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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review and Adjustment of the Corporate Separation Plan For Duke Energy Ohio, Inc.	)))	Case No. 08-613 -EL-UNC

APPLICATION TO AMEND THE CORPORATE SEPARATION PLAN OF DUKE ENERGY OHIO BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC" or "Applicant") respectfully submits this Application pursuant to Revised Code Section 4928.17(E) for action by the Public Utilities Commission of Ohio ("PUCO" or "Commission") to expressly state in the corporate separation plan of Duke Energy Ohio, Inc. ("Duke" or the "Company") the requirement that Duke cannot sell or transfer its ownership of generating plants unless the Company obtains PUCO approval of the transaction. Duke's corporate separation plan should be amended to recognize, among other matters, the passage of S.B. 221. S.B. 221 enacted significant revisions to Ohio law regarding the regulation of rates for electric generation service in Ohio.

Applicant submits that the recent filing by Duke before the Federal Energy Regulatory Commission ("FERC") that would transfer the ownership of plants currently owned by Duke demonstrates that action to modify Duke's corporate separation plan is reasonable. Duke's corporate separation plan should be amended such that Duke must receive specific, additional authority from the Commission before any generating unit may be sold or transferred to another entity.

In support of this Application, the OCC states the following:

PRELIMINARIES

1. The OCC was a party to the Electric Transition Plan Cases, Case Nos. 99-1658-EL-ETP, et al. in which Duke's predecessor company, the Cincinnati Gas & Electric Company ("CG&E"), submitted a plan for corporate separation as part of its electric transition plan. CG&E's initial, PUCO-approved corporate separation plan provided that the utility would transfer ownership of its generating plans after 2005.

2. The OCC was also a party to the subsequent Rate Stabilization Plan Cases, Case Nos. 03-93-EL-ATA, et al., that resulted in an extension of the requirement of CG&E/Duke to retain its generating plants through the end of 2008.[1]

3. Duke is engaged in the business of supplying electricity for light, heat or power purposes to consumers within Ohio. As such, Duke is an electric light company pursuant to Section 4905.03(A)(4), Revised Code, a public utility pursuant to Section 4905.02, Revised Code, is required to operate under a Commission-approved corporate separation plan pursuant to Section 4928.17, Revised Code, and is subject to the jurisdiction of the Commission.

4. The Commission has jurisdiction over this case, pursuant to Section 4928.17(D), Revised Code, which states:

> 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.

[1] Rate Stabilization Plan Case (October 24, 2007), Case Nos. 03-93-EL-ATA, et al., Order on Remand at 40. The Order on Remand states that "Duke's corporate separation plan shall be amended to require it to retain its generating asset during the RSP [which expires December 31, 2008]."

S.B. 221, which was signed by Governor Strickland on May 1, 2008 and is effective before the end of 2008, did not change R.C. 4928.17(D) but did make other important changes to the regulation of generation service in Ohio.

5. In part, S.B. 221 changed Section 4928.17(E), Revised Code to state as follows:

> No electric distribution utility shall sell or transfer any generation asset it wholly or partly owns at any time without obtaining prior commission approval.

S.B. 221 changed Section 4928.17(E) to specifically require PUCO approval of plans to sell or transfer ownership in generating plants.

DETAILS

6. On April 23, 2008 (after the General Assembly passed S.B. 221), Duke submitted an application to FERC, Docket EC08-78 ("FERC Application"), for approval of the transfer of all generating assets held by Duke to unidentified affiliates.

7. On April 28, 2008, the Commission released a statement in response to Duke's filing at FERC, stating that the "General Assembly, in passing Substitute Senate Bill 221, has extended this prohibition [against the transfer of generating plants without PUCO approval] into 2009 and beyond" and electric distribution utilities should obtain PUCO approval before they "can sell or transfer generating assets."

8. On May 1, 2008, S.B. 221 was signed by Governor Strickland. The provisions contained in S.B. 221 become Ohio law before the end of 2008.

9. On May 2, 2008, Duke filed a letter in the PUCO docket relating to the development of the Company's standard service offer (03-93-EL-MER, et al.) and its recent merger-related docket (05-732-EL-MER, et al.), as well as in FERC

Docket EC08-78. That letter stated that Duke "will not transfer its generating assets without Commission approval."

10. On May 6, 2008, Duke amended its FERC Application, stating that "Duke Energy Ohio commits that it will not consummate the Transaction without seeking PUCO approval required under law." Duke Amendment to Application at 1. Duke also stated that it did "not waive any legal rights." Id.

11. The Duke filing at FERC has raised concerns that actions outside of Ohio may be taken that could cause debate and/or litigation regarding the right of Duke to transfer ownership of generating plants to other entities after 2008, including affiliates of Duke. The Commission's Protest in FERC Docket EC08-78 filed on May 9, 2008 reflects those concerns, stating that [i]f the FERC were to authorize the transfer of these assets before the end of th[e] [PUCO's] process, it would greatly complicate the efforts of the Ohio Commission to fulfill its duties under the new state statute." PUCO Protest at 3. Complicating matters, Duke has not submitted an application to amend its current PUCO-approved corporate separation plan.

12. The concerns raised by the Duke filings should be directly addressed by the PUCO on the earliest possible date to make clear that Duke may not sell or transfer ownership of any generating assets without first obtaining Commission approval. Duke's corporate separation plan should be amended to directly address the matter of the Company's continued ownership of its generating facilities unless otherwise approved by the PUCO.

WHEREFORE, the OCC respectfully requests that the Commission find that the OCC's Application is reasonable, and that the Commission issue an order that *directs Duke to immediately file an amended corporate separation plan* stating that Duke cannot sell or transfer any generating unit to another entity unless it receives specific, additional authority from the Commission.

The OCC also respectfully requests that the Commission inform FERC in Docket No. EC08-78 that Ohio law regarding the ability of utilities to transfer ownership of generating assets has changed and that the Commission has required the amendment of Duke's corporate separation plan to bar Duke from selling or transferring any generating unit to another entity (including Duke's affiliated companies) unless Duke obtains specific, additional authority from the Commission.

Respectfully submitted,

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