



Office of the Ohio Consumers' Counsel

*Your Residential Utility Advocate*

Janine L. Migden-Ostrander  
Consumers' Counsel

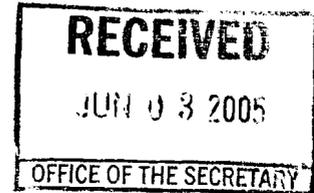
June 2, 2005

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**RECEIVED**

JUN 09 2005

Office of Public Utility Regulation



Secretary  
Securities & Exchange Commission  
450 Fifth St., N.W.  
Washington, DC 20549

Re: File No. 070-10254  
Cinergy Corporation

70-10254

Dear Secretary,

Enclosed please find an original and three (3) copies of the Office of the Ohio Consumers' Counsel's Reply to Cinergy Corporation's Third Amended Application for filing in the above referenced file.

Also, in order to verify receipt of filing please time stamp and return the extra copy of the document in the enclosed self-addressed, stamped envelope.

Thank you for your attention to this matter.

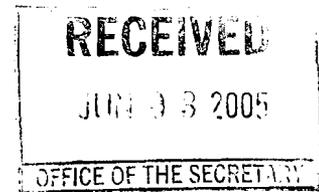
Sincerely,

Patricia J. Mallarnee  
Administrative Assistant

PJM

enclosures

**UNITED STATES OF AMERICA**  
**BEFORE THE**  
**SECURITIES AND EXCHANGE COMMISSION**



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In the Matter of the Cinergy Corp. Application of )      File No. 070-10254  
Declaration Under the Public Utility Holding )  
Company Act )

**REPLY TO CINERGY CORP.'S THIRD AMENDED APPLICATION THAT  
INCLUDES EXHIBIT "I" IN RESPONSE TO THE  
OCC'S REPLY MEMORANDUM  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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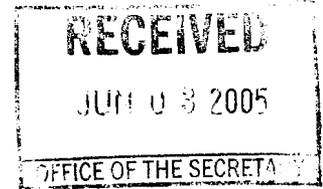
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**UNITED STATES OF AMERICA**  
**BEFORE THE**  
**SECURITIES AND EXCHANGE COMMISSION**



In the Matter of the Cinergy Corp. Application of ) File No. 070-10254  
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**I. INTRODUCTION**

On September 30, 2004, Cinergy Corp. ("Cinergy") filed an application ("Application"), and amended that filing on January 19, 2005 ("Supplement").<sup>1</sup> Cinergy is a registered holding company under the Public Utility Holding Company Act of 1935 ("PUHCA") and is the parent company of the Cincinnati Gas & Electric Company ("CG&E") as well as The Union Light, Heat & Power Company ("ULH&P;" collectively with CG&E and Cinergy Corp., the "Company" or "Applicant").<sup>2</sup> The Company has requested that the Securities and Exchange Commission ("Commission") allow CG&E to sell, pursuant to Section 12(d) of PUHCA and Commission Rule 44, its ownership interests in three electric generating facilities to ULH&P at net book value.<sup>3</sup>

On February 15, 2005, on behalf of the approximately 600,000 residential customers of CG&E in Ohio, the Office of the Ohio Consumers' Counsel ("OCC")

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<sup>1</sup> Form U-1 Declaration ("Application"); Form U-1 Declaration, Amendment No. 1 ("Supplement").

<sup>2</sup> Supplement, Item 1.A.

<sup>3</sup> Application, Item 1.A. ("at net book value"); also Supplement, Item 1.C.

timely moved to intervene in the above-captioned docket. The OCC also protested the Company's proposed sale and, in the event that the Commission considers the Company's proposals in their present form, moved for a hearing ("Motion"). The OCC's opposition to the proposed sale from CG&E to ULH&P is due to the higher rates that the transaction likely will impose on the Ohio customers of CG&E.

On March 4, 2005, the Company filed a second amended filing that contained the Company's Response to the OCC's Motion ("Response") as Exhibit H to its declaration under PUCHA.<sup>4</sup> On March 26, the OCC filed a Reply to the Company's Memo Contra.

On May 23, 2005, the Company filed a third amended filing that included an Exhibit I consisting of a letter dated May 11, 2005<sup>5</sup> from the Chairman of the Public Utilities Commission of Ohio ("PUCO" or the "Ohio Commission") to Chairman Donaldson of the Commission. The original May 11, 2005 letter was not transmitted to the OCC, and shows no sign that it was transmitted to the Company. The apparent intent of the May 23, 2005 filing was to present the May 11, 2005 letter to refute the OCC's filed arguments (therefore, offered as a "Second Response"). As a matter of basic fairness, the Commission should consider this Reply if the Commission considers the Company's Second Response.

The Ohio Commission states its legal opinions by means of its orders or through pleadings addressed to other agencies or courts, not through letters such as that which is reproduced, in principal part, as Cinergy's Exhibit I.<sup>6</sup> The parties have extensively

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<sup>4</sup> Form U-1 Declaration, Amendment No. 2, Exhibit H ("Response").

<sup>5</sup> Form U-1 Declaration, Amendment No. 3, Exhibit I ("Second Response")

<sup>6</sup> The OCC's Motion attaches numerous decisions of both the Ohio and the Kentucky Commissions.

argued their cases regarding Ohio ratemaking in earlier submissions to the Commission. Cinergy's Second Response fails in its effort to refute the OCC's arguments.

## II. ARGUMENT

### A. The OCC's earlier submissions in this case clarified ratemaking in Ohio and explained the harm caused to Ohioans.

In its Motion, the OCC argued that the residential customers of CG&E "have paid for generation service provided by CG&E's portfolio of generating assets, including the three plants whose sale is the subject of the above-captioned case."<sup>7</sup>

The Motion also recounted how a recent decision by the Ohio Commission allows CG&E to "charge customers for generation service according to a tracker ("SRT") placed into effect to recover CG&E's costs of acquiring generation resources."<sup>8</sup> In its March 4, 2005 Response, the Company wrongly asserted that Ohio customers will not be affected by the sale to ULH&P because "the Ohio legislature deregulated generation service..."<sup>9</sup> The OCC's Reply noted the Ohio Commission's approval of rates based on CG&E's generation charges, including:

... an infrastructure maintenance fund ("IMF") charge "to compensate CG&E for committing its generation capacity"; a system reliability tracker ("SRT") charge 'to flow through those actual costs [from purchase power to cover peak and reserve

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<sup>7</sup> Motion at 2.

<sup>8</sup> *Id.*, citing *In re CG&E Post Market Development Period Service*, PUCO Case No. 03-93-EL-ATA *et al.*, Entry on Rehearing at 8, ¶12(c) (November 23, 2004) (attached to Motion). As stated in the Motion, the Entry states that the SRT is intended to flow through costs associated with purchased power. CG&E has applied to the PUCO for approval "to recover certain costs [associated with the purchase or construction of generating facilities] and a reasonable return on the capital investment in such generating facilities and to recover such costs and return through its system reliability tracker [SRT] through 2008." *In re New CG&E Power Plant*, PUCO Case No. 04-1811-EL-AAM *et al.*, Application at 1, ¶3 (December 2, 2004) (attached to Motion).

<sup>9</sup> Response at 4.

capacity requirements] on a dollar-for-dollar basis”; a fuel and economy purchased power (“FPP”) component to cover “fuel and economy purchased power [including recovery of emission allowances]”; and an annually adjusted component (“AAC”) based on CG&E’s tariffed generation charges (“little g”).<sup>10</sup>

Therefore, the cost of generation stemming from CG&E’s portfolio of generating assets continues to determine the rates that CG&E’s residential customers pay and will pay in the future.

From these arguments, it follows that CG&E’s proposal to sell the depreciated generating assets would shift costs to the disadvantage of CG&E’s customers in Ohio. CG&E’s Second Response does not support a different conclusion.

**B. The Company’s Second Response fails to make any contribution to the two key issues regarding Ohio ratemaking that were addressed in earlier submissions in this docket.**

**1. CG&E’s residential ratepayers have paid for generation service provided by CG&E’s portfolio of generating assets, including the three plants whose sale is the subject of this case.**

The Company’s Second Response is apparently submitted to mislead the Commission into reaching the conclusion that payments by Ohioans have not contributed to the costs incurred by CG&E regarding the three plants whose sale is at issue in this case.

The Second Response states:

CG&E’s generation assets required to serve UHL&P {sic} were not included in CG&E’s revenue requirements during the time that the State of Ohio was under cost based rate making.<sup>11</sup>

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<sup>10</sup> *Id.*, citing *In re CG&E Post Market Development Period Service*, PUCO Case No. 03-93-EL-ATA, *et al.*, Entry on Rehearing at 8-9, (November 23, 2004) (attached to Motion).

<sup>11</sup> Second Response at 1.

The reference to “CG&E’s generation assets required to serve” ULH&P means a small portion of the total portfolio of CG&E’s generation assets, not the entirety of the three plants at issue in this case. The vast majority of CG&E’s system generation costs have been paid for by the Ohio customers of CG&E. There has been no designation of CG&E’s generating plants that have been paid for by Ohioans and those specific plants that have been paid for by Kentuckians. The Second Response does not state otherwise.

An examination of the allocation of plant in CG&E’s last rate case in Ohio shows that 13.5 percent of CG&E’s total generating capacity was allocated to ULH&P. That percentage, applied to CG&E’s current portfolio of approximately 4900 megawatts of generating capacity, amounts to approximately 660 megawatts of capacity. Yet Cinergy proposes the sale of units that have a nameplate rating of approximately 1100 megawatts.<sup>12</sup> Moreover, the analysis of installed capacity does not consider any other power from these plants that Cinergy plans to sell in the market while CG&E’s customers in Ohio are charged the high cost of replacing those sales with purchased power. Such empirical presentations would be the subject of the hearing requested by the OCC<sup>13</sup> if the Commission does not reject the Company’s application based on submissions in this case.

While Cinergy would have the Commission believe that its proposed sale is really just the furtherance of an existing relationship between CG&E and UHL&P, the Company has not produced a contract or made any other form of presentation that demonstrates that these three Ohio plants have been separately treated and dedicated to Kentucky and thus have not been considered as part of Ohio rates. To the contrary, Cinergy’s Supplement

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<sup>12</sup> Supplement at 4-5, Item 1 C (“Terms of Transfer”).

<sup>13</sup> Motion at 10.

states: “ULH&P and CG&E have always been operated and planned effectively as a single company.”<sup>14</sup>

The submissions in this case prior to the Second Response accurately reflect the rate-making treatment of the three plants at issue in this case. Only Cinergy’s strategy,<sup>15</sup> not prior rate-making treatment, provides the three generating plants with distinct treatment out of all the plants in CG&E’s portfolio for generating units. The Company argued that the Kentucky Commission should ignore Kentucky law due to the bargain price attached to the generating plant sale.<sup>16</sup> The KPSC jumped at the “unique[ ] . . . proposed transaction \* \* \* at an attractive price.”<sup>17</sup> Had Cinergy selected other capacity for sale to ULH&P, the resulting generating cost to ULH&P and the cost left to the remaining CG&E system would be different. The statement in the Second Response that a portion of CG&E’s system was excluded from Ohio rate-making makes no further contribution to understanding the issues raised in this case.

**2. The cost of generation stemming from CG&E’s portfolio of generating assets continues to determine the rates that CG&E’s residential customers pay and will pay in the future.**

The Second Response’s mention of past “cost based rate making” should not mislead the Commission into reaching the conclusion that retail electric customers of CG&E do not continue to bear the costs of generating assets retained by CG&E as well as the cost

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<sup>14</sup> Supplement at 6, Item 1 D (“Rationale for Transfer”).

<sup>15</sup> Cinergy states that “ULH&P and CG&E . . . analyzed a number of possible transfers of plants from CG&E to ULH&P.” *Id.*

<sup>16</sup> Motion at 6.

<sup>17</sup> Application, Exhibit D-3 [KPSC Case No. 2003-00252, Order at 11 (“Need for an RFP”) (December 5, 2003)]. The KPSC compared “the average depreciated cost of the generating units included in the offer . . . [at] \$332 per kw of capacity” and installed costs of “\$350 to \$400 per kw for CTs and \$1,000, or more, per kw for base load coal-fired capacity.” *Id.*

of power that must be purchased to supplement the power generated by CG&E. Pursuant to Case No. 03-93-EL-ATA, *et al.*, before the Ohio Commission (the case mentioned in the Second Response), CG&E will charge customers for generation service according to IMF, SRT, FPP, and AAC (as described above) that are based on CG&E's generation costs and the cost of CG&E's purchased power.

The OCC has opposed CG&E's plans to provide high cost generation services in Ohio, and it opposes the sale to ULH&P that would shift costs to Ohio's residential and other customers. The cost to Ohioans of the proposed sale of generating plants at a bargain price to a company located in Kentucky is not in the public interest.

### **III. CONCLUSION**

The approximately 600,000 residential customers in Ohio served by CG&E have paid for service from CG&E's generating facilities, including the three that the Company proposes to sell to ULH&P. CG&E's residential customers are charged according to the generation costs of the portfolio of generating plants owned by CG&E as well as the power purchased by CG&E. Ohio customers should not be asked to pay for expensive, new generating facilities and costly purchased power while the depreciated plants paid for by Ohioans are sold to serve Kentucky customers at lower costs.

The OCC's submissions in this case provide the context for the Company's proposed sale of generating facilities. Afforded with this more complete context, the Commission can better render a fair decision regarding the proper value for the proposed sale involving the Company's affiliates. The proposed sale of CG&E's generating facilities to ULH&P should be rejected as presently structured.

Respectfully submitted,

The Office of the Ohio Consumers' Counsel  
Janine L. Migden-Ostrander  
Consumers' Counsel

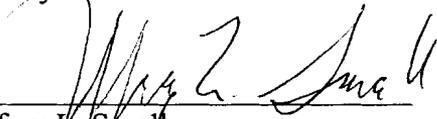


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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the OCC's *Reply* was served on the person(s) stated below via first class U.S. Mail, postage prepaid, this 2<sup>nd</sup> day of June 2005.

  
\_\_\_\_\_  
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Assistant Consumers' Counsel

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