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DE-OHIO EXHIBIT _____

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DIRECT TESTIMONY OF

JAMES B. GAINER

ON BEHALF OF

DUKE ENERGY OHIO

July 31, 2008

234366

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I. INTRODUCTION AND PURPOSE

1 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2 A. My name is James B. Gainer. My business address is 526 South Church Street,
3 Charlotte, North Carolina, 28202.

4 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

5 A. I am employed by Duke Energy Business Services, Inc., an affiliate of Duke
6 Energy, Inc. (Duke Energy), as Vice President, Federal Regulatory Policy, Duke
7 Energy Business Services, Inc., which is the service company affiliated with Duke
8 Energy Ohio (DE-Ohio or Company).

9 **Q. PLEASE SUMMARIZE YOUR EDUCATION AND PROFESSIONAL**
10 **QUALIFICATIONS.**

11 A. I earned a bachelor of arts degree in English and Political Science from Bowling
12 Green State University in 1982 and a juris doctorate degree from the University of
13 Dayton School of Law in 1985.

14 **Q. PLEASE SUMMARIZE YOUR WORK EXPERIENCE.**

15 A. I was employed in state government from 1985 to 1995 and then accepted a
16 position with Cinergy Services, Inc.

17 **Q. PLEASE DESCRIBE THE POSITIONS YOU HAVE HELD SINCE**
18 **JOINING CINERGY?**

19 A. I have held several positions of increasing responsibility in the Cinergy Legal
20 Department, including Vice President and General Counsel of Cinergy Regulated
21 Businesses and Vice President, Regulatory and Legislative Strategy. I am
22 currently Vice President, Federal Regulatory Policy, for Duke Energy Business

1 Services.

2 **Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE PUBLIC**
3 **UTILITIES COMMISSION OF OHIO?**

4 A. No.

5 **Q. PLEASE DESCRIBE HOW YOUR WORK RESPONSIBILITIES HAVE**
6 **RELATED TO DE-OHIO'S MARKET-BASED STANDARD SERVICE**
7 **OFFER.**

8 A. In my capacity as an attorney representing DE-Ohio, then the Cincinnati Gas &
9 Electric Company (CG&E), I was involved in the legislative process that resulted
10 in Senate Bill 3 in 1999. I was also an attorney representing DE-Ohio in its
11 transition plan case, Case No. 99-1658-EL-ETP. Later, I was an attorney and
12 Vice President, Regulatory and Legislative Strategy and participated in the
13 litigation and settlement of DE-Ohio's rate stabilization plan (RSP) market-based
14 standard service offer (MBSSO), Case No. 03-93-EL-ATA. Throughout these
15 activities I have remained familiar with the potential disposition of DE-Ohio's
16 generating assets and its corporate separation plan.

17 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS**
18 **PROCEEDING?**

19 A. My testimony consists of four parts. Part one of my testimony supports the
20 transfer of DE-Ohio's generating assets to affiliate(s) owned and operated by
21 Duke Energy Corporation (Genco). Part two of my testimony sponsors and
22 supports the proposed wholesale power contract between DE-Ohio and the Genco
23 necessary to maintain a sufficient capacity and energy supply for DE-Ohio's load

1 from assets previously owned by DE-Ohio and used and useful in DE-Ohio's
2 certified territory prior to 2001. Part three of my testimony supports DE-Ohio's
3 corporate separation plan, which remains unchanged and consistent with the
4 Commission's prior orders. Finally, I sponsor and support DE-Ohio's proposal to
5 permit Governmental Aggregators to avoid "standby service."

6 **II. GENERATING ASSET TRANSFER TO GENCO**

7 **Q. PLEASE DESCRIBE THE RELATIONSHIP OF DE-OHIO'S**
8 **GENERATING ASSETS TO ITS CERTIFIED TERRITORY?**

9 A. DE-Ohio's current portfolio of generating assets consists of two different and
10 distinct types of assets. The first category of generating assets were, prior to
11 January 1, 2001, regulated assets used and useful in the provision of retail electric
12 service in DE-Ohio's certified territory. On January 1, 2001, this set of generating
13 assets became merchant plants. Subsequently, in 2005, DE-Ohio agreed to
14 dedicate the capacity of these plants to serve DE-Ohio's load in its certified
15 territory for the duration of the RSP approved by the Commission in Case No. 03-
16 93-EL-ATA. The second category of generating assets are those that have never
17 been regulated or used and useful in DE-Ohio's certified territory and are not
18 dedicated to serve DE-Ohio's load in any way. This second set of generating
19 assets consists of the gas-fired plants acquired by DE-Ohio as a result of the
20 merger between Cinergy and Duke Energy in 2006 and the OVEC coal plants that
21 were never jurisdictional to Ohio and the costs of which were not recovered in
22 DE-Ohio's retail rates. These generating assets have always been merchant
23 plants.

1 **Q. WHAT DOES DE-OHIO PROPOSE RELATIVE TO ITS GENERATING**
2 **ASSETS?**

3 A. DE-Ohio proposes to transfer its generating assets to Genco.

4 **Q. IS THIS THE FIRST TIME DE-OHIO HAS SOUGHT TO TRANSFER ITS**
5 **ASSETS TO GENCO?**

6 A. No. DE-Ohio sought approval from the Commission to transfer its generating
7 assets to an Exempt Wholesale Generator (EWG) as part of its transition plan in
8 Case No. 99-1658-EL-ETP. At the same time it sought approval from FERC to
9 transfer its assets. Both the Commission and FERC approved the transfer, and
10 under its transition plan DE-Ohio was obligated to transfer its generating assets to
11 an EWG by December 31, 2004. DE-Ohio's obligation to transfer its generating
12 assets is set forth in its Corporate Separation Plan, also approved by the
13 Commission in Case No. 99-1658-EL-ETP.

14 **Q. WHY DID DE-OHIO NOT TRANSFER ITS GENERATING ASSETS TO**
15 **AN EWG BY DECEMBER 31, 2008?**

16 A. The Commission asked DE-Ohio to voluntarily enter into an RSP to maintain
17 stable prices for consumers, permit the development of the competitive retail
18 electric service market, and maintain a reasonable price for DE-Ohio. In order to
19 maintain a stable price without the ability to respond to changes in market prices,
20 DE-Ohio felt it was prudent to maintain ownership of capacity it could dedicate to
21 serve load in its certified territory during the RSP period. DE-Ohio sought a
22 waiver from the Commission to avoid transfer of its assets to an EWG until
23 December 31, 2008. The Commission granted the waiver from DE-Ohio's

1 approved Corporate Separation Plan in Case No. 03-93-EL-ATA.

2 **Q. DE-OHIO FORMERLY SOUGHT TO TRANSFER ITS PLANTS TO AN**
3 **EWG AND NOW SEEKS APPROVAL TO TRANSFER ITS PLANTS TO**
4 **GENCO. IS THERE ANY DIFFERENCE BETWEEN THE TWO TYPES**
5 **OF ENTITIES?**

6 A. No, in each case, the term refers to nonregulated affiliates of DE-Ohio. With the
7 Energy Policy Act of 2005's (EPA 2005) repeal of the Public Utility Holding
8 Company Act, the Federal Energy Regulatory Commission (FERC) initiated
9 docket RM05-32 to establish the "PUHCA 2005" regulations and abolished
10 EWGs. Under EPA 2005, holding companies that solely owned EWGs, foreign
11 utility companies and qualifying facilities were exempted from the books and
12 records provision, so FERC eliminated EWG regulations, making it impossible to
13 create new EWGs, and thus effectively narrowing the scope of the statutory
14 exemption.

15 **Q. WHY DOES DE-OHIO BELIEVE THAT IT IS REASONABLE TO**
16 **TRANSFER ITS GENERATING ASSETS TO GENCO EFFECTIVE**
17 **JANUARY 1, 2009?**

18 A. The separation of the assets will enhance the competitive retail electric service
19 market by placing the generation function on a precisely level playing field with
20 other wholesale and retail competitive generation providers.

21 **Q. HAS DE-OHIO TAKEN ACTION TO TRANSFER ITS ASSETS TO**
22 **GENCO?**

23 A. Yes. Subsequent to the passage of Amended Substitute Senate Bill 221 (S.B.

221), DE-Ohio applied to the FERC for authority to transfer its generating assets to Genco. DE-Ohio has publicly stated that regardless of FERC's approval, the transfer is conditioned upon approval from the Commission. DE-Ohio has also prepared a term sheet between DE-Ohio and the Genco for the capacity of the generating assets. The term sheet was filed with DE-Ohio's ESP Application at Part F. Finally, DE-Ohio is seeking the Commission's approval to transfer its generating assets to the Genco as part of this ESP Application.

III. TERM SHEET BETWEEN DE-OHIO AND THE GENCO

Q. PLEASE DESCRIBE THE TERM SHEET BETWEEN DE-OHIO AND THE GENCO?

A. The term sheet commits a first call on the capacity of the Genco's assets that were previously used and useful in DE Ohio's certified territory to retail load in DE Ohio's certified territory for the term of the ESP and for the blended component of an MRO for the next five years, in the event that DE-Ohio and/or the Commission do not extend the ESP.

Q. IF THE COMMISSION APPROVES THE TRANSFER OF ASSETS, HOW DOES DE-OHIO PROPOSE TO PRICE CAPACITY?

A. DE-Ohio proposes that the Genco would price capacity to DE-Ohio per the same price terms as negotiated in each ESP. In the event that DE-Ohio and/or the Commission do not extend the ESP, then the contracts with Genco would provide for pricing to DE-Ohio at the same pricing and for the same volume of power covered by the blended component of an MRO for a five-year period. The Genco would contractually commit to make the necessary information available to the

1 Commission to audit and compute the ESP price.

2 **IV. CORPORATE SEPARATION**

3 **Q. PLEASE DESCRIBE DE-OHIO'S CURRENT CORPORATE**
4 **SEPARATION PLAN.**

5 A. DE-Ohio's Corporate Separation Plan filed in this docket at Part F. It includes
6 two major components. First, DE-Ohio may transact business with its affiliates
7 pursuant to service agreements. Second, DE-Ohio must transfer its assets to an
8 EWG. As originally approved, DE-Ohio was required to transfer its assets by
9 December 31, 2004. In Case No. 03-93-EL-ATA, DE-Ohio received a waiver to
10 avoid transfer of its assets until December 31, 2008. Later in the same case the
11 Commission ordered DE-Ohio not to transfer its assets to an EWG for the
12 duration of the RSP period. DE-Ohio so amended its Corporate Separation Plan
13 which now permits it to transfer its assets effective January 1, 2009, and it is
14 being filed with this Application at Part F. DE-Ohio has publicly stated, however,
15 that it will not transfer its assets without Commission approval.

16 **V. GOVERNMENTAL AGGREGATION**

17 **Q. WHAT IS THE SUBSTANCE OF THE GOVERNMENTAL**
18 **AGGREGATION PROPOSAL MADE BY DE-OHIO AS PART OF ITS**
19 **ESP APPLICATION?**

20 A. Governmental Aggregators have the ability to give notice to the Commission to
21 avoid "standby service" charges assessed by DE-Ohio. Traditionally "standby
22 charges" regarding electric service, refer to the provision of backup service to
23 entities, like many municipalities, that own small generators for emergency supply

1 to municipal facilities. In this instance, however, DE-Ohio understands “standby
2 service” to mean that portion of DE-Ohio’s POLR obligation that requires DE-
3 Ohio to maintain an offer of firm generation service to all customers. DE-Ohio
4 proposes to permit governmental aggregators to avoid POLR charges associated
5 with that service.

6 **Q. WHAT IS THE POLR SERVICE?**

7 A. POLR service is made up of two components. The first component is referred to
8 as default service. DE-Ohio is required to accept customer load from CRES
9 providers, including governmental aggregators that default on their service
10 obligations. There is no authority permitting governmental aggregators, or any
11 CRES provider, to avoid charges assessed for default service. The second
12 component is now being referred to as “standby service.” As previously discussed
13 “standby service” represents DE-Ohio’s obligation to standby with an offer of
14 firm generation service for all customers so that customers may return to DE-Ohio
15 standard service for any reason. Reasons may include a voluntary return, the end
16 of a contract with a CRES provider, or a wrong address in a governmental
17 aggregation group. To provide POLR service, DE-Ohio must maintain sufficient
18 capacity to accept default load and standby load.

19 **Q. WHAT IS THE VALUE TO GOVERNMENTAL AGGREGATORS OF**
20 **AVOIDING “STANDBY SERVICE?”**

21 A. DE-Ohio proposes to grant a credit to load served by a governmental aggregator
22 of 5% of the Commission-approved POLR charge if a governmental aggregator
23 chooses to avoid “standby service.” The credit encourages the formation of

1 governmental aggregation by giving it a competitive advantage over other CRES
2 providers through a subsidy provided by DE-Ohio. DE-Ohio does not seek cost
3 recovery for the "standby service" credit from other customers.

4 **Q. WHY DID DE-OHIO CHOOSE A 5% POLR CREDIT AS THE VALUE**
5 **TO GOVERNMENTAL AGGREGATORS THAT CHOOSE TO AVOID**
6 **"STANDBY SERVICE?"**

7 A. DE-Ohio must maintain the same amount of capacity to provide default service
8 and "standby service." Therefore, there would be no benefit to a governmental
9 aggregator that chose to avoid "standby service" because it costs DE-Ohio the
10 same amount to provide default service by itself as it does to provide default
11 service and "standby service" together. To maintain a benefit to governmental
12 aggregators DE-Ohio decided to offer a POLR price credit. Because DE-Ohio
13 provides the subsidy for the credit without cost recovery there is no harm to
14 consumers and providing this credit allows governmental aggregators to avoid
15 part of DE-Ohio's POLR charge.

16 **Q. WHAT ARE THE BENEFITS AND DETRIMENTS OF DE-OHIO'S**
17 **PROPOSAL?**

18 A. The detriments are that it is anticompetitive because non-governmental aggregator
19 CRES providers do not get the same credit as governmental aggregators and are at
20 a competitive disadvantage. And, consumers may be placed involuntarily in a
21 governmental aggregation group that would not otherwise exist, forcing such
22 consumer to opt-out rather than opt-in to a voluntary contract with a CRES
23 provider. The benefits are that governmental aggregators may provide a

1 competitive option at a lower price and may hire CRES providers to provide
2 service on their behalf. Consumers may receive competitive options beside DE-
3 Ohio's ESP and offers from CRES providers.

4 **Q. WHAT OTHER APPROVAL DOES DE-OHIO SEEK FROM THE**
5 **COMMISSION FOR GOVERNMENTAL AGGREGATORS AS PART OF**
6 **ITS ESP?**

7 A. DE-Ohio also seeks a ruling from the Commission that, during the term of the
8 ESP, all of DE-Ohio's unavoidable charges shall remain unavoidable for
9 governmental aggregators except for the 5% discount noted above.

10 **VI. CONCLUSION**

11 **Q. DOES THIS CONCLUDE YOUR PRE-FILED DIRECT TESTIMONY?**

12 A. Yes.