

DUKE ENERGY CORP
Form U-1/A
March 08, 2002

FILE NO. 70-10013

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

AMENDMENT NO. 5 TO FORM U-1 APPLICATION/DECLARATION

UNDER SECTION 3(b) AND

RULE 10 OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

DUKE ENERGY CORPORATION
526 S. Church Street
Charlotte, North Carolina 28202

(Name of the company filing this application and
address of its principal executive office)

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ITEM 1. DESCRIPTION OF PROPOSED TRANSACTION

Applicant Duke Energy Corporation ("Duke Energy"), a North Carolina corporation, has entered into an Amended and Restated Combination Agreement with Westcoast Energy Inc. ("Westcoast"), a corporation organized under the laws of Canada, pursuant to which Duke Energy will acquire the stock of Westcoast(1) in exchange for \$3.5 billion in cash and stock and the assumption of approximately \$5 billion in Westcoast debt (the "Acquisition"). Duke Energy intends to finance the cash portion of the consideration to be paid for the Acquisition primarily

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through the sale of equity-linked securities. Duke Energy hereby applies under Section 3(b) of the Public Utility Holding Company Act of 1935, as amended ("1935 Act"), for an order exempting certain foreign companies that will be acquired by Duke Energy in conjunction with the Acquisition.(2)

Westcoast has three subsidiaries that are public-utility companies operating exclusively outside the United States ("Non-U.S. Utilities").(3) None of the Non-U.S. Utilities, either before or after the Acquisition, will serve customers in the United States, nor will the Non-U.S. Utilities derive any income directly or indirectly from sources within the United States.(4) The Non-U.S. Utilities are as follows:

1 The stock of Westcoast is traded on the New York Stock Exchange under the ticker symbol "WE."

2 The Commission issued notice of the Acquisition on February 1, 2002, with comments due by February 26, 2002. No comments were filed.

3 Westcoast previously had interests in three other subsidiaries that are public-utility companies that are operating exclusively outside the United States: (1) Shanghai WEI-Gang Energy Company Ltd. ("WEI-Gang"), a 50%-owned, indirect subsidiary company of Westcoast, which is engaged in the generation and sale of electric power to industrial customers in Shanghai, China; (2) Centra Gas British Columbia Inc., a wholly-owned, indirect subsidiary company of Westcoast, which is engaged in the transportation of natural gas and the distribution of natural gas to residential, commercial and industrial customers in British Columbia, Canada; and (3) Centra Gas Whistler Inc., a wholly-owned, indirect subsidiary company of Westcoast, which is engaged in the transportation of natural gas and the distribution of natural gas to residential, commercial and industrial customers in British Columbia, Canada. Westcoast has sold its interest in each of these subsidiaries. As indicated in Exhibit 13, Duke Energy is submitting with this filing evidence of the sale by Westcoast of its ownership interest in these entities.

4 Although the facilities of Union Gas Limited ("Union Gas") are located within Ontario, Canada, Union Gas provides storage service in Canada on behalf of several U.S. customers. This stored gas is owned by Union Gas's customers, and, when released, is delivered to pipelines in Canada for transportation within Canada and into the United States. Union Gas also provides transportation service to customers within the United States, by transporting natural gas in Canada up to the Canadian border with the United States. Union Gas does not, however, provide transportation service into or in the United States. As with storage service, Union Gas's transportation service is limited to transporting gas owned by its customers only within Canada. Union Gas does not sell any natural gas in the United States and Union Gas never acquires title to natural gas that may be subsequently transported into and sold in the United States. The only natural gas bought by Union Gas, i.e., to which it takes title, is that which Union Gas sells to its customers in Ontario, Canada. In addition, Union Gas does not provide either storage or transportation service in the United States to any affiliate of Duke Energy or Westcoast. Pursuant to Commission precedent, these activities of Union Gas do not result in Union Gas's deriving income from U.S. sources. See e.g., Emera Incorporated, HCAR No. 27445 (Oct. 1, 2001) (electric utility company's sales of power at the Canadian border do not make the company ineligible for foreign utility company ("FUCO") status. Section 33 of the 1935 Act, which relates to FUCOs, contains an analogous restriction on sales in or into the United States.). To the extent that a marketer affiliate of Union Gas may sell natural gas in the United States, such marketer does not own or operate any facilities used for the retail distribution of natural gas, and is consequently not a "gas utility company" within the meaning of the 1935 Act.

1. Union Gas, a wholly-owned, direct(5) subsidiary of Westcoast, is engaged in the transportation and storage of natural gas and the distribution of natural gas to residential, commercial and industrial customers in Ontario, Canada;

2. Pacific Northern Gas Ltd. ("Pacific Northern"), a 40.04%-owned, direct subsidiary company of Westcoast,(6) is engaged in the transportation of natural gas and the distribution of natural gas to residential, commercial, and industrial customers in British Columbia, Canada; and

3. P.T. Puncakjaya Power ("PJP"), a 42.86%-owned, indirect subsidiary company of Westcoast, is engaged in the generation and sale of electric power to industrial customers in Irian Jaya, Indonesia.

Union Gas is a public company. Westcoast directly owns 100% of the voting common shares of Union Gas stock. The public holds 100% of the Class A, Class B and Class C preferred, non-voting shares of Union Gas stock. The preferred shares of Union Gas trade on the Toronto Stock Exchange. The voting common shares are not listed. After acquiring Westcoast, Duke Energy, through its ownership interest in Westcoast, will indirectly own 100% of the voting shares of Union Gas stock. The public will continue to hold the Class A, Class B and Class C preferred, non-voting shares.

Pacific Northern is a public company and has Class A Non-Voting Common Shares with a par value of \$2.50 each and 6.75% Cumulative Redeemable Preferred Shares with a par value of \$25.00 each that trade on the Toronto Stock Exchange. Westcoast currently owns 40.04% of the non-voting Class A Common shares of Pacific Northern and 100% of the voting Class B Common shares, without intermediate subsidiaries. The public owns the balance of the Class A Common shares and all (200,000 shares) of the 6.75% Preferred shares. After the transaction, Pacific Northern will be a 40.04%-owned, indirect subsidiary company of Duke Energy. The remainder of Pacific Northern's stock will continue to be owned by the public.

(continued)

Moreover, even if any income from the above-described storage and transportation services were considered to be derived from U.S. sources, Union Gas's income from such sources clearly is not material. The income Union Gas derives from the above-described activities constitutes only 2.40 percent of its net income, 1.28 percent of its gross revenue, and 2.6 percent of its total margin. The Commission previously has held that with regards to Section 3(a)(1) of the 1935 Act, net income within 10.8 and 11.2 percent of a utility's total net income does not rise to the level of being "material." See NIPSCO Industries, Inc., HCAR No. 26975 (Feb. 10, 1999). Although the Commission has not considered "materiality" with respect to Section 3(b), its determinations with respect to other subsections of Section 3 should apply equally in this matter.

5 Westcoast directly owns all of the common shares of Union Gas. Union Gas is currently 100% owned by Centra Gas Utilities Inc., which is 100% owned by Centra Gas Holdings Inc., which is 100% owned by Westcoast Gas Inc., which is 100% owned by Westcoast Gas Holdings Inc., which is 100% owned by Westcoast. However, these four intermediate companies will be amalgamated into Westcoast prior to closing.

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6 Westcoast directly owns 40.04% of the non-voting Class A Common stock and 100% of the voting Class B Common stock of Pacific Northern.

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Westcoast indirectly owns, through Westcoast (PJP) Holdings, Inc., a corporation organized under the laws of Canada, a 42.86% share of PJP. Westcoast (PJP) Holdings, Inc., is a wholly-owned, direct subsidiary company of Westcoast.

Duke Energy also currently indirectly owns a 42.86% share of PJP through Duke Energy International PJP Holdings (Maruritiu)s, Ltd. ("Duke PJP Holdings"), an Indonesian company. Duke PJP Holdings is a wholly-owned subsidiary company of Duke Energy International PJP Holdings Ltd., a company established under the laws of Bermuda. Duke Energy International PJP Holdings Ltd. is a wholly-owned subsidiary company of Duke Energy International Asia Pacific Ltd. ("Duke Energy Asia Pacific"), which was also established under the laws of Bermuda. Duke Energy Group, Inc., a Delaware corporation, holds a 32% interest in Duke Energy Asia Pacific. Texas Eastern (Bermuda), Ltd., a company established under the laws of Bermuda, which is a wholly-owned subsidiary company of Duke Energy Group, Inc., holds the remaining 68% interest in Duke Energy Asia Pacific. Duke Energy Group, Inc. is a wholly-owned subsidiary company of Duke Energy International, LLC, a Delaware limited liability company, which is a wholly-owned subsidiary company of Duke Energy Global Markets, Inc., a Nevada corporation. Duke Energy Global Markets, Inc. is a wholly-owned subsidiary company of Duke Energy Services, Inc., a Delaware corporation, which is a wholly-owned subsidiary company of PanEnergy Corp., a Delaware Corporation, which is a wholly-owned subsidiary company of Duke Capital Corporation ("Duke Capital"), a Delaware corporation.

The remaining 14.28% interest in PJP is owned by P.T. Austindo Nusantara Jaya, a limited liability company established under the laws of the Republic of Indonesia. After Duke Energy's acquisition of Westcoast, PJP will be an 85.72%-owned, indirect subsidiary company of Duke Energy. P.T. Austindo Nusantara Jaya will continue to own its 14.28% interest.

Upon and after the effective date of the Acquisition, Duke Energy may, for tax, legal, regulatory or administrative reasons, restructure the corporate organization described above. If this restructuring involves the creation of any special purpose subsidiary company, such company will meet the requirements for exemption under the 1935 Act.

APPLICANT'S STATEMENTS IN SUPPORT OF APPLICATION

In support hereof, the Applicant states:

(1) Duke Energy is a publicly held corporation organized under North Carolina law with its principal offices located at 526 S. Church Street, Charlotte, North Carolina 28202. Duke Energy engages directly and indirectly in the generation, transmission, distribution and sale of electric energy to retail and wholesale customers in the States of North Carolina and South Carolina. Duke Energy is an electric utility company and a public-utility company as such terms are defined in the 1935 Act. Because Duke Energy operates in a divisional structure, it is not a holding company under the 1935 Act. Consequently, it is not regulated as a holding company under the 1935 Act, nor is any Duke Energy subsidiary company or affiliate regulated as such under the 1935 Act. Duke Energy's senior debt is currently rated Standard & Poors' Corporation - A+; Moody's Investor Service - A1; and Fitch - A+.

(2) Union Gas is organized under the laws of Ontario, Canada. Pacific Northern is organized under the laws of British Columbia, Canada. PJP is

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organized under the laws of the Republic of Indonesia. The Non-U.S. Utilities will not engage in any business other

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than the acquisition of Canadian or Indonesian public-utility companies, the supervision of Duke Energy's investments in Canada or Indonesia, and the participation in the management and operation of Canadian or Indonesian public-utility companies.

(3) The Non-U.S. Utilities derive no material part of their income, either directly or indirectly, from sources within the United States. Each of the Non-U.S. Utilities operate exclusively, in all respects, outside the United States. The Non-U.S. Utilities are not qualified to do business in any state of the United States, nor is any Non-U.S. Utility a public-utility company operating in the United States. The Non-U.S. Utilities have no plan to derive any income from United States operations, from any company qualified to do business in any state of the United States, or from any public-utility company operating in the United States. None of the Non-U.S. Utilities nor any of their subsidiary companies is a public-utility company operating in the United States.

(4) Section 3(b) of the 1935 Act provides that the Commission "shall exempt any subsidiary company, as such, from any provision or provisions of [the 1935 Act]. . . if such subsidiary company derives no material part of its income, directly or indirectly, from sources within the United States, and neither it nor any of its subsidiary companies is a public-utility company operating in the United States," provided that the Commission finds that the application of the 1935 Act to such subsidiary company is "not necessary in the public interest or for the protection of investors . . ."

(5) The proposed investment will not affect the Non-U.S. Utilities' status as public utility companies subject to regulation by the laws of the jurisdiction in which the Non-U.S. Utilities are organized and operate. As explained below, regulation of the Non-U.S. Utilities under the 1935 Act is not necessary in the public interest, or for the protection of investors or consumers. Therefore, as in the following cases, each of the Non-U.S. Utilities satisfies the standards of Section 3(b) and should be accorded an unqualified exemption, as a subsidiary company, from all provisions of the 1935 Act. See Public Service Company of Colorado, HCAR No. 26671 (Feb. 19, 1997) ("PSC Colorado"); UtiliCorp United, Inc., HCAR No. 26353 (Aug. 7, 1995) ("UtiliCorp 1995"); UtiliCorp United, Inc., HCAR No. 26919 (Sept. 28, 1998) ("UtiliCorp 1998").

(6) Although the Non-U.S. Utilities would satisfy the requirements under Section 33(a)(3) of the 1935 Act and become a FUCO as defined therein upon the filing of a notice on Form U-57, the capitalization limits established by Section 33(f) would restrict the ability of Duke Energy to finance the acquisition of the Non-U.S. Utilities as FUCOs. (7) The Commission has previously recognized that Section 3(b) provides an alternative route for foreign acquisitions in identical circumstances. See PSC Colorado; UtiliCorp 1995; UtiliCorp 1998.

7 In 1994, Duke Energy submitted a Notification of Foreign Utility Company Status on behalf of PJP. Form U-57, December 16, 1994. Upon obtaining the exemption requested herein and prior to acquiring the stock of Westcoast, Duke Energy will withdraw the Notification of Foreign Utility Company Status and PJP will no longer be a FUCO.

Through its subsidiaries, Westcoast previously owned an interest in another FUCO, WEI-Gang. On January 23, 2002, WEI-Gang filed an application with the

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Federal Energy Regulatory Commission ("FERC") for a determination of exempt wholesale generator ("EWG") status. As discussed above, Westcoast has sold its interest in WEI-Gang to a third party.

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(These opinions were issued after October 24, 1992, the date upon which Section 33 was added to the 1935 Act.)

(7) The legislative history of the Energy Policy Act of 1992, through which Section 33 became law, makes clear that Section 33 was to be read in a permissive -not a restrictive -manner. Senator Donald Riegle, the Chairman of the Senate Banking Committee and a primary Senate proponent of the Section 33 legislation, stated that "[w]hile section 33 is important, we must remember that international activities by utilities is permitted by current law. Specifically, under current law, the Securities and Exchange Commission has the authority to permit, on a case-by-case basis, utility functions outside the United States. . . The provisions of section 33 supplement these foreign options for

utility operations and do not in any way limit the ability to pursue the SEC approval under current law. . . . We must remember that the purpose of section

33 is to facilitate foreign investment, not burden it." Congressional Record,

102nd Cong., Oct. 8, 1992, 138 Cong. Rec. S. 17625 (emphasis supplied). See also Energy Policy Act of 1992, H.R. Conf. Report No. 102-1018 at 388, 1992 U.S.C.C.A.N. 2472, 2479 (1992); Entergy Corp. et al., HCAR No. 25706 (Dec. 14, 1992).

(8) Duke Energy will not seek recovery through higher rates to its domestic regulated utility customers for any possible loss it might sustain by reason of the proposed investment in the Non-U.S. Utilities or for any inadequate returns on that investment. Duke Energy's domestic utility customers will not be put at risk of any adverse financial effects resulting from the operations of the Non-U.S. Utilities, nor will the ability of the state public utility commissions of North Carolina and South Carolina, which have regulatory jurisdiction over the retail rates of Duke Energy to protect the interests of consumers in their respective states, be adversely affected. The domestic utility customers of Duke Energy will not be put at risk of any adverse financial effects resulting from the operations of the Non-U.S. Utilities.

(9) Duke Energy has previously filed, as Exhibits 3 and 4, respectively, its October 10, 2001 application to the North Carolina Utilities Commission ("NCUC") and its October 12, 2001 application to the Public Service Commission of South Carolina ("SCPSC") (collectively, the "State Commissions"), as amended. Both applications sought approval of the Acquisition and the issuance of Duke Energy stock in connection with the Acquisition. Among other things, these applications sought (i) approval of Duke Energy's indirect acquisition of the Non-U.S. Utilities, and (ii) a determination by the State Commissions that Duke Energy's stock issuance will be compatible with the public interest, will be necessary and appropriate for, and consistent with, the proper performance by Duke Energy of its service to the public as a utility, will not impair its ability to perform that service, and will be reasonably necessary and appropriate for such purpose. Previously submitted as Exhibits 7 and 8, respectively, are the State Commissions' rulings approving the Acquisition. As more thoroughly provided below, the orders of the State Commissions provide that they have the authority and resources to protect ratepayers subject to their jurisdiction and that they intend to exercise their authority.(8)

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8 See Exhibit 7 at 3; Exhibit 8 at 3. Also, both the North Carolina and South Carolina Public Service Commissions have previously issued letters to the SEC with regard to Duke Energy, stating that each Commission "has the authority and resources to protect ratepayers subject to its jurisdiction and that it intends to exercise its authority." These certifications, which appear in Exhibit 6 to the Application, are not limited to any specific non-U.S. acquisition, and thus represent the State Commissions' generally applicable views as to their ability to protect

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(10) Duke Energy has also previously filed as Exhibit 10, its December 14, 2001, application to the FERC for approval, pursuant to Section 203 of the Federal Power Act, for its proposed change in control over Engage Energy America LLC ("Engage Energy") and Frederickson Power L.P. ("Frederickson Power"), both of which are subsidiary companies of Westcoast.(9) Engage Energy is a power marketer with market-based rate approval from the FERC.(10) Frederickson Power is an EWG with market-based rate authority.(11) On February 27, 2002, FERC issued an order granting the section 203 application.(12)

(11) Duke Energy's domestic utility operations are, and will continue to be, fully separated from Duke Energy's foreign operations. Moreover, since Duke Energy is a publicly-traded company subject to the continuous disclosure requirements of the Securities Exchange Act of 1934, as amended, regulation under the federal securities laws offers significant additional protections for the interest of investors. As a result of the Acquisition, each of the Non-U.S. Utilities will be a "subsidiary company" of Duke Energy within the meaning of Section 2(a)(8) of the 1935 Act. Regulation of the Non-U.S. Utilities as subsidiaries of a holding company is not necessary for either the public interest or for the protection of investors.

(12) Duke Energy will maintain separate books of account for the Non-U.S. Utilities and any of its subsidiaries that may control the Non-U.S. Utilities and will commit to provide access to those books and records to each State Commission with retail rate jurisdiction to the extent not already required under state law. Duke Energy commits that it will maintain corporate separation from the Non-U.S. Utilities.

(13) Section 33(f) of the 1935 Act relates to the acquisition of FUCOs. This transaction does not involve the acquisition of any FUCOs or interests in FUCOs. Section 33(f)(2)(C) considers the relationship of the "transaction" in which a FUCO is acquired to the capitalization of the acquiring public-utility company. This section does not indicate whether the percentage should be limited to the costs associated with the FUCO being acquired, where the FUCO is a subsidiary company of a non-FUCO entity, or should reflect the entire purchase. In order to address both of these approaches, Applicant provides this information (1) based on the entire acquisition of Westcoast, including all of its subsidiary companies, and (2) based on just Westcoast's subsidiary public-utility companies.

(continued)

ratepayers and their intent to do so. The Commission has relied on similar certifications granting exemptions under Section 3(b) of the 1935 Act. See, e.g., PSC Colorado.

9 Duke Energy's application describes Engage Energy and Frederickson Power on pages 9-12.

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10 Newco US, L.P., Docket No. ER97-654-000 (Dec. 30, 1996) (unpublished Letter Order).

11 See Frederickson Power L.P., 95 FERC P. 62,151 (2001) (granting EWG determination); Frederickson Power L.P., Docket No. ER01-2262-000 (Feb. 21, 2002) (unpublished Letter Order) (granting market-based rate authority).

12 See Exhibit 11, filed previously.

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(a) The acquisition of Westcoast, including all of its subsidiary companies:

Duke Energy is acquiring Westcoast for \$8.5 billion, including assumption of debt; \$3.5 billion without debt. Of the amount Duke Energy will pay Westcoast for its stock, 50% will be in cash and 50% will be in Duke Energy stock. The cash portion is estimated to equal 2.79 billion Canadian dollars. Using the approximate exchange rate of 1.54 Canadian dollars to 1 U.S. dollar (the actual exchange rate will be the rate on the date Duke Energy acquires Westcoast), Duke Energy will pay approximately \$1.8 billion in cash to Westcoast. The value of the stock portion is also approximately \$1.8 billion. Duke Energy's total market capitalization is presently \$43 billion, consisting of \$28 billion in equity and \$15 billion in debt as of December 31, 2001. The total purchase price (cash and stock) for the acquisition of Westcoast (not taking into account the assumption of Westcoast debt) represents approximately 13% of the value of the equity of Duke Energy. If the debt of the two companies is considered, the total purchase price represents approximately 20% of the total market capitalization of Duke Energy.

(b) The acquisition of Union Gas, Pacific Northern, and PJP:

The portion of the total purchase price (cash and stock) paid by Duke Energy for Westcoast relating to Union Gas, Pacific Northern, and PJP (not taking into account the assumption of a proportionate amount of Westcoast debt) represents approximately 3% of the value of the equity of Duke Energy (2% for Union Gas, less than 1% for Pacific Northern and less than 1% for PJP). As indicated in Exhibit H, this information is based on an allocation of the total purchase price based on the book value of these companies. Including a proportionate amount of the assumed Westcoast debt, the acquisition of Union Gas, Pacific Northern, and PJP represents approximately 6% of the current market capitalization of Duke Energy (5% for Union Gas, less than 1% for Pacific Northern and less than 1% for PJP).

(14) The tables below show the capitalization of Duke Energy and Westcoast (including its interests in the Non-U.S. Utilities) as of September 30, 2001, December 31, 2000, and December 31, 1999, respectively, as well as the anticipated pro forma capitalization of Duke Energy post-Acquisition, according to U.S. GAAP.

DUKE ENERGY

BALANCE SHEET DATA	9/30/01	12/31/00	12/31/99
Total Assets	50,463	58,176	33,409
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Capitalization			
Notes Payable and Commercial Paper	951	1,826	267

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Long-Term Debt (including current portion) (a)	12,390	11,489	9,198
Guaranteed Preferred Beneficial Interests in Subordinated Notes of DEC or Subsidiaries	1,407	1,406	1,404
Preferred and Preference Stock	247	247	280
Minority Interest	2,528	2,435	1,200

 13 These calculations are based on data for Westcoast's most recent fiscal year end, December 31, 2001.

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Total Common Stock Equity	12,501	10,056	8,998
Total Capitalization	30,024	27,459	21,347

WESTCOAST (U.S. DOLLAR/CANADIAN GAAP)

BALANCE SHEET DATA	9/30/01	12/31/00	12/31/99
Total Assets	9,345	10,088	8,156

Capitalization			
Notes Payable	371	556	539
Long-Term Debt (including current portion)	3,936	4,121	4,066
Guaranteed Preferred Beneficial Interests in Subordinated Notes of DEC or Subsidiaries	-	-	-
Preferred and Preference Stock	548	577	599
Minority Interest	108	111	115
Total Common Stock Equity	1,925	1,843	1,659
Total Capitalization	6,889	7,208	6,979

PRO FORMA

BALANCE SHEET DATA	9/30/01
Total Assets	62,224

Capitalization	
Notes Payable and Commercial Paper	1,012
Long-Term Debt (including current portion) (b)	18,783
Guaranteed Preferred Beneficial Interests in Subordinated Notes of DEC or Subsidiaries	1,407
Preferred and Preference Stock	247
Minority Interest	3,325
Total Common Stock Equity	14,108
Total Capitalization(c)	38,882