Supreme Court of Ohio Clerk of Court - Filed February 13, 2015 - Case No. 2014-1651

IN THE
SUPREME COURT OF OHIO

Interstate Gas Supply, Inc.	:	Case No. 2014-1651
	:	
Appellant,	:	Appeal from the Public Utilities
	:	Commission of Ohio
v.	:	
	:	Public Utilities Commission of Ohio, *In*
The Public Utilities Commission of	:	*the Matter of the Application of Duke*
Ohio,	:	*Energy Ohio for Approval of the Fourth*
	:	*Amended Corporate Separation Plan*,
Appellee.	:	Case Nos. 14-689-EL-UNC, *et al.*

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO

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MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

In the orders on appeal, the Public Utilities Commission of Ohio (Commission) authorized Duke Energy Ohio (the Company or Duke) to enter into several new lines of business. The Commission conditioned this authorization on a number of specific limitations to prevent any possibility that Duke would use its position as a utility to benefit its new lines of business. The public at large will simultaneously benefit from the availability of new competitive options while being protected from any possibility of market power abuse. Achieving this balance is the Commission's job and it has done it. The orders should be affirmed.

STATEMENT OF THE FACTS AND CASE

A. History of Ohio's Electric-Market Deregulation

Prior to 1999, the electric market in Ohio was vertically integrated. In other words, electric distribution utilities provided the generation, transmission, and distribution components of electric service to customers in their service territories. This traditional regulatory structure changed when the General Assembly passed Amended Substitute Senate Bill No. 3 (Senate Bill 3). Generally, Senate Bill 3 "restructured Ohio's electric-utility industry to foster retail competition in the generation component of electric service" and separated the "three components of electric service – generation, transmission, and distribution." *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 5.

The specifics of *how* the General Assembly has restructured Ohio's electric market are integral to this case. The Ohio Revised Code declares that certain services are "competitive." Customers may obtain competitive services from an electric distribution utility or a competitive retail electric supplier. R.C. 4928.01(A)(4), App. at 1; R.C. 4928.03, App. at 12.[1] By statute, the *only* competitive services are "retail electric

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[1] References to appellee's attached appendix are denoted "App. at ___;" references to appellant's supplement are denoted "IGS Supp. at ___;" references to appellant's appendix are denoted "IGS App. at ___."

generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility."[2] R.C. 4928.01(B), App. at 10; R.C. 4928.03, App. at 12. Then, the law separates the three components of electric service: generation, transmission, and distribution. To do so, it prohibits electric distribution utilities from providing certain combinations of services unless the utility implements a Commission-approved corporate separation plan. *See* R.C. 4928.17, App. at 12-14. Specifically, no electric utility shall engage in the business of either (1) supplying a noncompetitive retail electric service and supplying a competitive retail electric service or (2) supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements a Commission-approved corporate separation plan. R.C. 4928.17(A), App. at 12. Stated differently, a utility must implement a Commission-approved corporate separation plan to provide: generation services, aggregation services, brokerage services, or "a product or service other than retail electric service." *See* R.C. 4928.17(A), App. at 12; R.C. 4928.01(B), App. at 10; R.C. 4928.03, App. at 12.

R.C. 4928.17 governs corporate separation plans. If an electric distribution utility chooses to provide one of these combinations of services it must operate under a corporate separation plan that provides "at minimum, for the provision of the competitive

[2] The Commission has not declared any services to be competitive. *See* R.C. 4928.01(B), App. at 10.

retail electric service or the nonelectric product or service through a fully separated affiliate of the utility." R.C. 4928.17(A)(1), App. at 12-13. There is an exception, however, to this full-separation requirement. Under R.C. 4928.17(C), the Commission may, for good cause shown, approve a corporate separation plan that does not comply with division (A)(1) of this section, but complies with such functional separation[3] requirements as the Commission authorizes to apply for an interim period prescribed in the order.

Once the Commission approves a corporate separation plan under R.C. 4928.17(C), Ohio law gives the Commission broad latitude to approve a Company's corporate separation plan amendment under R.C. 4928.17(D). That section provides:

> any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order *as it considers necessary* the filing of an amended corporate separation plan to reflect changed circumstances.

R.C. 4928.17(D), App. at 14 (emphasis added). Commission rules establish the procedure for filing and reviewing an amendment to a corporate separation plan. Ohio Adm.Code 4901:1-37-06, App. at 15.

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[3] The Ohio Revised Code does not define the term "functional separation." In practice, "functional separation" is a separation in the communications and reporting between a company's noncompetitive and competitive operations. This separation prevents an advantage being given to either operation. Functional separation is analogous to the Chinese-wall that law firms establish to manage conflicts of interest between clients. Communications between counsels representing two conflicted clients are prohibited to ensure no advantage or disadvantage is given to either client.

B. Duke's Corporate Separation Plan and Amendments to the Plan

In 1999, the Commission, upon finding good cause, approved Duke Energy's[4] first corporate separation plan under R.C. 4928.17(C). *In the Matter of the Application of The Cincinnati Gas & Elec. Co. for Approval of its Elec. Transition Plan, Approval of Tariff Changes and New Tariffs, Auth. to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator*, Case No. 99-1658-EL-ETP *("Initial Corporate Separation Plan Case")* (Opinion and Order at 46-47) (Aug. 31, 2000), App. at 18-19. The plan established a functional separation between the Company's noncompetitive services and its competitive generation services and allowed the Company to retain its generation assets for an interim period. *Id*.

Since the Commission's approval of the Company's corporate separation plan, the Commission has approved several amendments to the plan. First, the Commission approved an amendment in Case No. 03-93-EL-ATA and extended the amount of time the Company had to transfer its generation assets. *In the Matter of the Application of The Cincinnati Gas & Elec. Co. to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA (Opinion and Order at 33-34) (Sep. 29, 2004), App. at 22-23. The Commission then approved another minor amendment in the Company's first electric security

[4] Then known as Cincinnati Gas & Electric Company.

plan proceedings. *In the Matter of the Application of Duke Energy Ohio for Approval of an Elec. Security Plan*, Case Nos. 08-920-EL-SSO, *et al*. (Opinion and Order at 20) (Dec. 17, 2008), App. at 26. That amendment permitted the Company to transfer certain gas-fired generation plants and required the Company to retain other generation assets until otherwise ordered. *Id*.

Next, the Commission required the Company to amend its corporate separation plan following the enactment of Senate Bill 221. *In the Matter of the Application of Duke Energy Ohio for Approval of the Second Amended Corporate Separation Plan Under Section 4928.17, Revised Code and 4901:1-37 Ohio Adm.Code*, Case No. 09-495-EL-UNC (Opinion and Order at 1) (Apr. 5, 2011), App. at 28. Then, as part of the approval of the Company's second electric security plan, the Commission approved the Company's third amended corporate separation plan. In the third amended plan, the Company agreed to transfer all of its generation assets to an affiliate.[5] *In the Matter of the Application of Duke Energy Ohio for Auth. to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al*. (Opinion and Order at 45-46) (Nov. 22, 2011), App. at 42-43.

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[5] Appellant argues the orders in the present case are unreasonable because they are a step back from the full-separation ordered by the Commission in the Company's second electric security plan case. *See* Appellant's Merit Brief at 5. Appellant misconstrues these orders. The Commission's previous order, in the second electric security plan case, required the Company to transfer its generation assets to an affiliate. The Commission's orders in this case allow the Company to offer electric-related services. The two issues are distinct. Electric-related services are not generation services and the Company does not need to own generation assets to provide them.

At issue here is the Commission's approval of the Company's fourth amended corporate separation plan application, filed on April 16, 2014. *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Fourth Amended Corporate Separation Plan Under R.C. 4928.17 and Ohio Adm.Code 4901:11-37,* Case No. 14-689-EL-UNC *("Fourth Amended Corporate Separation Plan Case")* (Finding and Order at 1) (Jun. 11, 2014), IGS App. at 6. All interested parties were provided an opportunity to file initial and reply comments in the case. *Id.* Initial comments were filed by the Staff of the Public Utilities Commission of Ohio, Direct Energy, LLC and Direct Energy Business, LLC (Direct Energy), and Interstate Gas Supply, Inc. (IGS). Then, reply comments were filed by Duke Energy Ohio, Direct Energy, and IGS. *Id.*

In the Company's application, the Company requested Commission approval to offer products or services other than retail electric service. IGS Merit Brief at 6. Such services include: design, construction and maintenance of customer-owned substations; resolving power quality problems on customer equipment; and providing training programs for construction, operation, and maintenance of electric facilities, among other things. *Fourth Amended Corporate Separation Plan Case* (Application at 168) (Apr. 16, 2014), IGS Supp. at 18. The Commission conditionally approved the amendment, requiring that the Company implement certain consumer protection measures. *Fourth Amended Corporate Separation Plan Case* (Finding and Order at 7) (Jun. 11, 2014), IGS App. at 12. Specifically, when offering these services, the Commission directed that the Company must:

- obtain a signed work order from customers stating the customer's understanding that the products and services are unregulated and offered by other vendors;

- reformat the tariff language to make it easier for customers to read and understand;

- ensure that these electric-related services will be provided at a rate negotiated with the customer, but no less than Duke's fully-allocated costs[6] so that none of the costs associated with the electric-related services are passed on to the regulated utility's customers; and

- establish agreements and processes to guarantee that, upon the request of the Commission or Staff, Duke has access to the information necessary to prove that no costs associated with the electric-related products or services are being borne by the regulated utility's customers.

Id. at 6, IGS App. at 11.

The Commission's approval of the Company's amendment to its corporate separation plan adhered to R.C. 4928.17 and Ohio Adm.Code 4901:1-37-06 and provides adequate consumer safeguards.

STANDARD OF REVIEW

A Commission order shall be reversed, vacated, or modified by this Court only when, upon consideration of the record, the Court finds the order to be unlawful or unreasonable. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 50. The Court will not reverse or modify a Commission decision as to questions of fact if the record contains sufficient probative evidence to

[6] "Fully allocated costs are the sum of direct costs plus an appropriate share of indirect costs." Ohio Adm.Code 4901:1-37-01(G), App. at 13.

show that the Commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. "The appellant bears the burden of demonstrating that the commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record." *Id*.

Although the Court has "complete and independent power of review as to all questions of law" in appeals from the Commission, *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997), the Court may rely on the expertise of a state agency in interpreting a law where "highly specialized issues" are involved and "where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979); *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶¶ 12-13. The Commission's discretionary decisions receive deferential review. *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183, ¶ 11.

ARGUMENT

Proposition of Law No. I:

The Commission lawfully exercised its discretion under R.C. 4928.17 to approve Duke's application for an amendment to its corporate separation plan.

R.C. 4928.17 governs corporate separation plans. R.C. 4928.17(C) dictates the requirements for approving an initial corporate separation plan. Once the Commission has found that the initial corporate separation plan satisfies R.C. 4928.17(C), then R.C. 4928.17(D) establishes the mechanism by which that corporate separation plan may be amended. Ohio Adm.Code 4901:1-37-06 further provides for the automatic approval of amendments and explains the requirements for filing amendments upon approval.

The Commission, in 1999, found the Company's initial corporate separation plan fully satisfied R.C. 4928.17(C). *Initial Corporate Separation Plan Case* (Opinion and Order at 45-47) (Aug. 31, 2000), App. at 17-19. In that case, the Commission made the appropriate findings under R.C. 4928.17(C) to approve the Company's initial corporate separation plan. *Id*. (finding "good cause exists to allow the separation as proposed by the company" and that the plan "effectuate[s] the policy specified in R.C. 4928.02" and "satisfies the public interest in preventing unfair competitive advantage and…abuse of market power"). The appropriate time to challenge the Commission's initial approval of

the Company's corporate separation plan under R.C. 4928.17(C) was following that case, fifteen years ago. That time, has passed.[7]

On April 16, 2014, the Company filed an amended application to offer additional electric-related services under R.C. 4928.17 and Ohio Adm.Code 4901:1-37-06. *Fourth Amended Corporate Separation Plan Case* (Finding and Order at 1) (Jun. 11, 2014), IGS App. at 6. In response to the Company's application, parties filed comments on the Company's application, which the Commission outlined and considered.[8] *Id*. at 2-4, IGS App. at 7-9. The Commission approved the Company's amendment to its corporate separation plan, but conditioned its approval on the Company implementing certain customer safeguards.

R.C. 4928.17(D) is the statutory provision that governs corporate separation plan amendments. R.C. 4928.17(D) provides the Commission may approve a corporate separation plan amendment "as it considers necessary." However, state law requires the Commission to ensure effective competition in the electric market. *See* R.C. 4928.02(H), App. at 11. The purpose behind this requirement is straightforward. When a well-established electric distribution utility begins to offer new products or services, there is a risk that the utility could have an undue competitive advantage. The utility could achieve this

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[7] An application for rehearing must be filed within 30 days after the entry of the order. R.C. 4903.10, App. at 1-2.

[8] The Commission did not hold an evidentiary hearing in this case and was not required to do so. This Court has repeatedly held that a party before the Commission has no constitutional right to notice and a hearing if no statutory right to a hearing exists. *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 310, 513 N.E.2d 337 (1987).

undue advantage in a number of ways, it could: subsidize its new products with revenues from existing regulated services, exercise its market power to push-out competition, or use information and resources gained by nature of its corporate affiliation to gain an unfair advantage, among other things. Therefore, state law prohibits utilities from engaging in any of these activities. *See* R.C. 4928.02(H) (preventing anticompetitive subsidies flowing from a noncompetitive service to a product or service other than retail electric service), App. at 11; *see* R.C. 4928.02(I) (ensuring consumers protection against unreasonable sales practices, market deficiencies and market power), App. at 11; *see* Ohio Adm.Code 4901:1-37-02 (requiring standards be set so a competitive advantage is not gained through corporate affiliation), App. at 15.

To ensure the Company's amended corporate separation plan adhered to the pro-competitive principles in Ohio law, the Commission required the Company to include a number of safeguards in its plan. First, the Company must obtain a signed work order from customers stating they understand that these electric-related services are unregulated and that other companies offer these services. *Fourth Amended Corporate Separation Plan Case* (Finding and Order at 6) (Jun. 11, 2014), IGS App. at 20. Second, the Company must revise the tariff language that describes the services to improve the tariff's readability and make the Company's offerings more understandable to customers. *Id*. These safeguards ensure that customers are appropriately notified of their options and prevent the Company from misrepresenting the availability of competitive options. Third, customers receiving electric-related services must pay the full costs of service. *Id*.

This requirement ensures that none of the direct or indirect costs associated with the services and products are passed on to Duke's regulated customers and prevents the Company from gaining an unfair advantage by subsidizing the provision of these services through its regulated activities. Finally, Duke must establish the necessary agreements and processes to guarantee that the Commission has access to information to ensure no costs associated with these services and products are passed on to regulated utility customers. *Id*. This provision ensures the Commission and its Staff have access to information, regardless of whether that information is held by an unregulated entity.

R.C. 4928.17(D) provides that the Commission may approve a corporate separation plan amendment "as it considers necessary." This language constitutes a grant of discretion to the Commission. "When a statute does not prescribe a particular formula, the PUCO is vested with broad discretion." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 68. But the Commission did not just grant the Company unrestrained approval to the amended plan. Instead, the Commission went to great lengths to set forth conditions that ensure the plan upholds State law and protects consumers. The Commission prudently exercised its discretion to approve an amended plan that adhered to state law, protected the level playing field for retail electric market competition, and ensured ample customer safeguards existed. *Id*. at 2-7, IGS App. at 16-21. The Commission's orders satisfy R.C. 4928.17(D) and should be upheld.

Proposition of Law No. II:

Even though the Commission approved Duke's corporate separation plan amendment under R.C. 4928.17(D), the Commission's orders also satisfy R.C. 4928.17(C).

A. The Commission determined that good cause exists and granted the Company a waiver of R.C. 4928.17(A)(1) to provide electric-related services.

R.C. 4928.17(A)(1) directs that under a corporate separation plan, the Company must provide certain services through a fully-separated affiliate. But, an exception exists. R.C. 4928.17(C) allows the Commission to approve a corporate separation plan that does not require the Company to provide services through a fully-separated affiliate. Instead, the plan must comply "with such *functional* separation requirements as the commission authorizes." R.C. 4928.17(C) (emphasis added), App. at 13-14.

In the Company's application at issue here, the Company requested authority to offer electric-related services itself, rather than through an affiliate. *Fourth Amended Corporate Separation Plan Case* (Entry on Rehearing at 1) (Aug. 6, 2014), IGS App. at 15. The Commission reasoned that corporate separation plans are intended to allow companies to provide such electric-related services while preventing "undue competitive advantage or undue abuse of market power." *Id*. at 5, IGS App. at 19. The Commission then established functional separation requirements to govern the plan and found as long as the amended plan satisfied those requirements and adhered to the state's pro-competitive policies and corporate separation rules, the plan should be approved. *Id*.; *see also* R.C. 4928.02, App. at 10-12; Ohio Adm.Code 4901:1-37-02, App. at 15. The purpose of

the Commission's orders was to authorize the Company to provide these services and to define the parameters by which the Company could offer them. Good cause was found and the Commission's orders satisfy R.C. 4928.17(C).

B. The Commission prescribed an interim period during which the amended corporate separation plan would be in effect.

The Commission's approval of the Company's amendment to its corporate separation plan was not a blank check by any means. The Commission made clear that the Company had to strictly comply with the directives set forth in the Commission's orders and all relevant corporate separation laws, including R.C. 4928.17. *Fourth Amended Corporate Separation Plan Case* (Finding and Order at 6-7) (Aug. 6, 2014), IGS App. at 11-12. Ongoing monitoring was integral to the Commission's approval. The Commission's orders established the parameters of the Company's plan and explained that the Commission retained ongoing authority over the Company's implementation of its plan. *Id*. Any allegation that the Company failed to adhere to the parameters of the plan would result in an investigation and enforcement action by the Commission. The plan would then be subject to review and to termination or modification. Furthermore, any party could challenge the Company's implementation of its corporate separation plan through the Commission's formal complaint process at any time. *Fourth Amended Corporate Separation Plan Case* (Entry on Rehearing at 7) (Aug. 6, 2014), IGS App. at 21. The Commission's approval was not permanent, the Company's amended corporate separation plan is subject to termination by the Commission, at any time, for any misstep. *Id*.

The Commission's approval of the Company's amended corporate separation plan was interim in nature, adequately protects customers, and preserves competition. The Commission's orders should be upheld.

Proposition of Law No. III:

> **The Commission's Order and Entry on Rehearing contain sufficient evidence and discussion to satisfy the requirements of R.C. 4903.09. *See MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 311-312, 513 N.E.2d 337 (1987).**

The Commission's Order and Entry on Rehearing contain adequate findings of fact and conclusions of law to satisfy R.C. 4903.09. The Commission acknowledged that the Company filed an application for an amendment to its corporate separation plan under R.C. 4928.17 and Ohio Adm.Code 4901:1-37-06. *Fourth Amended Corporate Separation Plan Case* (Finding and Order at 1) (Jun. 11, 2014), IGS App. at 6. The Commission carefully considered and addressed the various parties' comments and reply comments regarding the Company's application. *Id*. at 2-4, IGS App. at 7-9. In particular, the Commission explained that IGS had argued that the Commission's Finding and Order violated R.C. 4928.17(A)(1) because "good cause does not exist for granting Duke a waiver" and the Order "set no time period by which Duke must comply with R.C. 4928.17(A)(1)." *Fourth Amended Corporate Separation Plan Case* (Entry on Rehearing at 2-3), IGS App. at 16-17. Upon consideration, the Commission found that its Order complied "with all statutory requirements and provides the safeguards that corporate separation plans are intended to provide." *Id*. at 5, IGS App. at 19. Specifi-

cally, the Commission noted that "corporate separation plans are intended to enable utilities, such as Duke, to provide such services within the parameters of a plan that includes sufficient safeguards…preventing any undue competitive advantage or abuse of market power." *Id*. The amended plan approved by the Commission did just that. It guarded against undue competitive advantage and abuse of market power by requiring the Company to: notify and obtain signatures from customers acknowledging that other companies offer these services, ensure that the Company's distribution customers do not pay for these services, and ensure the Commission has access to all information necessary to enforce these requirements. *Fourth Amended Corporate Separation Plan Case* (Finding and Order at 6) (Aug. 6, 2014), IGS App. at 11.

The Appellant bears the burden of substantiating its allegation that the Commission's entry on rehearing violated R.C. 4903.09. The Appellant must show "at least three things to prevail under R.C. 4903.09: first, that the commission initially failed to explain a material matter; second, that [the appellant] brought that failure to the commission's attention through an application for rehearing; and third, that the commission still failed to explain itself." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 71. The Appellant did not demonstrate that the Commission failed to explain a material matter. The Appellant argues, in conclusory fashion, that the Commission failed to explain a material matter because it did not comply with R.C. 4928.17(C). The Commission based its decision on the provision of R.C. 4928.17 that governs amendments to existing corporate separation plans, R.C. 4928.17(D). R.C. 4928.17(D) authorizes the Commission to make such changes "as

it considers necessary." The Commission did so. It weighed the evidence, approved the Company's proposed amendment, and subjected it to close scrutiny by the Commission. The Commission's Order and Entry on Rehearing satisfy the requirements of R.C. 4903.09 and should be upheld.

Proposition of Law No. IV:

> **The Appellant failed to demonstrate how it was harmed by the Commission's orders. This Court will not reverse a Commission decision when the Appellant cannot show prejudice as a result of the decision.**

It is well-settled that this Court will not reverse an order of the Commission on the basis of an error that did not prejudice the party seeking reversal. *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St.2d 335, 335, 402 N.E.2d 1175 (1980); *City of Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 161, 378 N.E.2d 480 (1978); *Ohio Edison Co. v. Pub. Util. Comm.*, 173 Ohio St. 478, 496, 184 N.E.2d 70 (1962); *City of Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 365, 86 N.E.2d 10 (1949). Indeed, this Court "will not reverse an order of the commission . . . without a showing of concomitant harm or prejudice." *Ohio Commt. of Cent. Station Elec. Protection Assn. v. Pub. Util. Comm.*, 50 Ohio St.2d 169, 174, 364 N.E.2d 3 (1977); *see also Worthington Hills Civic Assn. v. Pub. Util. Comm.*, 45 Ohio St.2d 11, 12-13, 340 N.E.2d 411 (1976). To pursue an appeal the Appellant must demonstrate a present, immediate, pecuniary interest and the Appellant here has none. *See E. Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295, 295, 530 N.E.2d 875 (1988).

The Appellant has failed to allege let alone show how the Commission's approval of the Company's amended corporate separation plan has prejudiced it. Because the Appellant has not pointed to any present interest or financial interest that has been harmed, the Court should uphold the Commission's orders.

CONCLUSION

The Commission's orders authorized the Company to provide additional electric-related services. This approval was conditioned on the Company adopting customer safeguards that prevent Duke from using its position as a utility to gain an advantage in offering electric-related services. The Commission's orders will lead to an increased availability of competitive options and will protect the public from any possibility of market power abuse. Achieving this balance is the Commission's job and it has done it. The orders should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served via electronic mail, upon the following parties of record, this 13th day of February, 2015.

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4903.09 Written opinions filed by commission in all contested cases.

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding. Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days

from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

4928.01 Competitive retail electric service definitions.

(A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

(2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code.

(4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.

(5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

(6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.

(7) “Electric light company” has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises.

(8) “Electric load center” has the same meaning as in section 4933.81 of the Revised Code.

(9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. “Electric services company” includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

(10) “Electric supplier” has the same meaning as in section 4933.81 of the Revised Code.

(11) “Electric utility” means an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. “Electric utility” excludes a municipal electric utility or a billing and collection agent.

(12) “Firm electric service” means electric service other than nonfirm electric service.

(13) “Governmental aggregator” means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.

(14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

(17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.

(18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity or energy and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users, including, but not limited to, advanced energy resources and renewable energy resources. "Advanced energy project" also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

(27) "Retail electric service" means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

(28) "Starting date of competitive retail electric service" means January 1, 2001.

(29) "Customer-generator" means a user of a net metering system.

(30) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

(31) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(32) "Self-generator" means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) "Rate plan" means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

(34) "Advanced energy resource" means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration technology;

(c) Clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American society of testing and materials standard D1757A or a reduction of metal oxide emissions in accordance with standard D5142 of that society, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion;

(d) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission; other, later technology; or significant improvements to existing facilities;

(e) Any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions as calculated pursuant to the United States environmental protection agency's waste reduction model (WARM);

(g) Demand-side management and any energy efficiency improvement;

(h) Any new, retrofitted, refueled, or repowered generating facility located in Ohio, including a simple or combined-cycle natural gas generating facility or a generating facility that uses biomass, coal, modular nuclear, or any other fuel as its input;

(i) Any uprated capacity of an existing electric generating facility if the uprated capacity results from the deployment of advanced technology.

"Advanced energy resource" does not include a waste energy recovery system that is, or has been, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(35) "Air contaminant source" has the same meaning as in section 3704.01 of the Revised Code.

(36) "Cogeneration technology" means technology that produces electricity and useful thermal output simultaneously.

(37)

(a) "Renewable energy resource" means any of the following:

(i) Solar photovoltaic or solar thermal energy;

(ii) Wind energy;

(iii) Power produced by a hydroelectric facility;

(iv) Power produced by a run-of-the-river hydroelectric facility placed in service on or after January 1, 1980, that is located within this state, relies upon the Ohio river, and operates, or is rated to operate, at an aggregate capacity of forty or more megawatts;

(v) Geothermal energy;

(vi) Fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion;

(vii) Biomass energy;

(viii) Energy produced by cogeneration technology that is placed into service on or before December 31, 2015, and for which more than ninety per cent of the total annual energy input is from combustion of a waste or byproduct gas from an air contaminant source in this state, which source has been in operation since on or before January 1, 1985, provided that the cogeneration technology is a part of a facility located in a county having a population of more than three hundred sixty-five thousand but less than three hundred seventy thousand according to the most recent federal decennial census;

(ix) Biologically derived methane gas;

(x) Heat captured from a generator of electricity, boiler, or heat exchanger fueled by biologically derived methane gas;

(xi) Energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors.

"Renewable energy resource" includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state's territorial waters of Lake Erie; methane gas emitted from an abandoned coal mine; waste energy recovery system placed into service or retrofitted on or after the effective date of the amendment of this section by S.B. 315 of the 129th general assembly, September 10, 2012, except that a waste energy recovery system described in division (A)(38)(b) of this section may be included only if it was placed into service between January 1, 2002, and December 31, 2004; storage facility that will promote the better utilization of a renewable energy resource; or distributed generation system used by a customer to generate electricity from any such energy.

"Renewable energy resource" does not include a waste energy recovery system that is, or was, on or after January 1, 2012, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(b) As used in division (A)(37) of this section, "hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state and meets all of the following standards:

(i) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.

(ii) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.

(iii) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromous fish.

(iv) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.

(v) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.

(vi) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.

(vii) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.

(viii) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

(38) "Waste energy recovery system" means either of the following:

(a) A facility that generates electricity through the conversion of energy from either of the following:

(i) Exhaust heat from engines or manufacturing, industrial, commercial, or institutional sites, except for exhaust heat from a facility whose primary purpose is the generation of electricity;

(ii) Reduction of pressure in gas pipelines before gas is distributed through the pipeline, provided that the conversion of energy to electricity is achieved without using additional fossil fuels.

(b) A facility at a state institution of higher education as defined in section 3345.011 of the Revised Code that recovers waste heat from electricity-producing engines or combustion turbines and that simultaneously uses the recovered heat to produce steam, provided that the facility was placed into service between January 1, 2002, and December 31, 2004.

(39) "Smart grid" means capital improvements to an electric distribution utility's distribution infrastructure that improve reliability, efficiency, resiliency, or reduce energy demand or use, including, but not limited to, advanced metering and automation of system functions.

(40) "Combined heat and power system" means the coproduction of electricity and useful thermal energy from the same fuel source designed to achieve thermal-efficiency levels of at least sixty per cent, with at least twenty per cent of the system's total useful energy in the form of thermal energy.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

4928.02 State policy.

It is the policy of this state to do the following throughout this state:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy.

In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

4928.03 Identification of competitive services and noncompetitive services.

Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. In accordance with a filing under division (F) of section 4933.81 of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code.

4928.17 Corporate separation plans.

(A) Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered

by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.

(B) The commission may approve, modify and approve, or disapprove a corporate separation plan filed with the commission under division (A) of this section. As part of the code of conduct required under division (A)(1) of this section, the commission shall adopt rules pursuant to division (A) of section 4928.06 of the Revised Code regarding corporate separation and procedures for plan filing and approval. The rules shall include limitations on affiliate practices solely for the purpose of maintaining a separation of the affiliate's business from the business of the utility to prevent unfair competitive advantage by virtue of that relationship. The rules also shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing. The commission may reject and require refiling of a substantially inadequate plan under this section.

(C) The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code. However, for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies

with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.

(D) Any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.

(E) No electric distribution utility shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval.

4901:1-37-01 Definitions.

(A) "Affiliates" are companies that are related to each other due to common ownership or control. The affiliate standards shall also apply to any internal merchant function of the electric utility whereby the electric utility provides a competitive service.

(B) "Commission" means the public utilities commission of Ohio.

(C) Competitive retail electric service provider means a provider of a competitive retail electric service as defined in division (A)(4) of section 4928.01 of the Revised Code.

(D) Electric services company shall have the meaning set forth in division (A)(9) of section 4928.01 of the Revised Code.

(E) Electric utility shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(F) Employees are all full- or part-time employees of an electric utility or its affiliates, as well as consultants, independent contractors, or any other persons performing various duties or obligations on behalf of or for an electric utility or its affiliate.

(G) Fully allocated costs are the sum of direct costs plus an appropriate share of indirect costs. For purposes of these rules, the term fully allocated costs shall have the same meaning as the term fully loaded embedded costs as that term appears in division (A)(3) of section 4928.17 of the Revised Code.

(H) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.

(I) "Staff" means the staff of the commission or its authorized representative.

4901:1-37-02 Purpose and scope.

(A) The purpose of this chapter is to require all of the state's electric utilities to meet the same standards so a competitive advantage is not gained solely because of corporate affiliation.

(B) This chapter is intended to create competitive equality, prevent unfair competitive advantage, prohibit the abuse of market power and effectuate the policy of the state of Ohio embodied in section 4928.02 of the Revised Code.

(C) The commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.

(D) To ensure compliance with this chapter, examination of the books and records of affiliates may be necessary.

(E) Violations of this chapter shall be subject to section 4928.18 of the Revised Code. The electric utility has the burden of proof to demonstrate compliance with this chapter.

4901:1-37-06 Revisions and amendments.

(A) All proposed revisions and/or amendments to the electric utility's approved corporate separation plan shall be filed with the commission, and a copy of the filing shall be provided simultaneously to the director of the utilities department (or their designee).

(B) Except for proposals related to the sale or transfer of assets filed pursuant to rule 4901:1-37-09 of the Administrative Code, if a filing to revise and/or amend the electric utility's corporate separation plan is not acted upon by the commission within sixty days after it is filed, the modified corporate separation plan shall be deemed approved on the sixty-first day after filing.

(C) Each electric utility shall file any modified corporate separation plan in its tariff docket upon approval of such plan.

SUMMARY OF
THE COMMISSION'S OPINION AND ORDER OF AUGUST 31, 2000
IN THE CINCINNATI GAS & ELECTRIC COMPANY
ELECTRIC TRANSITION PLAN CASE
CASE NO. 99-1658-EL-ETP ET AL.

On June 22, 1999, the Ohio General Assembly passed legislation requiring the restructuring of the electric utility industry and providing for retail competition with regard to the generation component of electric service (Amended Substitute Senate Bill No. 3 of the 123rd General Assembly). Governor Bob Taft signed this legislation (SB3) on July 6, 1999 and most provisions of SB3 became effective on October 5, 1999. Section 4928.31, Revised Code, required each electric utility to file with the Commission a transition plan for the company's provision of retail electric service in the state of Ohio.

On December 28, 1999, Cincinnati Gas & Electric Company filed its transition plan, as well as applications for tariff approval and accounting authority. On May 8, 2000, a stipulation and recommendation on CG&E's transition plan (CG&E Ex. 60) was filed on behalf of CG&E, the staff, Ohio Consumers' Council, Ohio Council of Retail Merchants, Industrial Energy Users-Ohio, Kroger Company, The Ohio Manufacturers' Association, National Energy Marketers Association, New Energy Midwest, LLC, WPS Energy Services, Inc., Enron Energy Services, Inc., Dynegy, Inc, Cincinnati/Hamilton County Community Action Agency, Supporting Council of Preventive Effort, The Ohio Hospital Association, People Working Cooperatively, Exelon Energy, Strategic Energy, Columbia Energy Services Corp., Columbia Energy Power Marketing Corp., Mid-Atlantic Power Supply, city of Cleveland, and American Municipal Power-Ohio. Stand Energy Corp., and Local Union 1347 International Brotherhood of Electrical Workers, AFL-CIO subsequently signed the stipulation. Also on May 8, 2000, a stipulation on CG&E's employee assistance plan was filed on behalf of CG&E, the staff, Industrial Energy Users-Ohio, The Ohio Council of Retail Merchants, AK Steel, Kroger Company, The Ohio Manufacturers' Association, The Ohio Hospital Association, Columbia Energy Services Corp., Columbia Energy Power Marketing Corp., Exelon Energy, Strategic Energy, Mid-Atlantic Power Supply Assoc., Ohio Consumers' Council, New Energy Midwest, LLC, WPS Energy Services, Inc., and Enron Energy Services, Inc. A third stipulation on CG&E's independent transmission plan was filed on May 8, 2000, on behalf of CG&E, staff, Ohio Consumers' Council, The Ohio Council of Retail Merchants, Industrial Energy Users-Ohio, Kroger Company, The Ohio Manufacturers' Association, New Energy Midwest LLC, WPS Energy Services, Inc., Enron Energy Services, Inc., Dynegy, Inc., and The Ohio Hospital Association. The evidentiary hearings were held on May 30, and June 1, 2, 5, 6, 8, and 14, 2000. A local public hearing was held on June 8, 2000, in Cincinnati, Ohio.

In the opinion and order, the Commission is approving the agreements submitted by the various parties listed above with certain modification regarding the operational support plan. The Commission found that the terms of the agreements, considered in their totality, advance the public interest and provide substantial benefits to all customer classes. The stipulations provide for extended rate freezes, rate reductions,

F. CG&E's Corporate Separation Plan (CSP)

CG&E proposed a CSP that it contends meets all the requirements set forth in Sections 4928.17 and 4928.06, Revised Code, and the Commission's rules on utilities' code of conduct. No parties opposed CG&E's CSP. Under its plan, effective January 1, 2001, CG&E will not offer non-tariffed products and services and it will transfer any such products and services to a fully separated affiliate (CG&E Ex. 57 at 2). Additionally, CG&E's CSP provides for the transfer of its generating assets to an EWG and, according to the plan, CG&E will complete the transfer by no later than December 31, 2004 (CG&E Ex. 57 at 3). CG&E's CSP also describes the mechanisms that CG&E will utilize to ensure that CG&E institutes proper accounting procedures for affiliate transactions (CG&E Ex. 57 at 4-5). CG&E's CSP includes provisions related to structural safeguards, separate accounting, financial arrangements, complaint procedures, education and training, the policy statement, internal compliance monitoring, and a detailed listing of CG&E's electric services. As described in the testimony of Paul G. Smith, CG&E will implement a cost allocation manual, pursuant to Rules 4901:1-20-16(G)(1)(a) and (b) and 4901:1-20-16(J), O.A.C. (CG&E Ex. 14 at 5). CG&E will also only share employees, facilities, and services in accordance with its SEC-approved service agreements, pursuant to Rule 4901:1-20-16(G)(1)(c), O.A.C. (CG&E Ex. 37 at 3). Under its proposal, CG&E will keep its books, records, and accounts separate from those of its affiliates pursuant to Rule 4901:1-20-16(G)(2), O.A.C. (CG&E Ex. 14 at 6). CG&E will also follow the Commission's rules on financial arrangements to preserve the financial independence of CG&E from its affiliates pursuant to Rule 4901:1-20-16(G)(3), O.A.C. (CG&E Ex. 14 at 7).

CG&E's filing includes an affiliate code of conduct that complies with the Commission's rules. According to the Company's proposal, CG&E is prohibited from releasing any proprietary customer information to an affiliate without the prior authorization of the customer (CG&E Ex. 37 at Ex. PGS-1 at 2). Furthermore, CG&E's affiliate code of conduct requires CG&E to make customer lists available on a nondiscriminatory basis to all nonaffiliated and affiliated certified retail electric competitors transacting business in its service territory (*Id.* at 1). CG&E's affiliate code of conduct stipulates that the Company shall treat as confidential all information obtained from any certified supplier of retail electric service and that the Company shall not tie the provision of regulated services to the taking of any goods and/or services from CG&E's affiliates. CG&E maintains that its code of conduct ensures that anticompetitive subsidies will not flow from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa (*Id.* at 6).

CG&E notes that Section 4928.17(C), Revised Code, provides that "for good cause, the Commission may issue an order approving a corporate separation plan that does not comply with Section 4928.17(A)(1), Revised Code, but complies with such functional separation requirements as the Commission authorizes to apply for an interim period. Further, CG&E states that the Commission's corporate separation rules require the utility to show good cause for selecting an interim functional separation

plan. CG&E believes that it has met this burden through its corporate separation financing plan. CG&E notes that its corporate separation financing plan provides for a program to complete the transfer of its generating assets to an EWG by December 31, 2004, and it describes the expected costs CG&E would incur if it is forced to transfer its generating assets to the EWG by December 31, 2000. It is CG&E's intention to achieve the transfer of assets to the EWG at the lowest cost practicable by seeking to minimize the transaction costs, including tax obligations; minimize the expenditures related to the recapitalization of CG&E; and optimize the capital structure of CG&E. CG&E's ability to minimize its transaction costs will turn on three key issues: (1) what steps CG&E must take to adjust its capital structure as a result of the corporate separation plan; (2) whether it can release the generation from the mortgage without having to redeem the first mortgage bonds; and (3) whether it can eliminate or minimize the tax obligations which may arise from the transfer (*Id.* at 3). CG&E is undertaking the process of seeking to release the generation assets from its existing first mortgage lien obligations (*Id.* at 3). CG&E expects this process to take at least six to nine months (*Id.* at 3). While CG&E hopes that it can achieve this release, there can be no assurance that CG&E will be fully successful. In the event CG&E is unsuccessful, it may have to pursue other means to release the properties, as described in CG&E's Corporate Separation Financing Plan.

CG&E has presented a corporate separation plan for Commission approval pursuant to Section 4928.17(C), Revised Code. CG&E has indicated that, if it is forced to transfer its generating assets to the EWG by December 31, 2000, it will incur significant costs. Since the corporate separation plan does not provide for complete separation by December 31, 2000, in order for this Commission to approve an interim plan the company must show "good cause" pursuant to Section 4928.17(C), Revised Code. This section provides that an interim plan must be consistent with such functional separation requirements as is authorized for the interim period, and that the plan must provide for ongoing compliance with the policy set out in Section 4928.02, Revised Code. Section 4928.17(A)(2), Revised Code, also requires that all plans satisfy the public interest in preventing unfair competitive advantage and abuse of market power. The plan must also be sufficient to ensure that no undue preference or advantage is extended to or received by the competitive retail affiliate from the utility affiliate (Section 4928(A)(3), Revised Code). The Commission's rules also address interim plans and require that such plans set out a detailed timeline of progression to full structural separation, and that they be subject to periodic Commission review (Rule 4901:1-20-16(G)(1)(d), O.A.C.).

We find that CG&E's proposed interim plan achieves the structural separation contemplated by Section 4928.17(A)(1), Revised Code, and the corresponding Commission rules. The Company has shown that it will incur significant costs if it is forced to transfer its generating assets to the EWG by December 31, 2000. We find that good cause exists to allow the separation as proposed by the company to occur by December 31, 2004, in that specific steps are set forth to insure the release of the subject properties

in that time frame. The plan provides for competitive retail electric service through a fully separated affiliate of the utility and includes separate accounting requirements and code of conduct necessary to effectuate the policy specified in Section 4928.02, Revised Code. The plan also satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power. The plan also is sufficient to ensure that the Company will not extend any undue reference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric produce or service. CG&E has provided a reasonable timeline for its transition to full structural separation. Therefore, the Company has met its burden of showing "good cause" for this Commission to approve the interim functional separation plan. We will closely monitor the implementation of the plan and take appropriate steps where we find competitive inequality, unfair competitive advantage, or abuse of market power. We believe that through the periodic Commission review of the interim separation plan, through auditing of the company's books and records, including the cost allocation manual, and the complaint process, this Commission can ensure that the corporate separation plan is implemented in accordance with the policy enunciated in SB3.

G. CG&E's Employee Assistance Plan (EAP)

CG&E's EAP was presented through the testimony of Richard L. Bond, CG&E's general manager of Compensation, Benefits and Human Resources Information System. Mr. Bond described CG&E's EAP including the programs for severance, retraining, retirement, retention, outplacement and other assistance that the company commits to provide to its employees whose employment is affected by electric industry restructuring (CG&E Ex. 17, 3). Mr. Bond contended that CG&E's EAP provides for all of the types of benefits described in Section 4928.31(A)(4), Revised Code, and that the EAP will be communicated to CG&E's eligible employees verbally and in writing (*Id.* at 3). He noted that CG&E has had experience with voluntary workforce reduction and voluntary severance plans and that a very substantial number of those employees who were eligible to participate in the plans took advantage of the plans' benefits (*Id.* at 5). Mr. Bond also testified that CG&E has no current plans to downsize its workforce during the MDP as a result of restructuring (*Id.* at 6). CG&E has requested no transition costs related to the EAP (CG&E Ex. 12 at Ex. JPS-5 at 1). No parties opposed CG&E's EAP or the EAP stipulation.

Pursuant to Section 4928.34(A)(10), Revised Code, the Commission finds that the Company's EAP sufficiently provides severance, retraining, early retirement, retention, outplacement, and other assistance for the Company's employees whose employment is affected by electric industry restructuring. As noted above, CG&E's EAP will be subject to negotiations with CG&E's unions and, in accordance with the EAP rules, we will continue to provide the Company flexibility in implementing the EAP.

ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Craig A. Glazer

Judith A. Jones

Donald L. Mason

SEF/RRG/vrm

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Gary E. Vigorito
Secretary

SUMMARY OF
THE COMMISSION'S OPINION AND ORDER
OF SEPTEMBER 29, 2004,
IN THE CINCINNATI GAS & ELECTRIC COMPANY
RATE STABILIZATION PLAN CASES
CASE NOS. 03-93-EL-ATA, ET AL.

On June 22, 1999, the Ohio General Assembly passed legislation requiring the restructuring of the electric utility industry and providing for retail competition with regard to the generation component of electric service (Amended Substitute Senate Bill No. 3 of the 123rd General Assembly). Pursuant to that legislation, on August 31, 2000, the Commission issued an opinion and order approving a transition plan for The Cincinnati Gas & Electric Company (CG&E). During the CG&E's market development plan, the Commission anticipated that competition would develop to the level described by the Ohio General Assembly in Senate Bill 3.

On January 10, 2003, CG&E filed an application for authority to modify its nonresidential generation rates to provide for a competitive market option. On October 8, 2003, CG&E filed three additional, related cases requesting authority to modify certain accounting procedures related to its participation in Midwest Independent Transmission System Operator and its investment in transmission and distribution facilities, and requesting authority to establish a capital investment rider to recover deferred transmission and distribution costs. Subsequent to the filing of these four cases, the Commission requested that CG&E file a rate stabilization plan. CG&E filed that plan on January 26, 2004.

Following the filing of its rate stabilization plan, CG&E filed a stipulation signed by it and several of the intervening parties, including staff of the Commission, FirstEnergy Solutions Corp.; Dominion Retail, Inc.; Industrial Energy Users-Ohio; Green Mountain Energy Company; Ohio Energy Group, Inc.; The Kroger Co.; AK Steel Corporation; Cognis Corp.; People Working Cooperatively; Communities United For Action; and Ohio Hospital Association. Parties that did not sign the stipulation include Ohio Consumers' Counsel; Constellation NewEnergy Inc.; MidAmerican Energy Company; Strategic Energy, LLC; WPS Energy Services, Inc.; Constellation Power Source, Inc.; Ohio Partners for Affordable Energy; The Ohio Manufacturers Association; National Energy Marketers Association; and PSEG Energy Resources & Trade LLC.

In the opinion and order, the Commission is approving the stipulation with certain modifications, including:

- requiring Commission approval for all changes in the amount or avoidability of the annually adjustable component of the price, and providing that the Commission, in evaluating such changes, would consider cost savings as well as increases (see page 32),

- allowing the annually adjustable component to be avoidable during 2005 for shopping customers (see page 32),

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that may be avoidable will be reviewed by the Commission when it considers the AAC for subsequent years, based on the facts as they then appear.

Because the AAC is intended to compensate CG&E for its POLR responsibilities, and because the Commission, after the modifications in this opinion and order, will be in a position to monitor at least the company's expenses, the market, trading activities by the company, and the workings of MISO, the Commission finds that the increase to the AAC for 2005 and the level of unavoidability of the AAC for 2005 that are authorized in this opinion and order will be reasonable, not anticompetitive, and not likely to create a subsidy. The Commission will determine whether any subsequent AAC increases or changes to the level of avoidability are reasonable, not anticompetitive, and not likely to create a subsidy, at the time that it considers any such application from the company.

(f) Should the Stipulation Require CG&E to Complete its Corporate Separation?

Section 4928.17, Revised Code, prohibits electric utilities from engaging in certain noncompetitive and competitive businesses unless it implements and operates under a corporate separation plan which satisfies a number of conditions. Under the ETP opinion, CG&E had a corporate separation plan that required it to complete its structural separation by the end of 2004. The stipulation provides that CG&E would not be required to transfer generating assets to an electric wholesale generator by the end of 2004. Approval of this provision would thus be an amendment of its corporate separation plan.

OCC, OMG, and CPS submit that CG&E should be required to comply with its existing corporate separation plan and statutory provisions, and should not be permitted to retain ownership of its generation assets. While the Commission has some flexibility to allow complete structural separation to be delayed for a period of time for good cause, OCC asserts that this flexibility is not unlimited as to time. OCC notes that the terms of the stipulation do not explain how the goals of structural separation will be met without actual structural separation. (OCC Brief at 17-20.)

OMG and CPS reason that corporate separation was discussed in the ETP stipulation and, thus, should not be changed in the stipulation, which is not signed by all of the parties to the ETP stipulation. It also argues that the failure to separate its generation facilities is clearly prohibited by Section 4928.17, Revised Code. From a policy standpoint, OMG and CPS point out that, without corporate separation, CG&E could use its utility assets to secure its general obligations, including those from its energy trading activities. (OMG/CPS Brief at 11-15.)

CG&E counters OCC, OMG, and CPS's concerns, indicating that it is operating under a Commission-approved separation plan, in accordance with the provisions of Section 4928.17(A), Revised Code. After the MDP, CG&E says that it will only be providing the market-based standard service offer and/or the competitive bidding process as required by Section 4928.14, Revised Code. It notes that there was no evidence introduced at the hearing that would support an argument that CG&E, by not structurally separating, would give itself or any affiliate an undue advantage. CG&E stresses that, in

order to provide service at stable rates, it must retain its generating assets. (CG&E Reply Brief at 23-31.)

The Commission finds that it is reasonable for CG&E to retain its generating assets during the period in which it is committing to provide stabilized rates. It would not be appropriate to ask the company to stabilize its rates and then to deny it the opportunity to do so. Therefore, CG&E's corporate separation plan shall be amended to allow it to retain its generating assets through 2008, after which time the stabilized prices under the stipulation will terminate and corporate separation should be reconsidered. It should be noted that, if the company does not implement the stipulation as modified by this opinion and order, then full separation should be established as directed, and under the time frames established in, the ETP opinion.

(g) Does the Collection of Distribution Deferrals Violate the Rate Cap of SB 3?

The stipulation would allow CG&E to establish accounting deferrals for the difference between (a) CG&E's current revenue requirement on the net capital investment related to its distribution business and (b) the revenue requirement on CG&E's capital investment in its electric distribution business from July 1, 2004, through December 31, 2005. The amounts deferred would be recovered over a period of five years, starting on January 1, 2006. (Jt. Ex. 1, at 11-12.)

OCC opposes this aspect of the stipulation. It refers to the rate cap provision of SB 3 which states that "the total of all unbundled components in the rate unbundling plan are capped and shall equal during the market development period . . . the total of all rates and charges in effect under the applicable bundled schedule of the electric utility . . . in effect on the date before the effective date of this section . . .." Section 4928.34(A)(6), Revised Code. OCC contends that, by deferring the cost of capital investments made between July 2004 and December 2005, and recovering those costs subsequently, CG&E would render the rate cap provision meaningless. (OCC Brief at 24-27.)

CG&E controverts OCC's argument, stating that accounting deferrals are not rate increases. The company contends that, since rates would not rise as a result of distribution cost increases until after the end of the MDP, there can be no violation of the rate freeze. (CG&E Reply Brief at 36-37.)

The Commission finds that, while deferrals are not rate increases, the amounts that would be deferred under the stipulation are representative of amounts that ultimately may be charged to customers. Those costs, if and when ultimately recovered, would be based on accruals during the MDP, and the deferrals would therefore violate the rate cap under SB 3.

The termination of the MDP is therefore a critical factor in determining the legality of the distribution deferrals. Under the stipulation, the MDP for residential consumers will continue through December 31, 2005. The MDP for nonresidential consumers will end with the effective date of this opinion and order. However, CG&E could have requested that the nonresidential consumers' MDP be terminated as early as May or July, 2002

ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

JWK/SEF;geb

Entered in the Journal
SEP 29 2004

Reneé J. Jenkins
Secretary

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan.	)))	Case No. 08-920-EL-SSO
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Accounting Methods.	)))	Case No. 08-921-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Certificate of Public Convenience and Necessity to Establish an Unavoidable Capacity Charge(s).	)))))	Case No. 08-922-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend its Tariff.	)))	Case No. 08-923-EL-ATA

OPINION AND ORDER

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(c) Economic Competitiveness Fund

Duke's application proposes the establishment of a rider for an economic competitiveness fund, rider DR-ECF, that would permit Duke and the Commission to support public and private economic development, including green infrastructure for public entities and public renewable energy projects, as well as public and private job creation and job retention initiatives and requests by business customers for generation service discounts. The application suggests that the Commission would review contracts or grants where Duke seeks recovery of costs through rider DR-ECF. The rider would be adjusted quarterly and would be audited annually, according to the application. (Duke Ex. 20, at 21-22.)

The stipulating parties agree that Duke should be authorized to recover, through rider DR-ECF, delta revenues associated with reasonable arrangements, to the extent individually approved by the Commission. They also recommend that the Commission approve an economic development contract with the city of Cincinnati under Section 4905.31, Revised Code. (Jt. Ex. 1 at paras. 14-15.)

4. Other Matters

(a) Corporate Separation

Duke points out, in its application, that it is operating under a corporate separation plan approved by the Commission in prior cases and that the Commission has granted it a waiver such that it is not required to transfer its generating assets prior to December 31, 2008. In the application, Duke asks for approval to transfer its generating assets to an affiliated entity or entities that will directly or indirectly own or have rights to the capacity of the units. (Duke Ex. 20, at 23-25.)

The stipulation states that Duke's corporate separation plan shall remain in effect as filed in these proceedings, except that Duke may transfer to an affiliate or sell to an unaffiliated party five gas-fired generating assets, with such transfer subject to approval by the Federal Energy Regulatory Commission (FERC), if necessary. Further, Duke agrees to withdraw, from these proceedings and from FERC, its request to transfer its previously used and useful assets. However, the stipulation notes that Duke may subsequently file an application for a transfer to be effective no earlier than January 1, 2012. (Jt. Ex. 1 at para. 26.)

(b) Market Price

Duke's application notes that its witnesses testify that the ESP price is less than the price would be under a market option. (Duke Ex. 20, at 25-26.) The stipulation recommends that the Commission find that the ESP price, terms, and conditions, including

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

JWK/SEF;geb

Entered in the Journal
DEC 17 2008

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke-Ohio Energy Ohio, Inc. for Approval of the Second Amended Corporate Separation Plan Under Section 4928.17, Revised Code, and Chapter 4901:1-37, Ohio Administrative Code.	))))))	Case No. 09-495-EL-UNC

OPINION AND ORDER

The Public Utilities Commission of Ohio, having considered the record in this matter and the application for approval of the second amended corporate separation plan, hereby issues its opinion and order.

OPINION:

I. Background

Duke-Ohio Energy Ohio, Inc. (Duke-Ohio) is a public utility as defined under Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.

By opinion and order issued December 17, 2008, in *In the Matter of the Application of Duke-Ohio Energy Ohio, Inc. for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, et al., the Commission approved Duke-Ohio's continued operation under the original corporate separation plan (CSP) was approved by the Commission in *In the Matter of the Application of the Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan*, Case No. 99-1658-ETP, and as amended in *In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish and Alternative Competitive-Bid Service Rate Option, Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, et al.

Pursuant to a finding and order issued in *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17 and 4928.31, Revised Code, as Amended by Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD (December 17, 2008), the Commission adopted Chapter 4901:1-37, Ohio Administrative Code (O.A.C.). This Chapter became effective on April 2, 2009. In this Chapter, the Commission directed each electric utility to file, within 60 days of the effective date of the Chapter, an application for approval of its proposed CSP, as outlined in Rule 4901:1-37-05, O.A.C.

On June 11, 2009, Duke-Ohio filed its application for approval of its new CSP, in accordance with Rule 4901:1-37-05(A), O.A.C., along with a motion to file its CSP instanter. Duke-Ohio clarified this plan in a June 22, 2009, letter, which explained that this was a new application, and labeled as "Second Amended Corporate Separation Plan," to distinguish it from prior CSPs. On August 26, 2009, Duke-Ohio's motion to file its CSP instanter was granted. In this same entry, the Commission issued a request for proposal (RFP) for an auditor to assist the Commission in its evaluation of Duke-Ohio's CSP and directed Duke-Ohio to bear the cost of the consulting services of the contractor chosen by the Commission.

Silverpoint Consulting LLC and Vantage Consulting, Inc. (jointly referred to as Silverpoint-Vantage) were selected by the Commission on September 30, 2009, to assist the Commission with the evaluation of Duke-Ohio's CSP. As the auditor, Silverpoint-Vantage was directed to evaluate Duke-Ohio's CSP to determine if the methodologies used by Duke-Ohio that allocate, charge, or assign costs to the Ohio-regulated operating companies are appropriate. Further, Silverpoint-Vantage was to ascertain whether Duke-Ohio implemented its CSP in compliance with previous Commission orders and to determine whether the CSP complies with the rules set forth in Chapter 4901:1-37, O.A.C. Silverpoint-Vantage filed its report of investigation on March 29, 2010 (audit report).

By entry issued April 8, 2010, motions to intervene in this matter by Ohio Consumers' Counsel (OCC) and the Ohio Energy Group (OEG) were granted. Further, the April 8, 2010, entry directed interested persons to file comments to the auditor's report of investigation no later than April 29, 2010, and reply comments no later than May 13, 2010. On April 29, 2010, as clarified on June 28, 2010, Duke-Ohio filed comments on the audit report.

II. Applicable Law

Section 4928.17, Revised Code, provides that an electric utility that, either directly or through an affiliate, engages in the business of supplying a noncompetitive retail electric service and a competitive retail electric service (CRES) or a product or service other than retail electric service must operate under a CSP. Pursuant to the statute, the CSP must be consistent with the policy of the state set forth in Section 4928.02, Revised Code, and achieve all of the following:

(1) provide, at minimum, for the provision of the CRES or the nonelectric product or service through a fully separated affiliate of the utility, and include separate accounting requirements, the code of conduct, and such other measures as are necessary to effectuate the state policy;

(2) satisfy the public interest in preventing unfair competitive advantage and preventing the abuse of market power; and

(3) be sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the CRES or nonelectric product or service, without compensation based upon fully loaded embedded costs charged to the affiliate; and ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference.

Chapter 4901:1-37, O.A.C., sets forth the requirements pertaining to corporate separation for electric utilities. Specifically, this chapter is applicable to the activities of the utility and its transactions or other arrangements with its affiliates, any shared services of the utility with any affiliates, and the sale or transfer of generating assets.

III. Audit Recommendations, Duke-Ohio's Comments, and Commission's Decision

As part of its evaluation of Duke-Ohio's CSP, Silverpoint-Vantage reviewed relevant orders, testimony, Staff reports, and other documents filed at the Commission. Silverpoint-Vantage also reviewed various internal documents relating to Duke-Ohio's compliance with its CSP and evaluated documents relating to Duke-Ohio's allocation policies, practices, and procedures. Silverpoint-Vantage documented the methods and allocation factors Duke-Ohio used to assign costs to Ohio-regulated operations and reviewed and tested affiliated costs assigned to Duke-Ohio. The audit covered an 18-month period from January 1, 2008 to June 30, 2009. (Audit Report at 2.)

Based on its audit, Silverpoint-Vantage concluded that, overall, Duke-Ohio is in compliance with: all areas of Chapter 4901:1-37, O.A.C., regarding structural separation, separate accounting, financial arrangements, code of conduct, and emergencies; and the requirements of Rule 4901:1-37-05, O.A.C., regarding the filing of a CSP. As for Rule 4901:1-37-09, O.A.C., pertaining to the sale or transfer of generating assets, the auditor noted that, while no activities occurred under this provision, the process for such activities is clearly spelled out in the cost allocation manual (CAM). Regarding overall compliance, Silverpoint-Vantage stated that Duke-Ohio provides appropriate training on relevant policies and procedures, as well as the regulations on corporate separation. Silverpoint-Vantage conducted a comparison of pre- and post-merger charges; however, they reached no specific conclusions. As discussed below, during the audit, Silverpoint-Vantage identified several issues and set forth six recommendations. (Audit Report at 4-5.)

A. Recommendation 1: Include all agreements that describe the allocation of costs among affiliates in future CAMs.

Silverpoint-Vantage found that Duke-Ohio complies with the requirements of Rule 4901:1-37-08, O.A.C., regarding the CAM, with the exception of one agreement that should have been included. Silverpoint-Vantage asserted that Duke-Ohio should include all documentation and agreements that describe cost allocations among its affiliates. During the audit process, Silverpoint-Vantage discovered an affiliate agreement that was not included in the CAM and determined that Duke-Ohio needs to be more diligent and thorough in its determination of what documents need to be included in the CAM. (Audit Report at 5, 20.)

Duke-Ohio admitted that the document in question had not been included in the CAM and represented that it has now been incorporated. Moreover, Duke-Ohio recommitted itself to assure that its CAM is maintained in accordance with Rule 4901:1-37-08, O.A.C. (Duke-Ohio Comments at 3; Duke-Ohio Supp. Comments at 1.)

Upon consideration of the auditor's first recommendation, the Commission finds that it is reasonable and should be adopted. Duke-Ohio's recommitment to assuring that its CAM is maintained in accordance with Rule 4901:1-37-08, O.A.C., is appropriate and addresses the auditor's findings and recommendation on this issue.

B. Recommendation 2: Develop and maintain a formal corporate-wide affiliate transaction accounting manual.

In its technical analysis, Silverpoint-Vantage concluded that: all affiliate transactions were subject to written agreements; affiliate transaction accounting systems and methods are sufficient to ensure the accuracy and reliability of affiliate transaction data; and there was no evidence of widespread problems that would call to question the overall integrity and reliability of the affiliate transaction data used in the audit. To insure transparency, Silverpoint-Vantage recommended that Duke-Ohio develop and maintain a formal corporate-wide affiliate transaction accounting manual. Specifically, Silverpoint-Vantage noted that Duke-Ohio does not maintain a formal affiliate transaction accounting manual and has no common set of guidelines for how to process individual affiliate transactions. It was further noted that various groups within Duke Energy Corporation (Duke-Ohio Energy) have developed specific guidelines and procedures for their own purposes, but no uniform set of policies and procedures exist to guide the broader audience. According to Silverpoint-Vantage, the fact that the Commission does not require a formal affiliate transaction accounting manual should not excuse Duke-Ohio from keeping one. (Audit Report at 5, 34-36.)

In response, Duke-Ohio stated that it disagrees with the recommendation. Duke-Ohio asserted that, because of the different jurisdictions Duke-Ohio's affiliates operate in, it would be impractical to implement a generic document to which all of the operating

utility companies would be subject. In addition, Duke-Ohio further asserted that Silverpoint-Vantage found that the existing system and methods under which Duke-Ohio currently operates are sufficient to ensure proper accounting between Duke-Ohio and its affiliates. Therefore, Duke-Ohio argued it should not be compelled to adopt requirements that the Commission has not found to be necessary. (Duke-Ohio Comments at 3-4; Duke-Ohio Supp. Comments at 2.)

Initially, the Commission notes that the auditor confirmed that Duke-Ohio's affiliate transactions were subject to written agreements, that Duke-Ohio's affiliate transaction accounting systems and methods were sufficient to ensure the accuracy and reliability of affiliate transaction data, and that there was no evidence of widespread problems relating to the affiliate transaction data. While the Commission agrees with the auditor's second recommendation that a corporate-wide manual would be optimal, we do not find it necessary, at this time, to require Duke-Ohio to develop such a manual. The Commission emphasizes, however, that Duke-Ohio should continue its diligent efforts to be as consistent as possible in its accounting of affiliate transactions. Accordingly, at this time, the Commission will not adopt the auditor's second recommendation that Duke-Ohio develop and maintain a corporate-wide affiliate transaction accounting manual.

As a final matter, the Commission notes that it is not clear whether Duke's affiliate transaction accounting manual clearly addresses the processes utilized in the event of an emergency which requires mutual aid between affiliates. Therefore, the Commission finds that Duke should clarify in its affiliate transaction accounting manual what processes and procedures are to be followed when mutual aid is necessary in a time of emergency. Furthermore, when mutual aid is utilized, Duke-Ohio needs to clarify in its affiliate transaction accounting manual how it will account for mutual aid situations.

C. Recommendation 3: Develop a plan to determine if further insulation from ratepayers is appropriate or complete separation of risks associated with Duke-Ohio-owned generation assets is appropriate.

The auditor found that, in general, the separation of financial risks is being handled appropriately. However, Silverpoint-Vantage noted that Duke-Ohio's current electric security plan (ESP) is scheduled to end December 31, 2011. Therefore, the auditor questioned possible separation through ring fencing or other means. The auditor recommended that Duke-Ohio develop a plan, as part of its next ESP discussions, to determine if further insulation from Duke-Ohio's ratepayers, or complete separation of risks associated with Duke-Ohio-owned generation assets, is appropriate. Specifically, Silverpoint-Vantage advised that Duke-Ohio should:

(1) conduct a risk assessment of the generation system owned by Duke-Ohio, given current industry issues;

(2) identify means to either further insulate ratepayers, or to separate ownership in a manner that does not impair ratepayers; and

(3) develop proposed solutions and provide them to the Commission in order to complete any necessary hearings and transactions before the termination of the ESP.

(Audit Report at 5-6, 48.)

In response, Duke-Ohio asserted that this recommendation is outside of the standard process required by the Commission. Moreover, Duke-Ohio argued that the proposal recommending Duke-Ohio conduct a risk assessment is an effort to usurp Duke-Ohio's own decision making process, and, if appropriate, Duke-Ohio will include a proposal to insulate ratepayers in its next standard service offer (SSO) application. Duke-Ohio further stated that it will address this issue internally by conducting risk assessments that it deems necessary. (Duke-Ohio Comments at 4-5; Duke-Ohio Supp. Comments at 2.)

The Commission does not know at this time whether Duke's SSO will be an Electric Security Plan or a Market Rate Option; or the details of its rate plan within those options. An issue such as risk insulation for ratepayers, including whether risk insulation is appropriate, may vary depending on the outcome of the SSO proceeding. The Commission may better address those issues in the SSO proceeding or in an application to transfer generation assets under Section 4928.17(E), Revised Code. The Commission does not believe that Duke-Ohio needs to take any additional action at this time to be in compliance with Chapter 4901:1-37, O.A.C.

D. Recommendation 4: Clarify the appropriate treatment of transactions between regulated and nonregulated portions of Duke-Ohio.

According to Silverpoint-Vantage, its review of operational agreements addressed a broad range of technical issues and found them to be reasonable. The auditor noted that, during the audit period, Duke Energy changed its policy regarding the inclusion of overhead in labor costs between the regulated and nonregulated portions of Duke-Ohio. For example, the auditor stated that, while the commercial power segment of Duke-Ohio is not technically an affiliate of the franchised electric and gas segment of Duke-Ohio, until recently, Duke-Ohio had treated it as such for purposes of pricing transactions. The auditor explained that, for the first half of 2008, Duke-Ohio applied overhead to labor charges in such transactions; however, after its conversion to new software in mid-2008, the company did not apply the affiliate overhead loader in transactions between the regulated and nonregulated portions of Duke-Ohio because they occurred within a single entity. Silverpoint-Vantage pointed out, however, that Duke-Ohio continues to issue formal service requests for services between the two segments, consistent with the nonutility agreement but no longer follows the transfer pricing requirements of the

agreement. Therefore, the auditor recommended that Duke-Ohio clarify its position regarding the appropriate treatment of transactions between the regulated and nonregulated portions of Duke-Ohio. (Audit Report at 5-6, 58.)

In its comments, Duke-Ohio took exception with the auditor's statement that the effect of applying or not applying an affiliate overhead loader was that Duke-Ohio was not following transfer pricing requirements with regard to labor transactions between regulated and nonregulated segments of Duke Energy. Duke-Ohio explained that, under its accounting system, each payroll company can only have one business unit associated with it; thus, all employees of Duke-Ohio are paid out of the same payroll company, regardless of whether they are serving regulated or nonregulated functions. After unproductive labor is recorded to the associated company, Duke-Ohio allocates those amounts to split the activity among regulated and nonregulated and between electric and gas. While this recording of unproductive and subsequent allocation appeared to the auditors as if the nonregulated segment of Duke-Ohio was charging the regulated segment for transactions, Duke claims that this was not the case. Moreover, Duke-Ohio emphasized that the regulated and nonregulated portions of its business are a single entity; therefore, transfers between those entities should be made at cost. (Duke-Ohio Comments at 4-7; Duke-Ohio Supp. Comments at 2.)

The Commission finds that Duke-Ohio's transition to a different accounting system in mid-2008 appears to have created some confusion; thus, the auditor's fourth recommendation that Duke-Ohio clarify its treatment of transactions between the regulated and nonregulated portions of its business was appropriate and should be adopted. In its comments, Duke-Ohio addressed the auditor's recommendation and adequately clarified how it treats such transactions. On a going forward basis, the Commission expects Duke-Ohio to adhere to this process, as clarified, regarding such transactions between the regulated and nonregulated segments of Duke-Ohio.

E. Recommendation 5: Inform Staff of changes to service company cost distribution methods.

According to the auditor, an analysis of cost distribution methods did not uncover any major problems; however, Silverpoint-Vantage recommended that Duke-Ohio keep Staff informed of future changes to service company cost distribution methods. Silverpoint-Vantage stated that prior audits of Duke Energy's affiliate transactions and cost distribution methods resulted in three recommendations related to the methods by which the service company distributes its costs, namely, Duke Energy should: narrow the use of the three-part formula general allocator; eliminate the effect of spreading overhead costs from the calculation of allocation percentages; and develop a method to fairly assign service company overhead costs. Silverpoint-Vantage pointed out that the prior audit reports for Duke Energy recommended that, if the service company decided to maintain its approach of spreading overhead charges in a way that is not linked to the use of services or cost causation in any way, it should be required to make a showing that its

approach yields equitable results and that those results are comparable to more direct approaches. Similarly, Silverpoint-Vantage pointed out that the prior audit reports recommended that the service company be required to make a showing that its charging method results in fully allocated costs for each function that it provides. Silverpoint-Vantage submitted that these recommendations are still appropriate, stating that cost distribution methods should be adequately designed to prevent cross-subsidization and yield equitable results. The auditor noted that similar recommendations have been made to, and addressed by, some of Duke-Ohio's affiliates. According to the auditor, Duke-Ohio has implemented changes to address these concerns beginning in 2010. Silverpoint-Vantage recommended that Duke-Ohio make available, upon request, the final reports from any third-party audits of Duke-Ohio's affiliates that address these issues. (Audit Report at 5-7, 73-74.)

In its response, Duke-Ohio commits to respond to any inquiry or audit initiated by the Commission on this subject matter. However, Duke-Ohio objects to producing irrelevant audit reports in their entirety from other jurisdictions, as they cannot dictate Duke-Ohio's business practices. (Duke-Ohio Comments at 7; Duke-Ohio Supp. Comments at 2.)

The Commission agrees with the auditor that it is important for Duke-Ohio to keep Staff apprised of future changes to the cost distribution methods employed by the service company. Furthermore, should Staff find it necessary to review final reports from third-party audits of Duke-Ohio's affiliates that address any of the issues mentioned by the auditor in this case, the Commission is confident that Duke-Ohio will work with Staff and, upon request, provide Staff copies of such reports. With this in mind, the Commission finds that the auditor's fifth recommendation should be adopted and Duke-Ohio should continue to work with Staff.

F. Recommendation 6: Inform Staff of improvements to service company charging practices.

Silverpoint-Vantage noted the following two audit recommendations from prior audit reports related to the service company charging practices, which recommended that Duke Energy: increase the percentage of labor that the service company directly charges to business units; and encourage employees to do more positive time reporting. Silverpoint-Vantage stated that it believes these recommendations remain appropriate and that Duke-Ohio has committed to implementing changes to address these concerns, beginning in 2010. The auditor noted that the service company's charging practices have a direct bearing on the cost of providing service by Duke-Ohio. Therefore, Silverpoint-Vantage again recommends that any future audit reports from third-party audits of Duke-Ohio's affiliates which address these issues should be made available to Staff upon request. Silverpoint-Vantage recommended that Duke-Ohio keep Staff informed of future improvements to service company charging practices. (Audit Report at 89.)

In response, Duke-Ohio asserted that it regularly cooperates and communicates with Staff. However, Duke-Ohio stated that it does not believe that delivery of out-of-state audits are appropriate. (Duke-Ohio Comments at 8; Duke-Ohio Supp. Comments at 3.)

As we stated previously, the Commission is confident that Duke-Ohio will continue to work with Staff and provide whatever information is necessary to assist Staff in its responsibilities, including third-party audit reports. Accordingly, the Commission finds that Silverpoint-Vantage's sixth recommendation should be adopted.

CONCLUSION:

The Commission finds the audit recommendations set forth by Silverpoint-Vantage should be adopted to the extent stated herein. Based on Silverpoint-Vantage's review and audit, and the directives set forth in this order, we believe that Duke-Ohio's second amended CSP filed on June 11, 2009, as clarified on June 22, 2009, is in compliance with Section 4928.17, Revised Code, and the rules contained in Chapter 4901:1-37, O.A.C. Accordingly, the Commission concludes that Duke-Ohio's application for approval of its second amended CSP should be granted, contingent upon its compliance with our directives delineated in this order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) Duke-Ohio is a public utility as defined under Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.

(2) Section 4928.17, Revised Code, governs CSPs for electric utilities.

(3) Chapter 4901:1-37, O.A.C., sets forth the requirements pertaining to corporate separation for electric utilities.

(4) On June 11, 2009, as clarified on June 22, 2009, Duke-Ohio filed an application for approval of its second amended CSP.

(5) Silverpoint-Vantage was selected by the Commission to assist with the evaluation of Duke-Ohio's CSP.

(6) Silverpoint-Vantage filed its audit report on March 29, 2010.

(7) On April 8, 2010, OCC and OEG were granted intervention in this case.

(8) On April 29, 2010, as clarified on June 28, 2010, Duke-Ohio filed comments on the audit report.

(9) The audit recommendations set forth by Silverpoint-Vantage should be adopted to the extent stated herein.

(10) Duke-Ohio's second amended CSP is in compliance with Section 4928.17, Revised Code, and the rules contained in Chapter 4901:1-37, O.A.C., and should be approved.

It is, therefore,

ORDERED, That the recommendations of the auditor, Silverpoint-Vantage, be adopted to the extent set forth herein. It is further,

ORDERED, That Duke-Ohio's application for approval of its second amended CSP filed on June 11, 2009, and clarified on June 22, 2009, be granted, contingent upon Duke-Ohio's compliance with our directives delineated in this order. It is, further,

ORDERED, That nothing in this opinion and order shall be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this order be served upon all persons of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Paul A. Centolella

Valerie A. Lemmie

Steven D. Lesser

Cheryl L. Roberto

JJT/CMTP/sc

Entered in the Journal APR 05 2011

Betty McCauley
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service.	)	Case No. 11-3549-EL-SSO
In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	)	Case No. 11-3550-EL-ATA
In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Amend its Corporate Separation Plan.	)	Case No. 11-3551-EL-UNC

OPINION AND ORDER

The Public Utilities Commission of Ohio, considering the above-entitled applications, the testimony, the applicable law, the proposed stipulation, and other evidence of record, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Amy B. Spiller, Elizabeth H. Watts, Rocco O. D'Ascenzo, and Jeanne W. Kingery, 2500 Atrium II, 139 East Fourth Street, Cincinnati, Ohio 45201, on behalf of Duke Energy Ohio, Inc.

Mike DeWine, Ohio Attorney General, by John H. Jones, Assistant Section Chief, and Steven L. Beeler and Devin D. Parram, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Commission.

Colleen L. Mooney, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839, on behalf of Ohio Partners for Affordable Energy.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Michael J. Settineri, 52 East Gay Street, Columbus, Ohio 43216, on behalf of Constellation New Energy, Inc., and Constellation Energy Commodities Group, Inc.

creating a PJM subaccount shall be that of the CRES provider.

(f) Duke withdraws its proposed profit sharing mechanism rider and Advance Southwest Ohio Fund, as well as the funding for same.

(g) Duke withdraws its distribution reliability rider as proposed in these proceedings. Within 45 days of the execution of the stipulation, Duke shall file, in a separate proceeding, for Commission approval of a distribution revenue decoupling mechanism that will adjust rates between rate cases to effectively remove Duke's through-put incentive, with all parties retaining their rights to due process in such proceeding. The decoupling mechanism to be filed through such application shall not be applicable to Rates TS, DS, and DP. Nothing in this stipulation is intended, or shall be interpreted, to signify parties' agreement with such application. Further, nothing in this stipulation shall affect Duke's existing SmartGrid recovery mechanism, which shall continue under the distribution reliability infrastructure modernization rider.

(h) Duke shall conduct collaborative meetings, on or before November 15, 2011, with all interested wholesale suppliers, retail suppliers, and transmission owners to confirm the charges from PJM that shall be paid by Duke and the charges from PJM that shall be paid by CRES providers.

(i) Duke shall be permitted to amend its certified supplier tariff, as proposed in its application, as modified in this stipulation.

(j) Duke agrees to withdraw from these proceedings the proposed amendment to Section XIV.C of its Third Amended Corporate Separation Plan (CSP) that, if approved, would enable Duke to provide special customer services. Duke expressly

reserves the right to seek revision of its CSP to incorporate this proposal to provide special customer services in a subsequent proceeding. Except as modified in the stipulation, Duke shall be permitted to adopt its Third Amended CSP, as proposed in its application. The Third Amended CSP will be amended to identify additional affiliates and parties to agreements following the anticipated merger of DEC and Progress Energy, Inc., and the parties agree not to oppose such amendment. Within 90 days after the effective date of full legal corporate separation, Duke agrees to file for approval of a fourth amended CSP that will address any issues with the full legal corporate separation.

(k) The parties agree that the SEET, as provided for under Section 4928.143(F), Revised Code, shall be administered to Duke with an ROE threshold of 15 percent for the term of this ESP. The methodology for applying the SEET is outlined in attachment H to the stipulation.

(l) During the term of this ESP, transmission voltage customers, whether shopping or nonshopping, with loads in excess of 10 MW at a single site shall have the option to annually nominate any part of their load as being subject to interruption through Duke. Any such nomination shall have an effective date no earlier than June 1, 2012. For any customer electing to nominate load subject to interruption through Duke, such load: (1) must be registered with PJM and abide by all of PJM's requirements for the demand response (DR) program chosen by the customer, by March 1 of the upcoming PJM planning year; (2) must not have been previously sold or committed to PJM or another party as a DR resource for the same planning year; and, (3) will have Duke serve as its curtailment service provider. The customer acknowledges that Duke may use such interruptible load in Duke's FRR plan and any

encourage competition in Duke's territory, which will benefit all consumers (RESA Ex. 1 at 9; Constellation Ex. 1. at 6).

Staff witness Turkenton explains some of the benefits customers will see under the proposed ESP, including increased development of competition in Duke's service territory, a discount for PIPP customers, and incentives to support economic development and energy efficiency initiatives. Moreover, Ms. Turkenton explains that the Duke auction process is similar to the one that has been successfully utilized in the FirstEnergy service territory to fulfill market-based SSO obligations. (Staff Ex. 1 at 3-7.)

As noted by the witnesses supporting the stipulation, it appears that, as a whole, the provisions of the stipulation provide benefits to all stakeholders. Not only does the stipulation, when compared to the initial application filed in these cases, provide a more straightforward approach for Duke's provision of SSO service, but the three-year, five-month term of the ESP set forth in the stipulation is more judicious. The stipulation provides safeguards and promotes an appropriate level of review during the term of the ESP, including audits and true-ups of Duke's riders, as well as audits of Duke's energy sales, transfer of generation assets, and Duke's compliance with Section 4928.17, Revised Code, and Rule 4901:1-37, O.A.C., to ensure that no subsidiary or affiliate of Duke that owns competitive generation assets has any competitive advantage due to its affiliation with Duke. Furthermore, the Commission finds that the stipulation promotes collaborative discussions amongst stakeholders for topics including, the CBP, the residential SREC purchase program, combined heat and power, a pilot energy efficiency project, energy efficiency products and programs for small- and mid-sized businesses, confirmation of the charges from PJM, and the deployment of an EV ecosystem that works in tandem with a competitive retail market.

Moreover, the Commission acknowledges that the stipulation contains provisions which promote economic development and energy efficiency as evidenced by Duke's commitment to provide support to industrial and commercial enterprises throughout the company's service territory. Duke's support for low-income ratepayers is also demonstrated in the stipulation through Duke's commitment to low-income, weatherization programs and the discounts for PIPP customers.

Accordingly, based upon the evidence on the record in these proceedings, the Commission finds that the stipulation, as a package, benefits ratepayers and promotes the public interest.

D. Generating Assets and Corporate Separation, Section 4928.17, Revised Code

The stipulation provides that the Commission's approval of the stipulation will constitute approval of Duke's Third Amended CSP and full legal corporate separation, as contemplated by Section 4928.17(A), Revised Code, such that the transmission and distribution assets of Duke will continue to be held by the distribution utility and all of Duke's generation assets will be transferred to an affiliate (Jt. Ex. 1 at 26).

Section 4928.17, Revised Code, provides that an electric utility that, either directly or through an affiliate, engages in the business of supplying a noncompetitive retail electric service and a CRES or a product or service other than retail electric service must operate under a CSP. Pursuant to the statute, the CSP must be consistent with the policy of the state set forth in Section 4928.02, Revised Code, and achieve all of the following:

(1) provide, at minimum, for the provision of the CRES or the nonelectric product or service through a fully-separated affiliate of the utility, and include separate accounting requirements, the code of conduct, and such other measures as are necessary to effectuate the state policy;

(2) satisfy the public interest in preventing unfair competitive advantage and preventing the abuse of market power; and

(3) be sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the CRES or nonelectric product or service, without compensation based upon fully-loaded embedded costs charged to the affiliate; and ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference.

Chapter 4901:1-37, O.A.C., sets forth the requirements pertaining to corporate separation for electric utilities. Specifically, this chapter is applicable to the activities of the utility and its transactions or other arrangements with its affiliates, any shared services of the utility with any affiliates, and the sale or transfer of generating assets.

Pursuant to the stipulation, the parties support Duke's request for waiver of the requirements set forth in Rule 4901:1-37-09(B) through (D), O.A.C., relating to the sale or transfer of generating assets (Jt. Ex. 1 at 26). Specifically, the provisions in Rule 4901:1-37-

09(B) through (D), O.A.C., set forth the filing requirements and the procedures to be followed for an application requesting approval of the sale or transfer of generating assets.

Upon review of the stipulation, the Commission believes that the provisions contained therein provide the necessary safeguards to ensure that the statutory mandates pertaining to Duke's sale of generation assets and corporate separation are adhered to and the policy of the state is carried out. Therefore, we conclude that, to the extent necessary, Rule 4901:1-37-09(B) through (D), O.A.C., should be waived and Duke should be authorized to transfer title to all of its generation assets out of Duke, in accordance with the provisions of the stipulation. Furthermore, we conclude that Duke's full legal corporate separation and Third Amended CSP, as provided in the stipulation, are in compliance with Section 4928.17, Revised Code, and the rules contained in Chapter 4901:1-37, O.A.C., and should be approved.

E. Is the proposed ESP more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code?

The Commission must also consider the applicable statutory test for approval of an ESP. Section 4928.143(C)(1), Revised Code, provides that the Commission should approve, or modify and approve, an application for an ESP if it finds that the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO pursuant to Section 4928.142, Revised Code.

Staff witness Turkenton believes that the ESP provides a better framework than an MRO. According to Ms. Turkenton, the ESP should be judged as a comprehensive plan that promotes fully competitive markets, promotes energy efficiency, provides rate certainty and stability, promotes economic development by making specific tangible commitments to vital industrial and commercial enterprises, and supports low-income ratepayers. (Staff Ex. 1 at 8.)

In support of the ESP, Duke witness Janson explains that, under the ESP, Duke residential SSO customers will see an approximate 11 percent reduction from their current rates. In addition, customers will realize financial benefits that are not contemplated under MRO provisions, including: $1 million to support economic development efforts in Duke's service territory in 2012; $1.35 million for low-income weatherization programs; and $350,000 for a fuel fund administered by OPAE. These programs may be renewed for 2013 and 2014. (Duke Ex. 21 at 10-11.)

ORDERED, That a copy of this opinion and order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Paul A. Centolella

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

CMTP/KLS/vrm

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Betty McCauley

Betty McCauley
Secretary