

FILE

15

KRAVITZ, BROWN & DORTCH, LLC

Attorneys at Law

Janet Kravitz
Paula Brown
Michael D. Dortch
Richard R. Parsons

65 East State Street - Suite 200
Columbus, Ohio 43215-4277
614.464.2000
fax 614.464.2002
mdortch@kravitzllc.com

Max Kravitz (1946-2007)

Of Counsel:
William H. Bluth*

*Also Admitted in NY

September 18, 2009

VIA MESSENGER DELIVERY

Ms. Renee Jenkins
Chief, Docketing Division
Public Utilities Commission of Ohio
180 E. Broad Street, 13th Floor
Columbus, Ohio 43215

Re: In The Matter of Duke Energy Ohio, Inc.'s Application to Change Accounting
Methods Case No. 09-620-GE-AAM

Dear Ms. Jenkins:

Enclosed please find an original and ten copies of Duke Energy Ohio, Inc.'s Amended Application to Change Accounting Methods.

Please accept the original and nine copies of this document for filing in the above identified matter. I would appreciate the return of a time stamped copy via the individual who delivers the same to you.

As always, please call me if you have any questions concerning this filing. Thank you.

Very truly yours,



Michael D. Dortch

Enclosures

RECEIVED-DOCKETING DIV
2009 SEP 18 PM 4:24
PUCO

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician SM Date Processed SEP 21 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter Of
Duke Energy Ohio, Inc.'s
Application To Change
Accounting Methods

Case No. 09-620-GE-AAM

RECEIVED-DOCKETING DIV
2009 SEP 18 PM 4:24
PUCO

**DUKE ENERGY OHIO'S AMENDED APPLICATION
TO CHANGE ACCOUNTING METHODS
AND
MOTION FOR EXPEDITED REVIEW**

1. On or about July 23, 2009, Duke Energy Ohio, Inc, (Duke Energy Ohio or the Company) filed its application in the above-styled proceeding, seeking authority, among other things, to hold shareholders harmless from the effects of push down accounting as it pertains to the level of retained earnings that existed prior to and immediately following the merger between Duke Energy Holding Company and Cinergy Corp (Cinergy).
2. Duke Energy Ohio is an integrated electric light company and a natural gas company, and thus a public utility, all as defined within Sections 4905.02 and 4905.03 of the Ohio Revised Code (R.C.)
3. Through this amended application (Amended Application,) Duke Energy Ohio seeks authority, pursuant to R.C. § 4905.13, to establish an account through which it will track dividends declared and paid out of Duke Energy Ohio's stated capital account.
4. Moreover, to the extent any such authority may be deemed necessary, Duke Energy Ohio seeks authority to declare and pay dividends out of Duke Energy Ohio's stated capital account subject to the limitations described within this Amended Application.

5. Duke Energy Ohio respectfully moves for expedited review of this Amended Application so that the Company has access to available funds to meet possible future dividend obligations.
6. This Amended Application is one consequence of so-called "push-down" accounting principles¹ employed in conjunction with the 2006 merger between Duke Energy Holding Company and Cinergy, then the ultimate corporate parent of the Cincinnati Gas & Electric Company n/k/a Duke Energy Ohio.
7. Retained earnings represent the accumulated net income that is available to pay dividends to shareholders. In a given year, the amount of money available to a company, after all expenses, taxes, and interest has been paid, is called net income available for common. With that money, a company can pay dividends to its shareholders. To the extent it pays less than the total net income generated in a year, the remaining dollars are kept by the company in retained earnings. These retained earnings can then be used to fund capital projects or held and paid in the form of dividends in future years.

As a result of the merger and the requirement to 'push down' goodwill to Duke Energy Ohio all of the retained earnings that existed on Duke Energy Ohio's books before consummation of the merger effectively became part of the new common equity balance and re-categorized as paid-in capital.

8. The facts that underlie and support this Amended Application, as developed through a series of cases, are as follows:

¹ "Push-down" accounting may be necessary due to the Application of Financial Accounting Standard (FAS) 141 and SEC Staff Accounting Bulletin (SAB) Nos. 54 and 73.

The Merger Case

- a. In Case No. 05-732-EL-MER (Merger Case), the Public Utilities Commission of Ohio (Commission) approved a merger between Duke Energy Holding Company and Cinergy by Finding and Order (the Order) entered December 21, 2005.
- b. In support of the merger, Duke Energy Ohio submitted the testimony of several witnesses, including those who testified that, upon information and belief, "push-down" accounting would not apply to the merged entities and thus "push-down" accounting would not adversely affect either Duke Energy Ohio's rate payers or its shareholders.
- c. In further support of the merger, Duke Energy Ohio entered into a partial stipulation with a number of parties seeking intervention in that case. Within that stipulation, Duke Energy Ohio made the following commitments, all embodied within Exhibit E to the stipulation:
 9. The payment for Cinergy's stock shall be recorded on New Duke Energy's and Cinergy's books, and shall be excluded from CG&E's books for retail ratemaking purposes.
 10. Any acquisition premium paid by Duke Energy for Cinergy stock shall not be "pushed down" to CG&E for retail ratemaking purposes. CG&E commits that it will not seek a return on or a return of any acquisition premium associated with the merger. CG&E will not adopt "push down accounting" for retail rate making purposes.
 11. No purchase accounting adjustments resulting from the merger will be reflected for CG&E's ratemaking purposes.
 24. CG&E will not declare and pay dividends out of capital or unearned surplus without the prior authorization of the Commission.²

² See *In re Merger of Duke Energy and Cinergy Corp.*, Stipulation filed Dec. 15, 2005 in Case No. 05-732-EL-MER, 05-733-EL-AAM, and 05-974-GA-AAM, at p. 8, §2.16, and Exhibit E, no. 24.

- d. Within its Order, the Commission properly limited the factors it would consider to those described within R.C. 4905.402(B), finding:

The Commission is required to approve the merger if we find that it will promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge.³

- e. The Commission next denied all motions to intervene and, after stating that it had nonetheless considered all submitted comments, the Commission specifically addressed a limited number of issues related to the merger. The issues addressed by this Commission did not include “push-down” accounting.
- f. Finally, the Commission dismissed all issues it found unnecessary to address with the following statement.

With regard to other issues and recommendations raised by other commenters but not addressed in this finding and order, the Commission finds that such issues and recommendations either are unrelated to our determination of whether the transaction proposed in the Application meets the statutory standard or do not warrant adoption as part of these proceedings.⁴

- g. Through an Entry on Rehearing filed February 6, 2006, the Commission later reaffirmed its approval of the merger and again expressly ruled that it was not approving the stipulation:

We determined that nothing in the substance of the stipulation would lead us to modify our findings in these proceedings. In addition, because the stipulation included certain obligations over which the Hamilton County Court of Common Pleas, rather than the Commission, would retain jurisdiction, there was no need for the Commission to approve the partial stipulation.⁵

³ Order, p. 5, ¶13.

⁴ Id., p. 19, ¶21.

⁵ February 6, 2006, Entry on Rehearing, p. 7, ¶13.

The Post Merger Accounting Cases

- h. Shortly after this Commission approved the Cinergy / Duke Energy Holding Company merger, the companies learned that "push-down" accounting principles would in fact be employed and thus that the merger would impact CG&E's balance sheet. As a result, on April 12, 2006, Duke Energy Ohio filed two cases⁶ with this Commission seeking authority to modify its accounting procedures (the Post-Merger Accounting Cases.)
- i. Duke Energy Ohio expressed concern in the Post-Merger Accounting Cases that push down accounting would result in the elimination of certain accounts in which the Company was recording the expense of pensions and other post-retirement employee benefits, and the expense of certain interest rate hedges. Thus, Duke Energy Ohio sought this Commission's authority to create regulatory assets reflecting the balances currently in those accounts.
- j. The Commission approved the creation of the regulatory assets as requested by Duke Energy Ohio, relying in part upon the fact that [a]t Exhibit E of that stipulation, it was agreed in pertinent part "that pushdown accounting would not impact ratemaking" and citing to Exhibit E commitments no. 9, 10, and 11 as quoted above.⁷

⁶ *In the Matter of the Application of The Cincinnati Gas & Electric Company d/b/a/ Duke Energy Ohio for Authority to Modify Current Accounting Procedures in Order to Establish Regulatory Assets for its Electric Distribution Rates Relating to Push-Down Accounting Impacts Arising from the Merger of Duke Energy Corp. and Cinergy Corp.*, Case No.06-572-EL-AAM and *In the Matter of the Application of The Cincinnati Gas & Electric Company d/b/a/ Duke Energy Ohio for Authority to Modify Current Accounting Procedures in Order to Establish Regulatory Assets for its Gas Rates Relating to Push-Down Accounting Impacts Arising from the Merger of Duke Energy Corp. and Cinergy Corp.*, Case No. 06-573-GA-AAM.

⁷ Sept. 13, 2006 Finding and Order, p. 1, ¶2.

- k. As a further result of the imposition of purchase accounting principles, the level of retained earnings that existed prior to the merger became paid-in capital at the consummation of the merger.
- l. At Paragraph 11 of its Application in the Post-Merger Accounting Cases, Duke Energy Ohio noted its concern with the possible impact of push-down accounting on its shareholders, and pointed this out to the Commission as follows:

11. Duke Energy Ohio notes that, under push-down accounting, Duke Energy Ohio's retained earnings would be re-set to zero as of the merger closing. Duke Energy Ohio made a merger commitment that it would not pay dividends out of capital or unearned surplus without the prior authorization of the Commission. **Duke Energy Ohio understands the intent of this merger commitment was to tie Duke Energy Ohio's ability to pay dividends to its historical retained earnings existing prior to the merger, not to retained earnings of zero**, which would result from a push-down accounting adjustment. Duke Energy Ohio therefore will apply this merger commitment to tie its ability to pay dividends to the level of historical retained earnings existing prior the merger if push-down accounting is required, as well as additional future retained earnings.⁸

- m. Duke Energy Ohio notes that while the Industrial Energy Users of Ohio (IEU) moved to intervene in the Post-Merger Accounting Cases, and while the Ohio Consumers' Counsel (OCC) filed comments in that case without seeking to intervene, neither IEU nor OCC even addressed Duke Energy Ohio's comments concerning its "dividend commitment," and as a result neither indicated any opposition to Duke Energy Ohio's stated understanding that the "dividend commitment" was tied to CG&E's pre-merger levels of paid in capital, not to Duke Energy Ohio's post-merger levels of paid-in capital.

⁸ Application, p. 5, ¶11, (emphasis supplied.)

The FERC Accounting Case

- n. A few days after filing the Accounting Cases with this Commission, Duke Energy Ohio also filed a petition⁹ with the Federal Energy Regulatory Commission (FERC) in which it asked that agency to declare that Duke Energy Ohio could in the future make payment of dividends from its post-merger capital accounts without violating section 305(a) of the Federal Power Act.¹⁰
- o. FERC authorized both Duke Energy Ohio and its subsidiary, Duke Energy Kentucky, to pay dividends from their capital accounts in the future, provided the companies' payment of dividends paid from these accounts did not diminish the dollar value of those accounts below pre-merger retained earnings, and also provided that the companies maintain a minimum equity balance equal to 30% of total capital¹¹ before any regulatory adjustments.¹²
- p. FERC cites its own precedent to establish this mandatory minimum equity balance and has routinely included this restriction in response to section 305(a) of the Federal Power Act, which prevents holding companies from issuing excessive dividends based on the securities of their operating companies.¹³ FERC has determined that the 30 percent minimum equity balance restriction is sufficient

⁹ FERC Docket No. EL06-66-000.

¹⁰ 16 U.S.C. §825d(a) provides: It shall be unlawful for any officer or director of any public utility to . . . participate in the paying of any dividends of such public utility from any funds properly included in capital accounts.

¹¹ Order issued May 26, 2006 in Docket No. EL06-66-000, 115 FERC ¶61,250.

¹² In the Company's two prior retail rate cases, 07-589-GA-AIR and 08-709-EL-AIR, the Company made adjustments to remove the impact of purchase accounting and the impact on capital associated with the transfer of assets formerly owned by Duke Energy North America, LLC.

¹³ See Delmarva Power and Light, Docket EL00-52-000, 91 F.E.R.C. P61,043, 2000 FERC LEXIS 800, (April 13, 2000).

insulation to protect utilities from issuing excessive dividends through its holding company.¹⁴

Duke Energy Ohio's Rate Case

q. On June 25, 2008, Duke Energy Ohio filed notice of its intent to file an application for an increase in rates for electric distribution service within its service territory, asking that the test year begin January 1, 2008 and that the date certain be March 31, 2008. Its notice was docketed to open Case No. 08-709-EL-AIR, *et al* (the Rate Case). Duke Energy Ohio subsequently filed its application with the Commission on July 25, 2008.

r. On July 8, 2009, this Commission issued its Opinion and Order in the Rate Case, approving a stipulation filed on March 31, 2009. Among the stipulated terms, the Parties agreed that:

For purposes of any riders that require a rate of return, the calculation of the rate of return shall be made on the basis of Duke's actual adjusted¹⁵ capital structure and a return on equity of 10.63% (which is the midpoint of staff's recommended return on equity.)¹⁶

s. Duke Energy Ohio's actual adjusted capital structure as of the March 31, 2008 date certain selected for its Rate Case consisted of a debt ratio of 41.72% and an equity ratio of 58.28%. Duke Energy Ohio's overall return on rate base, using the capital structure and return on equity approved for riders, equaled 8.89%.

Attached hereto as Exhibit A is schedule D-1A depicting Duke Energy Ohio's

¹⁴ The Company is not requesting that the Commission establish a minimum equity ratio in this proceeding. The Company is merely requesting the Commission permit its shareholders to remain in the same position held prior to the merger and as already approved by FERC and in the other state jurisdictions in which Duke Energy Corp. operates.

¹⁵ The adjustments removed from the equation the impact of purchase accounting, consistent with Duke Energy Ohio's merger commitment, as well as the value certain former Duke Energy North America assets contributed to Duke Energy Ohio.

¹⁶ *In re: In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 08-709-EL-AIR, *et al.* (Opinion and Order) at 8, (July 8, 2009).

adjusted capital structure as of March 31, 2008, as filed in support of the rate application Duke Energy Ohio filed within Case No. 08-709-EL-AIR.

- t. In order to demonstrate that the Company's proposed treatment of pre-merger retained earnings, now currently classified as paid-in capital, as retained earnings, would have a de minimus effect on the Company's debt equity ratio, the Company has provided the attached Exhibit B which presents a hypothetical schedule D-1. Exhibit B depicts the changes in Duke Energy Ohio's capital structure that would result under a hypothetical scenario where 100% of the pre-merger level of retained earnings that was restated as paid-in-capital as a result of "push-down" accounting practices employed in the Merger Case were to immediately be distributed as a dividend. As can be clearly demonstrated, this proposed treatment will have no negative effects whatsoever upon rate payers, because even assuming the entire amount of pre-merger retained earnings were to be declared a dividend and distributed, Duke Energy Ohio's adjusted equity ratio would fall only to 50.53% well within the range of typical equity ratios for financially health utilities. Further, the only circumstances that can result in an adjusted equity ratio of less than 50.53% are (1) if it pays out more dividends in a year than it earns or (2) it issues significant additional debt. The first possibility is unlikely as it is at odds with corporate dividend policy and the second possibility can only occur with Commission approval.
9. Duke Energy Ohio herein seeks authority to declare and pay dividends to its shareholders out of Duke Energy Ohio's stated capital account, subject to the limitations approved by FERC as described within this Amended Application.

10. Duke Energy Ohio also seeks authority, pursuant to R.C. § 4905.13, to establish an account through which it will track dividends declared and paid to its shareholders out of Duke Energy Ohio's stated capital account.
11. Approval of this Amended Application is consistent with all representations made and all commitments assumed by Duke Energy Ohio in both the Merger Case and the Post-Merger Accounting Cases. Further, approval of this Amended Application will have no negative effects whatsoever upon rate payers. Moreover, a distribution of the entire amount at issue based upon the requested authority would result in Duke Energy Ohio's weighted average cost of capital falling, assuming there were no other changes, from 8.89% to 8.56%.
12. Approval of this Amended Application will in no way be inconsistent with the authority granted Duke Energy Ohio in the FERC case. FERC authorized both Duke Energy Ohio and its subsidiary, Duke Energy Kentucky, to pay dividends from their capital accounts in the future, *provided the companies' payment of dividends paid from these accounts did not diminish the dollar value of those accounts below pre-merger retained earnings*. Because disbursement of even the entire amount of restated paid in capital would reduce Duke Energy Ohio's adjusted equity ratio to only 50.53%, FERC's alternative requirement that Duke Energy Ohio maintain a minimum equity balance equal to 30% of total capital would not be implicated.
13. Duke Energy Ohio files its quarterly and annual financial information as part of its Securities and Exchange Commission (SEC) Form 10-Q and Form 10-K which provide a continuing view of the company's financial position during the year. Through the balance sheet included in the SEC documents and certain adjustments as filed in support

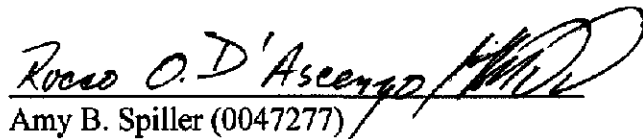
of the rate application Duke Energy Ohio filed within Case No. 08-709-EL-AIR, the Commission will be able to monitor the level of Duke Energy Ohio's adjusted capital structure on a quarterly basis.

14. Duke Energy Ohio respectfully requests expedited treatment of this Amended Application. The transaction will not have any adverse impact on ratepayers and is consistent with the commitments made in Case No. 05-732-EL-MER, *et al.*, to hold both rate payers and shareholders harmless from purchase accounting principles.

15.

WHEREFORE: Duke Energy Ohio respectfully requests that the Commission GRANT it the accounting authority described within this Amended Application.

Respectfully submitted,



Amy B. Spiller (0047277)

Associate General Counsel

Rocco O. D'Ascenzo (0077651)

Senior Counsel

DUKE ENERGY BUSINESS SERVICES, INC.

139 E. Fourth Street, Rm 2500 AT II

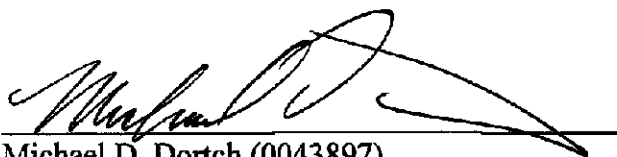
Cincinnati OH 45201

Tel: 614- 221-7551

E-mail: amy.spiller@duke-energy.com

rocco.d'ascenzo@duke-energy.com

Attorneys for DUKE ENERGY-OHIO, INC.



Michael D. Dortch (0043897)

KRAVITZ, BROWN & DORTCH, LLC

65 State Street

Suite 200

Columbus, Ohio 43215

Tel: 614-464-2000

Fax: 614-464-2002

E-mail: mdortch@kravitzllc.com

Attorneys for DUKE ENERGY OHIO, INC.,

DUKE ENERGY OHIO, INC.
CASE NO. 08-709-EL-AIR
RATE OF RETURN SUMMARY
AS OF MARCH 31, 2008

DATE OF CAPITAL STRUCTURE: MARCH 31, 2008
TYPE OF FILING: "X" ORIGINAL UPDATED REVISED
WORK PAPER REFERENCE NO(S): See Below

SCHEDULE D-1A
PAGE 1 OF 1

LINE NO.	CLASS of CAPITAL	REFERENCE	AMOUNT (\$)	% of TOTAL	COST	WEIGHTED COST
1	Long-term debt	D-3A	1,787,741,777	41.72%	6.45%	2.69%
2						
3	Preferred stock	D-4A	0	0.00%	0.00%	0.00%
4						
5	Common equity		<u>2,497,378,912</u>	<u>58.28%</u>	<u>10.83%</u>	<u>6.20%</u>
6						
7	Total capital		<u>4,285,120,689</u>	<u>100.00%</u>		<u>8.89%</u>

Note: Long-term debt and common equity have been adjusted to remove the impact of purchase accounting and to eliminate the impact of the generation assets contributed to DE-Ohio by Duke Energy North America ("DENA").

**SCHEDULE D-1 AS FILED
(WITH STIPULATED ROE)**

DUKE ENERGY OHIO, INC.
CASE NO. 08-709-EL-AJR
RATE OF RETURN SUMMARY
AS OF MARCH 31, 2008

DATE OF CAPITAL STRUCTURE: MARCH 31, 2008
TYPE OF FILING: "X" ORIGINAL UPDATED REVISED
WORK PAPER REFERENCE NO(S): See Below

(HYPOTHETICAL) SCHEDULE D-1A
PAGE 1 OF 1

LINE NO.	CLASS of CAPITAL	REFERENCE	AMOUNT (\$)	% of TOTAL	COST	WEIGHTED COST
1	Long-term debt	D-3A	1,787,741,777	49.47%	6.45%	3.19%
2						
3	Preferred stock	D-4A	0	0.00%	0.00%	0.00%
4						
5	Common equity		1,828,185,133	50.53%	10.63%	5.37%
6						
7	Total capital		<u>3,613,924,910</u>	<u>100.00%</u>		<u>6.56%</u>

Note: Long-term debt and common equity have been adjusted to remove the impact of purchase accounting and to eliminate the impact of the generation assets contributed to DE-Ohio by Duke Energy North America ("DENA").

HYPOTHETICAL SCHEDULE D-1
(ADJUSTED TO ELIMINATE PRE-MERGER
RETAINED EARNINGS FROM EQUITY)