulation and other misdeeds:

- In July 2004, the California Attorney General announced a $207.5 million "electricity price gouging settlement" with Duke Energy for the company's role in ripping off the state's consumers during the crisis that led to forced blackouts.[20]
- In September 2003, the U.S. Commodity Futures Trading Commission fined Duke Energy a "civil monetary penalty" of $28 million for manipulating natural gas markets.[21]
- In December 2003, FERC fined Duke Energy $2.5 million for intentionally withholding electricity from the California market in a successful scheme to drive prices up and make more money. In the process, Duke Energy's actions helped plunge millions of Americans into corporate-sponsored blackouts.[22]
- In September 2004, FERC forced Duke to pay $549,973 for violating California energy market rules.[23]
- The California Independent System Operator rescinded $14.4 million in payments Duke Energy had received after the company did not make its power plants available for the California market. The CAISO then issued a $4.5 million fine against Duke for failing to follow California market rules during a declared system emergency.

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[18] Richard J. Osborne Direct, Page 14, Case Number 05-0732, filed August 1, 2005, www.puc.state.oh.us
[19] Jonathan Peterson, "Tapes Reveal Enron's Power Plant Rigging," *Los Angeles Times*, February 4, 2005.
[20] http://caag.state.ca.us/newsalerts/2004/04-073.htm
[21] www.cftc.gov/opa/enf03/opa4840-03.htm
[22] www.ferc.gov/press-room/pr-archives/2003/2003-4/12-19-03-duke.asp
[23] Docket EL03-152, http://elibrary.ferc.gov/

In July 2005, the Securities and Exchange Commission imposed a cease-and-desist order on Duke Energy because the company engaged in power and natural gas trading "without having internal accounting controls that were sufficient to ensure the company's traders properly" recorded their speculative deals. As a result, Duke Energy illegally classified $56.2 million of the company's speculative power and natural gas trading operations.[24] The investigation into Duke Energy's energy trading operations resulted in criminal charges against three Duke employees.

In addition, Cinergy was forced to pay a $3 million "civil monetary penalty" in November 2004 to the U.S. Commodity Futures Trading Commission for manipulation of natural gas prices.[25]

In light of this horrendous track record, Public Citizen demands that Duke Energy provide a detailed description of what management changes have occurred that will convince consumers that the company can be trusted. Such a description should include a list of all executives who continue to serve in management positions who had similar positions at the time that the company was engaged in manipulating markets and falsifying its accounting, and defend why these executives can be trusted today. As long as the same executives who helped perpetrate one of the greatest frauds upon the American people are still in a decision-making capacity at the company, the merger is not in the public interest.

VI. The merger will result in Duke controlling too much natural gas pipeline capacity, so Texas Eastern must be divested

Duke owns nearly 13,000 miles of natural gas pipeline in Central and Eastern United States, with the company's Texas Eastern representing the bulk of this system. The company' pipeline network runs concurrently from Texas and the Gulf Coast all the way through New England and into Canada. This massive control over natural gas pipeline capacity generates huge profit margins for the company and raises competition concerns.

Together, Duke's five natural gas pipelines generated $4.7 billion in revenues and $1.2 billion in profits since 2001, for a healthy 26% rate of return. This rate of return is very high for a monopolistic business like natural gas pipelines, and threatens electricity competition in much of the United States (since most new power generation is fueled by natural gas).

Duke's Texas Eastern pipeline runs over 9,000 miles through 16 states: Alabama, Arkansas, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Texas and West Virginia. Since 2001, Duke Energy's Texas Eastern pipeline has enjoyed after-tax profits of $824 million on revenues of $3.2 billion—a healthy 26% profit margin.[26]

Duke's Algonquin pipeline, which extends over 1,000 miles from Texas Eastern through Boston, has also enjoyed healthy profits. Since 2001, the Algonquin pipeline has had revenues of $639 million and profits of $213 million—a whopping 33% rate of return.

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[24] www.sec.gov/litigation/admin/34-51995.pdf
[25] www.cftc.gov/opa/enf04/opa5020-04.htm
[26] Form 2 Annual Report of Major Natural Gas Companies, http://elibrary.ferc.gov/

Duke's Maritimes & Northeast pipeline runs 670 miles from the Algonquin in Massachusetts through New England to Canada. Duke owns 77.53% of the pipeline; ExxonMobil owns 9.55% and Scotia Power owns the remaining 12.92%. The pipeline enjoyed revenues of $454 million and profits of $90 million since 2001.

Duke's East Tennessee natural gas pipeline runs 1,269 miles through Tennessee, Virginia, North Carolina and Georgia, and intersects with Texas Eastern in Tennessee. This pipeline has enjoyed revenues of $258 million and profits of $76 million since 2001. In August 2004, Duke acquired an expansion to this system by purchasing a pipeline and a share in the Saltville Gas Storage from AGL Resources for $62 million.

Duke owns half (with Williams Cos owning the other half) of the Gulfstream natural gas pipeline, running 700 miles through Alabama, Florida and Mississippi. In 2004, the pipeline had revenues of $94 million and profit of $29 million.

Several of Duke's power plants sit right on this pipeline, and, combined with Duke's proposed acquisition of Cinergy's KO Transmission line, this presents clear anti-competitive concerns for consumers in the Midwest.

Duke's massive control over America's natural gas system is further enhanced with the acquisition of Cinergy's KO pipeline system, which originates east of Lexington, Kentucky and extends north for 90 miles to the citygates of Cinergy's Cincinnati Gas & Electric.

To alleviate market concentration concerns, Public Citizen requests that Duke divest Texas Eastern as a condition of merger approval.

VII. Transferring power plants to Cinergy raises problems

Duke will transfer five power plants to Cinergy: Fayette, a 620 MW natural gas power plant in Masontown, Pennsylvania; Hanging Rock, a 1,240 natural gas power plant in Lawrence County, Ohio; Lee, a 640 MW natural gas power plant in Lee County, Illinois; 75% interest in Vermillion, a 648 MW natural gas power plant in Vermillion County, Indiana; and Washington, a 620 MW natural gas power plant in Washington County, Ohio.

This transfer of unregulated generation is in explicit violation of FERC's policy on transfers of assets between affiliates. According to the Duke-Cinergy Merger Agreement, this asset transfer will only take place after Duke Energy's unregulated generation (DENA) and Cinergy's utility Cincinnati Gas & Electric become affiliates. The Duke-Cinergy Merger Agreement is written so as to assure that this asset transfer does not occur unless the merger is consummated.

Additionally, this transfer of unregulated generation will likely be folded into Cinergy's regulated revenue requirement, raising the potential for rate increases for Cinergy customers. This presents a particular problem since Cinergy holds a virtual monopoly over its residential customers. Of the 584,844 residential customers in Cinergy's Cincinnati Gas & Electric utility's service area, over 97% (or 568,595) continue to be served by Cinergy.[27] As a result, residential customers have no other option to choose alternative suppliers.

[27] www.puco.ohio.gov/Puco/StatisticalReports/Report.cfm?doc_id=365

Duke Energy's financial performance of these "unregulated" merchant plants has been poor, so this is a clear attempt to save the company money and charge consumers more by sticking the power plants in Cinergy's regulated revenue requirement, forcing consumers to pay for them. Indeed, Public Citizen foresees a scenario where Cinergy's Indiana and Ohio utilities will be buying more intra-company power than it should when market prices are high (especially from the DENA merchant plants being transferred to CG&E) and selling more than it should when market prices are low.

The Duke-Cinergy merger proposal must be rejected because this transfer of assets from Duke Energy to Cinergy is in violation of FERC's own rules regarding the transfer of assets between affiliates and will lead to higher rates for consumers, harming the public interest.

VIII. The merger will result in rate increase for consumers

According to the company's own filings, the merger will result in rate increases to consumers. The companies request that the Ohio Public Utilities Commission authorize the collection of net costs associated with the merger. As a result, the merger is in explicit violation of the Federal Power Act and must be rejected.

While the companies claim that savings will result from the merger, Cinergy's CEO was forced to admit, however, that "there are no guarantees that all these savings will be achieved."[28]

But the companies request to pass merger costs on to consumers is quite clear. The companies' filing with the Ohio PUC states:

"Joint Applicants requests that the Commission approve in this proceeding the recovery of the costs, net of savings, incurred by CG&E related to consummating the transaction discussed herein, including transaction costs and costs to achieve merger savings. Those net costs include, but are not limited to, the following: merger case expense, systems' integration expense, asset transfer expense, external advisors, and external legal fees. CG&E proposes that the deferred costs to be recovered will be accounted for as a regulatory asset. The regulatory assets will be apportioned jurisdictionally between CG&E's gas and electric utility services as determined in the appropriate retail base rate cases."[29]

IX. The Merger poses greater risks to the environment

In Duke-Cinergy's merger filing with FERC, the companies boast on page 17:

> "The Transaction will create a stronger platform from which to continue the Applicant's leadership in finding practical solutions to the environmental challenges facing the industry and the nation. The demonstrated commitment by the Applicants to proactively shape the climate change debate forms the basis for a substantial contribution to the development of a long-term carbon reduction strategy that will benefit both shareholders and the larger public interest."

[28] James E. Rogers Direct, Page 10, Case Number 05-0732, filed August 1, 2005, www.puc.state.oh.us
[29] Page 17, Case Number 05-0732, filed June 1, 2005, www.puc.state.oh.us

This is quite an inspiring message, until further review of the Merger proposal contains no information on how exactly the merger will in fact provide "practical solutions to the environmental challenges facing the industry and the nation."

In fact, the merger will simply solidify the company's investments in using fossil fuels for electric power. Now, we wouldn't normally make climate change demands before FERC, but it was the companies themselves who raised the issue of their commitment to solving climate change.

A recent paper[30] outlines the pending financial risks to the electric utility industry due to compliance with regulations to address climate change. The report suggests that utilities can protect their shareholders and consumers from these financial risks by implementing an assessment of the cost that emissions will have when evaluating the company's resource options. That way, the true costs of a company's investments in coal and natural gas fired power plants can be more accurately compared to alternatives such as renewable energy or demand reduction programs.

We therefore request that, as a condition of the merger's approval, Duke-Cinergy adopt such a strategy in order to best serve consumers.

Wherefore, the organizations listed below provide this Motion for Intervention and Protest and request an evidentiary hearing in the above-captioned proceedings and respectfully request that the Motion be granted for the reasons set forth herein.

Respectfully submitted,

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[30] Karl Bokenkamp, Hal LaFlash, Virinder Singh, Devra Bachrach Wang, "Hedging Carbon Risk: Protecting Customers and Shareholders from the Financial Risk Associated with Carbon Dioxide Emissions," *The Electricity Journal*, Vol. 18, Issue 6, July 2005.