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VIA OVERNIGHT MAIL DELIVERY

May 4, 2012

Docketing Division  
Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, Ohio 43215


Re: Case No. 12-1280-GA-UNC

Dear Docketing Division:

Enclose please find an original and seventeen copies of the *Application of Duke Energy Ohio, Inc. for Administration of the Significantly Excessive Earnings Test* and the *Direct Testimony of Peggy Laub*. Please date-stamp the two extra copies of each of the filings and return in the envelope provided.

Should you have any questions, please contact me at (513) 287-4337.

Very truly yours,

  
Dianne Kuhnell  
Senior Paralegal

Enclosures

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Dianne B. Kuhnelt  
Senior Paralegal

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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke )  
Energy Ohio, Inc., for Administration of )  
the Significantly Excessive Earnings Test ) Case No. 12-1280-EL-UNC  
under Section 4928.143(F), Revised Code, )  
and Rule 4901:1-35-10, Ohio )  
Administrative Code. )

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**APPLICATION OF DUKE ENERGY OHIO, INC., FOR  
ADMINISTRATION OF THE  
SIGNIFICANTLY EXCESSIVE EARNINGS TEST**

Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and hereby applies for the administration of the significantly excessive earnings test (SEET), as required under Section 4928.143(F), Revised Code (R.C.), and Rule 4901:1-35-10, Ohio Administrative Code (O.A.C.). Duke Energy Ohio further submits that the SEET is to be applied to it in a manner consistent with the Stipulation and Recommendation approved by the Public Utilities Commission of Ohio (Commission) in connection with its electric security plan (ESP) filed under Case No. 08-920-EL-SSO, *et al.*<sup>1</sup> Further, the Company recognizes that the interpretation of the governing statute and administrative rule are addressed in the Commission's orders in its generic SEET proceeding (SEET Proceeding).<sup>2</sup> As will be demonstrated herein and through the testimony filed in support of this Application, Duke Energy Ohio did not earned significantly excessive earnings in 2011.

<sup>1</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, *et al.*, Opinion and Order (February 11, 2009) and Stipulation and Recommendation (October 24, 201108).

<sup>2</sup> *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, *et al.*, Finding and Order (June 30, 2010) and Entry on Rehearing (August 25, 2010).

## **REQUIREMENT FOR A SIGNIFICANTLY EXCESSIVE EARNINGS TEST**

Pursuant to R. C. 4928.143(F), the Commission must determine, on an annual basis, whether the earnings of an electric distribution utility operating under an ESP are “significantly excessive.” Insofar as it concerns the administration of this test, the burden is on the electric distribution utility to prove that such significantly excessive earnings did not occur.<sup>3</sup>

The applicable statute provides, in relevant part, that the test is to consider whether adjustments under an ESP “resulted in excessive earnings, as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk.”<sup>4</sup> As the statute does not define “significantly in excess,” Duke Energy Ohio expressly addressed that term, and its application to the Company, in the course of approval of its first ESP. Specifically, Duke Energy Ohio – and all other parties to the ESP proceeding – agreed that the SEET would be administered as followed:

The Parties agree that beginning in 2010, by May 15 of each year covered by this Stipulation, the Commission will implement the significantly excessive earnings test as follows:

[Duke Energy Ohio’s] return on ending common equity will be computed using [Duke Energy Ohio’s] prior year publicly reported FERC Form 1 financial statements, including off-system sales, subject only to the following specific adjustments:

- Net Income
  - Eliminate all depreciation and amortization expense related to the purchase accounting recorded pursuant to the Duke Energy/Cinergy merger,
  - Eliminate all impacts of refunds to customers pursuant to this paragraph,
  - Eliminate all impacts of mark-to-market accounting,

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<sup>3</sup> R.C. 4928.143(F).

<sup>4</sup> Id.

- Eliminate all impacts of material, non-recurring gains/losses, including, but not limited to, the sale or disposition of assets.
- Common Equity
  - Eliminate the acquisition premium recorded to equity pursuant to the Duke Energy/Cinergy merger.

Should the actual annual return on ending common equity for each review year, as adjusted pursuant to this paragraph, not exceed 15%, [Duke Energy Ohio's] return on common equity shall be deemed to not be significantly in excess of the return on common equity that was earning during the same period by publicly traded companies that face comparable business and financial risks.<sup>5</sup>

Subsequent to the approval of Stipulation and Recommendation concerning Duke Energy Ohio's ESP, this Commission implemented rules under Chapter 4901:1-35, O.A.C. In general, these rules set forth the filing requirements for an application for a standard service offer, whether an ESP or a market rate option. However, the chapter also includes Rule 4901:1-35-10, which requires an annual filing to commence the SEET review, with process and timeframes to be established on a case-by-case basis. That rule also requires the applicant to include, in its application, the information set forth in Rule 4901:1-35-03(C)(10)(a), O.A.C. Specifically, this latter rule provides as follows:

a) For the annual review pursuant to division (F) of section 4928.143 of the Revised Code, the electric utility shall provide testimony and analysis demonstrating the return on equity that was earned during the year and the returns on equity earned during the same period by publicly traded companies that face comparable business and financial risks as the electric utility. In addition, the electric utility shall provide the following information:

(i) The federal energy regulatory commission form 1 (FERC form 1) in its entirety for the annual period under review. The electric utility may seek protection of any confidential or proprietary data if necessary. If the FERC form 1 is not available, the electric utility shall provide balance sheet and income statement information of at least the level of detail as required by FERC form 1.

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<sup>5</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, et al., Stipulation and Recommendation, pg. 36, Para. 28 (October 28, 2008).

- (ii) The latest securities and exchange commission form 10-K in its entirety. The electric utility may seek protection of any confidential or proprietary data if necessary.
- (iii) Capital budget requirements for future committed investments in Ohio for each annual period remaining in the ESP.<sup>6</sup>

This rule was analyzed in detail in the SEET Proceeding, which directed utilities as to the application of the statute and the rule.

By virtue of the specific SEET methodology incorporated into and agreed to as an express part of Duke Energy Ohio's Stipulation and Recommendation and the SEET Proceeding, the Company states that it need not submit testimony comparing its return on equity to the returns on equity of other publicly traded companies. The issue of what level of returns on equity might be obtained by other publicly traded companies facing comparable risks was already conclusively determined in the Company's ESP proceeding. As set forth in the ESP Stipulation, provided Duke Energy Ohio's return on equity does not exceed 15%, its earnings are found not to be significantly excessive as compared to other publicly traded companies facing comparable risks.

The Direct Testimony of Peggy A. Laub, filed contemporaneously herewith, demonstrates that Duke Energy Ohio's return on common equity for 2011 did not exceed 15%. Accordingly, the Company's earnings were not significantly excessive as compared to other publicly traded companies facing similar business and financial risks. Duke Energy Ohio thus addresses – and satisfies – the requirement of subparagraph (a) of Rule 4901:1-35-03(C)(10), O.A.C.

The testimony of Company witness Laub also addresses other issues required through the Commission's orders in the SEET Proceeding. Specifically, she discusses (1) that Duke Energy

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<sup>6</sup> Rule 4901:1-35-03(C)(10)(a), O.A.C.

Ohio included off-system sales in its SEET calculation; (2) that the Company excluded all earnings or allocable equity associated with its gas operations; (3) the Company's earned return on average electric common equity, both including and excluding ESP-related deferrals; and, (4) the "certain factors" specified by the Commission.

As required under subparagraphs (a)(i)-(iii) of Rule 4901:1-35-03(C)(10), O.A.C., Duke Energy Ohio submits the following:

1. FERC Form 1 for 2010 (electronically available at <http://www.duke-energy.com/pdfs/2010-3Q-Duke-Energy-Ohio-Form-3Q.pdf>); and,
2. Form 10-K (electronically available at [http://www.duke-energy.com/pdfs/DukeEnergy\\_2011\\_10k.pdf](http://www.duke-energy.com/pdfs/DukeEnergy_2011_10k.pdf))

The ESP at issue and under which the Company's earnings will be renewed expired on December 31, 2011. As such, there are no capital budget requirements for future electric-committed investments under the expired ESP. Through these submissions, Duke Energy Ohio confirms that it did not earn significantly excessive earnings during 2011, the third and final year of its ESP approved under Case No. 08-920-EL-SSO, *et al.*

## **CONCLUSION**

For the reasons stated herein and as confirmed by the testimony filed in support of this Application, Duke Energy Ohio respectfully requests that this Honorable Commission conclude that Duke Energy Ohio has satisfied the requirements of Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C. and that it has not earned significantly excessive earnings.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Amy B. Spiller", is written over a horizontal line.

Amy B. Spiller (0047277) (Counsel of Record)

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