

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy Indiana, LLC  
GIC Infra Holdings Pte. Ltd.

Docket No. EC21-56

**Joint Comments of Public Citizen, Sierra Club and Citizens Action Coalition**

The May 28, 2021 Response by Duke Energy Indiana, LLC (“Duke Indiana”) and GIC Infra Holdings Pte. Ltd. (“GIC Infra” and together with Duke Indiana, “Applicants”) to the May 17, 2021 deficiency letter of Federal Energy Regulatory Commission (“FERC” or “Commission”) fails to resolve cross-subsidization concerns regarding GIC’s ownership of the Genesee & Wyoming railroad, and issues related to state regulatory oversight. We additionally raise questions about conflicts between the HoldCo Agreement and the involvement of Elliott Management Corp. as a Duke Energy investor.

In response to the Commission’s first question regarding why it “should not be concerned about potential cross-subsidization with respect to rail transports between [G&W] and Duke Indiana”, Applicants proffer that they “are willing to agree ... as a condition to the Commission’s approval of the Transaction [that] GIC Infra’s (or its subsidiaries’) designees to the board of directors of Holdco shall not be permitted to vote or otherwise participate in any action, decision, discussion or negotiation pertaining to any contract or transaction with G&W or any subsidiary thereof”.<sup>1</sup>

But Applicants’ offer to have GIC’s designees to Holdco’s board of directors abstain from votes concerning transactions with G&W railroad fails to alleviate potential harm to consumers. GIC’s control over G&W in a regional market featuring few competitors raise implicit competition concerns that threaten Duke Indiana customers when the current contract expires at the close of 2021. The railroad was taken private by GIC & Brookfield on Dec 30, 2019 in a transaction where they paid a massive premium of approximately \$8.4 billion, or 40% over the share price at the time. Most of the \$8.4 billion was funded with debt. Between the 40% markup and the significant leveraged

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<sup>1</sup> *Deficiency Response*, at page 8.

buyout, Brookfield and GIC may become aggressive with their new debt-laden asset. As we asserted from our first protest in this proceeding, the only way to protect consumers is for GIC to divest its ownership of G&W as a condition of approving the proposed transaction.<sup>2</sup>

Second, the Commission should require Applicants to submit the proposed transaction to the Indiana Utility Regulatory Commission (IURC) for review, especially with regards to compliance with the quoted/cited Cinergy-Duke merger conditions. Applicants state in their Deficiency Response that “Duke Indiana has agreed to give the IURC significant additional authority over its affiliate relationships”<sup>3</sup> and that “the IURC has full authority and procedures in place to protect against retail cross-subsidization...”<sup>4</sup>—contentions we disputed in our May 6, 2021 filing. As we requested there:

...this Commission should thereafter take such action as would be necessary to impose “ring-fencing” and “affiliate transaction” protections for the benefit of Duke Indiana retail customers in the absence of *prior* IURC regulatory review of the Transaction. In 2006, the IURC issued a final order approving a settlement agreement prior to the Duke-Cinergy merger which imposed Financial Insulation and Affiliate Transactions protections for the benefit of the entity which was then PSI Energy but is now Duke Indiana and its retail customers.<sup>5</sup> Applicants expressly acknowledge the 2006 IURC order and settlement’s existence only in a draft footnote (Page 12, Note 1) in the HoldCo Agreement. But, they do not otherwise disclose nor discuss the 2006 IURC merger case, its settlement agreement, and its final order or analyze their implications for regulatory review of key aspects of the proposed Transaction. Especially but not exclusively, Applicants do not analyze the regulatory implications of the Financial Insulation Commitment No.19, “PSI will not declare and pay dividends out of capital or unearned surplus without the prior authorization of the [Indiana Utility

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<sup>2</sup> See our March 18, 2021 *Joint Protest*, at page 3

<sup>3</sup> *Deficiency Response*, at page 4.

<sup>4</sup> *Deficiency Response*, at page 8.

<sup>5</sup> See *In re PSI Energy, Inc.*, Cause No. 42873, 2006 WL 1465924 (IURC March 15, 2006), available at: [https://iurc.portal.in.gov/entity/sharepointdocumentlocation/de299297-3e83-e611-810e-1458d04f0178/bb9c6bba-fd52-45ad-8e64-a444aef13c39?file=42873order\\_031506.pdf](https://iurc.portal.in.gov/entity/sharepointdocumentlocation/de299297-3e83-e611-810e-1458d04f0178/bb9c6bba-fd52-45ad-8e64-a444aef13c39?file=42873order_031506.pdf) (approving a settlement agreement in a proceeding initiated by Duke to assess impacts and impose protections before consummating the Duke-Cinergy merger in 2006). See especially Settlement Agreement, Attachment 1, Additional Commitment Nos. 15 through 24.

Regulatory] Commission”<sup>6</sup> – even though that is the precise provision of the 2006 settlement agreement and order in IURC Cause No. 42873 which Applicants have buried in a draft footnote to the HoldCo Agreement only belatedly filed with the Commission and disclosed to the parties on a confidential basis in this Docket.

The document cited by Applicants in their Deficiency Response for “enhanced oversight” de jure by the IURC is the exact same Duke-Cinergy Merger Order attachment which includes an express provision for prior IURC review of payments directed by Duke from Duke Indiana net income or retained earnings—a provision which is opaquely footnoted in the *Amended and Restated Limited Liability Company Operating Agreement of Duke Energy Indiana HoldCo, LLC* (“HoldCo Agreement”) but otherwise ignored and disregarded de facto by both Duke and (so far) the IURC. Absent a requirement by FERC for the Applicants to seek IURC review of the transaction, there is no guarantee that it will occur, placing consumers at risk.

Finally, we highlight a new concern for the Commission’s consideration. The *Wall Street Journal* reports that “Activist investor Elliott Management Corp. has a stake in Duke Energy Corp. and is pushing the utility giant to add directors to its board and possibly take other actions . . . Elliott might also urge Duke to sell some assets”.<sup>7</sup> The involvement of Elliott Management Corp has a material impact on the Singapore transaction at issue here and requires clarification by the Applicants. Specifically, Article XI of the non-public HoldCo Agreement contains Section 11.8 [REDACTED]

[REDACTED]  
[REDACTED] Exhibit B-1 of the *HoldCo Agreement* lists [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Applicants must explain to the Commission in this proceeding:

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<sup>6</sup> *Id.*, Attachment 1 to Settlement Agreement, Additional Commitment No. 19.

<sup>7</sup> Cara Lombardo, “Duke Energy Faces Push by Activist to Expand Its Board,” May 11, 2021, [www.wsj.com/articles/elliott-management-has-stake-in-duke-energy-11620666507](http://www.wsj.com/articles/elliott-management-has-stake-in-duke-energy-11620666507).

[REDACTED]

Respectfully submitted,

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Filed June 21, 2021