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PUCO

April 25, 2008

Dr. Alan Schriber, Chairman
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215

Re PUCO Case Nos. 05-732-EL-MER, 05-733-EL-AAM,
05-974-GA-AAM, 03-93-EL-ATA, 03-2079-EL-AAM,
03-2081-EL-AAM, 03-2080-EL-ATA and FERC Docket No.
EC08-___-000

Dear Dr. Schriber:

I write this letter on behalf of the Industrial Energy Users-Ohio ("IEU-Ohio")¹ to urge the Public Utilities Commission of Ohio ("Commission") to recognize and forcefully address the clear and present danger presented by the application which Cinergy Corp. ("Cinergy"), Duke Energy Ohio, Inc. ("DEO"), Cinergy Power Investments, Inc. ("CPI") and various as-yet unformed affiliates (collectively referred to as the "Applicants") filed yesterday with the Federal Energy Regulatory Commission ("FERC"). Despite the public claims to the contrary, the structure and timing of this FERC application must be regarded as an attempt to bypass existing PUCO orders and the legislation that has been recently passed by Ohio's General Assembly. The Commission must respond to this FERC application with a forceful protest submitted to FERC. As importantly, the Commission must apply its full authority in favor of immediate action to

¹ IEU-Ohio is an organization of commercial and industrial customers joined together by a common interest in issues that affect the price and availability of energy within Ohio. IEU-Ohio has previously and unsuccessfully protested utility proposals to transfer generating assets to affiliates, warning that such transfers would likely be used to disadvantage Ohio electric consumers. While IEU-Ohio has relatively few members served by DEO, it believes that the application which the Applicants have filed at FERC may create a monkey-see-monkey-do dynamic that will more significantly threaten Ohio. Through the hard lessons learned from prior IEU-Ohio efforts to obtain customer-focused decisions from FERC, it would be imprudent for the Commission to assume that FERC has any regard for the interests of Ohio's retail electric customers. IEU-Ohio is accustomed to FERC slamming its regulatory door on IEU-Ohio's efforts to protect the interests of retail customers from FERC's peculiar notions about how to use its authority under the Federal Power Act. Forceful action by the Commission may make it harder for FERC to continue its stunning disregard for the effects of its faith-based electric markets on retail electric customers in Ohio and elsewhere.

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revoke, reopen and revisit various forms of authority that DEO or its affiliates have received from the Commission in the proceedings referenced above. Below, I describe some of the actions that the Commission should take and take promptly.

In the FERC application, the Applicants assert that the proposed transfer of generating assets is in the public interest, will have no impact on regulation and will have no impact on prices. At page 13 of the application, the Applicants support these contentions in part by stating:

Indeed, according to the Ohio Supreme Court, '[i]t is well settled that the generation component of electric service is not subject to [PUCO] regulation.' (citation omitted) Thus, the transaction will not have any effect on rates for retail or wholesale power sales.

But the quote above describes a legal view that is very different than the position which DEO recently expressed in its March 21, 2008 motion to dismiss filed in *Anthony Williams et al. v. Duke Energy International, Inc.*, Case No. 1:08-CV-00046 (U.S. District Court, Southern District of Ohio, Western Division at Cincinnati) (hereinafter cited as *Williams v. Duke*). At page 13 of this motion to dismiss, Duke Energy Inc. states:

Pursuant to this comprehensive regulatory system, public utilities such as DEO-Ohio *must* charge competitive generation rates approved by the PUCO. Ohio Rev. Code Ann. § 4928.14. Rates are established pursuant to Ohio Administrative Code Chapter 4901:1-35. Ohio Admin. Code Ann. Ch. 4901:1-35 (2008). Thus, a utility may not amend its competitive generation rates without the PUCO's approval, Ohio Rev. Code Ann. § 4909.14, and while a rate is in effect, a public utility must charge its customers in accordance with the PUCO-approved competitive generation rate. Further, the PUCO may only approve competitive generation rates that are just and reasonable. *Id.* § 4909.18.

The motion to dismiss repeats the positions taken in the above-quoted language beginning at page 27. I trust that DEO has and will provide the Commission with credible reasoning that will permit the Commission, FERC and the Federal District Court to reconcile the sharply different legal positions that DEO and its affiliates appear to have from case to case. The Commission should provide DEO and its affiliates with a prompt opportunity to reconcile these sharply different legal views through an open and transparent process.

As the Commission knows, DEO is presently subject to a Commission order to not transfer generating assets and a corporate separation plan that

requires that such generating assets be retained.² *In Re Application of the Cincinnati Gas & Electric Company*, Case Nos. 03-93-EL-ATA *et al.*, Order on Remand at 40 (October 24, 2007)³. The Commission must use its authority under Section 4905.60, Revised Code, to address the scenario presented by the FERC application which indicates that DEO is about to fail to obey an existing Commission order.

As the Commission also knows, the subject and potential consequences of a transfer of generating assets was considered in the Commission's merger-related proceedings that brought DEO into existence. The Commission's disposition of the issues in those merger-related proceedings clearly contemplated that DEO would retain its generating assets through December 31, 2008 and that the Commission would consider what and how this condition would change, if at all, in a subsequent phase of the merger proceeding. See *In Re Application of Cinergy Corp.*, Case Nos. 05-732-EL-MER *et al.*, Entry on Rehearing at 11-12 (February 6, 2006). If the Applicants are seriously embarked on a regulatory and business plan that is different than the plan embedded in the merger-related proceedings and doing so to "unlock the value of the generating assets", then the Applicants are seeking to extract benefits from the merger authorized by the Commission and to do so in a way that may unfairly transfer wealth to the Applicants' shareholders. Given the potential significance of the Applicants' FERC application and the Commission's prior merger-related determinations, the Commission must reopen the merger-related proceedings (as it said it would) to make sure that DEO's Ohio customers are not harmed by a potential bait-and-switch scheme. As part of this reopening, the Commission should direct DEO and its affiliates to demonstrate the amount of value that the Applicants propose to unlock through the generating asset transfer and to show cause why this value should not be fairly allocated to DEO's Ohio customers.

The Commission reaction to the Applicants' FERC application should also proactively sensitize DEO to the risk that it is accepting as a result of joining its corporate family in the FERC application. The relief requested by the Applicants will leave DEO exposed to the risk of a difference between the wholesale prices it must pay to satisfy its provider of last resort obligation and the retail prices that may be approved by the Commission. Clearly, DEO recognized itself that this transfer was not prudent when it requested and received the Commission's relief from any transfer requirement that may have been established previously pursuant to a Commission order. In current circumstances, these generating

² This was a contested issue with the Office of Consumers' Counsel, Ohio Marketers Group and other stakeholders urging the Commission to require generation divestiture.

³ The Commission granted rehearing regarding this requirement at DEO's request and the matter is still before the Commission on rehearing. *In Re Application of the Cincinnati Gas & Electric Company*, Case Nos. 03-93-EL-ATA *et al.*, Entry on Rehearing at 5 (December 12, 2007). Pending the Commission's determination on rehearing, the Commission's Order on Remand is controlling.

assets provide DEO with a physical hedge against the business and financial risks that are associated with pricing decisions made by FERC and those made by the Commission. As part of the Commission's response to the Applicants' FERC application, the Commission should initiate an open and transparent proceeding that is commenced with a requirement that DEO show good cause why the Commission should not declare DEO's support of the generating asset transfer to be imprudent *per se*.

Respectfully submitted,



Samuel C. Randazzo

cc: Governor Ted Strickland
Jon Husted, Speaker of the House
Bill Harris, President of the Senate
Members of the House Public Utilities Committee
Members of the Senate Public Utilities Committee
Dr. Mark Shanahan
Commissioner Ronda Hartman Fergus
Commissioner Valerie A. Lemmie
Commissioner Paul A. Centolella
Commissioner Cheryl Roberto
All parties of record in the cases referenced above