

126 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Cinergy Corp.
Duke Energy Ohio, Inc.
Cinergy Power Investments, Inc.
Generating Facility LLCs

Docket Nos. EC08-78-000
EL08-61-000

ORDER CONDITIONALLY AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued February 19, 2009)

1. Cinergy Corp. (Cinergy), Duke Energy Ohio, Inc. (Duke Ohio), Cinergy Power Investments, Inc. (Cinergy Power), and certain entities that are yet to be formed (Generating Facility LLCs) (collectively, Applicants) filed an application seeking authorization under section 203 of the Federal Power Act (FPA)¹ for an internal reorganization involving transfers of certain generating facilities.² In the Proposed Transaction, Duke Ohio's generation facilities and appurtenant interconnection facilities will be transferred to the Generating Facility LLCs, which will be direct subsidiaries of Cinergy Power and indirect subsidiaries of Duke Ohio's parent, Cinergy. In addition, Applicants request a declaratory order confirming that the Proposed Transaction is not barred under section 305(a) of the FPA.³

2. The Commission has reviewed the Proposed Transaction under the Commission's Merger Policy Statement.⁴ As discussed below, we will conditionally authorize the

¹ 16 U.S.C. § 824b (2006).

² An application was filed on April 24, 2008 (Initial Application) and supplemented on May 6, 2008 (together, Initial Proposal). An amendment to the Initial Proposal was filed on November 17, 2008 (Proposed Transaction).

³ 16 U.S.C. § 825d(a) (2006).

⁴ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341

(continued...)

Proposed Transaction under section 203(a)(1) and 203(a)(2), as we find that, with certain conditions, it is consistent with the public interest. Although Applicants do not state whether they are seeking authorization under section 203(a)(1) or 203(a)(2), the Commission is asserting jurisdiction under both. We remind applicants that when they submit an application seeking authorization under section 203 of the FPA, they must specify the subsection(s) of section 203 under which they are seeking authorization. In addition, we confirm that the Proposed Transaction is not barred by section 305(a) of the FPA.

I. Background

A. Description of the Parties

3. Applicants are all direct or indirect subsidiaries of Duke Energy Corporation (Duke Energy). Duke Energy operates its business primarily through: (1) utility companies that generate, transmit, distribute, and sell electricity at retail and wholesale in North Carolina, South Carolina, Indiana, Ohio, and Kentucky, and sell gas to retail customers in the Greater Cincinnati area in both Ohio and Kentucky; (2) entities that develop, operate, and manage power generation facilities, and that sell and market natural gas and electric power outside the United States and Canada; and (3) its Duke Energy Generation Services subsidiary, which develops, owns, or manages energy projects.

1. Cinergy

4. Cinergy is a direct, wholly-owned subsidiary of Duke Energy.⁵ It is the direct parent of Duke Ohio as well as Duke Energy Indiana, Inc. (Duke Indiana).

(1997), 79 FERC ¶ 61,321 (1997) (*Merger Policy Statement*); see also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001); *Transactions Subject to Federal Power Act Section 203*, Order No. 669, 71 Fed. Reg. 1348 (2006), FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, 71 Fed. Reg. 28,422 (2006), FERC Stats. & Regs. ¶ 31,214 (2006), *order on reh'g*, Order No. 669-B, 71 Fed. Reg. 42,579, FERC Stats. & Regs. ¶ 31,225 (2006).

⁵ *Duke Energy Corp.*, 113 FERC ¶ 61,297 (2005) (authorizing the merger of Duke and Cinergy).

2. Duke Ohio

5. Duke Ohio is a wholly-owned direct subsidiary of Cinergy. It is the direct parent of Duke Energy Kentucky, Inc. (Duke Kentucky). Duke Ohio is a combination electric and gas public utility company that provides service in the southwestern portion of Ohio. Duke Ohio generates, transmits, distributes, and sells electricity at retail and wholesale, and distributes and sells natural gas at retail. Its electric operations are subject to Ohio's electric utility restructuring statute, which initiated retail electric competition in Ohio starting in 2001. Duke Ohio partially or wholly owns generating units in 16 stations in Ohio, Pennsylvania, Illinois, and Indiana.⁶ Some of these stations have multiple generating units.

6. Duke Ohio acquired five of these Facilities⁷ as part of the merger between Duke Energy and Cinergy, and it also acquired at that time reactive power supply tariffs associated with each facility (Unit Specific Reactive Supply Tariffs).⁸

7. Duke Ohio is authorized to sell power at market-based rates, including power sales to, and purchases from, unregulated affiliates. Applicants state that the Commission has determined that the potential for affiliate abuse by Duke Ohio has been mitigated.⁹

8. Duke Ohio owns transmission facilities that are under the operational control of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). The Midwest ISO provides transmission service over Duke Ohio's transmission facilities under the Midwest ISO Transmission and Energy Markets Tariff (Midwest ISO Tariff).

3. Cinergy Power

9. Cinergy Power is a wholly-owned direct subsidiary of Duke Ohio. It currently owns no generating or transmission assets, and it will not own any after the Proposed Transaction, although it will directly or indirectly own the Generating Facility LLCs. Cinergy Power is authorized to sell power at market-based rates, but it does not currently make any sales.

⁶ Pages 3-4 of the Initial Application set forth each station's name, location, gross nameplate capability and Duke Ohio's share of the ownership and the gross capability of that share.

⁷ The stations' generating units and appurtenant interconnection facilities are called Facilities in this order.

⁸ Initial Application at 4.

⁹ *Id.* at 5 (citing *Cincinnati Gas & Elec. Co.*, 113 FERC ¶ 61,197 (2005)).

4. Generating Facility LLCs

10. Applicants expect to transfer the Facilities to different Generating Facility LLCs. These companies have not yet been formed, and Applicants are still considering tax and other issues that may lead them to modify this structure slightly. Applicants state that the differences between the structures being contemplated would not be material to the Commission's analysis.

B. Filings

1. Initial Proposal

11. Under the structure contemplated by the Initial Proposal, all generation held by Duke Ohio would be transferred to Generating Facility LLCs. There would be a limited liability company for each current Duke Ohio generating station (the Station Level Generating Facility LLCs).

12. The Initial Proposal consists of several steps that would all occur at closing. These include the following.¹⁰ First, Duke Ohio and Cinergy Power will be converted to limited liability companies. Second, Duke Ohio will contribute its interests in all of the Station Level Generating Facility LLCs, as well as debt associated with the Facilities (to the extent not already contributed to the Generating Facility LLCs), and some or all of Duke Ohio's wholesale power contracts, to Cinergy Power.¹¹ Third, Duke Ohio will distribute its ownership in Cinergy Power to Duke Ohio's immediate parent, Cinergy.

13. The facilities that would be transferred under the Initial Proposal include the Facilities, the Unit Specific Supply Tariffs, Duke Ohio's wholesale power sales contracts,¹² Cinergy Power's market-based rate tariff, Generating Facility LLC tariffs, and associated books and records.

14. Applicants note that the Initial Proposal could vary from the description they have provided in ways that are not material to the criteria the Commission uses to evaluate such transactions under section 203. Three basic facts will not change. First, all Duke

¹⁰ The Initial Proposal also contains steps that relate only to facilities that, based on subsequent determinations in a state settlement in Ohio, will not be transferred. We do not describe those steps here, as they are no longer material to any determination we make here.

¹¹ See P 24, which notes that Applicants no longer plan to transfer any debt.

¹² Applicants no longer seek authorization for Duke Ohio to transfer wholesale power contracts. See *id.*

Ohio jurisdictional facilities that are transferred will be transferred to Generating Facility LLCs. Second, all Generating Facility LLCs will be wholly-owned direct or indirect subsidiaries of Duke Energy. Third, no traditional utility affiliate of the Applicants will be involved in the Initial Proposal, except to the extent expressly discussed in the application. Applicants also state that fewer jurisdictional facilities than those described above may be involved in the transaction. In particular, Duke Ohio's interest in the Ohio Valley Electric Corporation may not be transferred, and all of Duke Ohio's wholesale power sale contracts may not be transferred. Applicants state that they will not transfer any additional jurisdictional facilities without permission. They request that the Commission approve the Initial Proposal as described or with the variations as discussed here. Applicants commit to inform the Commission of any of the variations that occur when they provide notice of consummation of the Initial Proposal.

15. Finally, Applicants note that in the final step of the Initial Proposal, Duke Ohio will distribute to its parent, Cinergy, its 100 percent ownership interest in Cinergy Power. In so doing, Duke Ohio will be distributing indirectly its interest in the generating plants owned by the Generating Facility LLCs because those entities will be direct or indirect subsidiaries of Cinergy Power. Applicants state that the value of the ownership interest in Cinergy Power that Duke Ohio will distribute to Cinergy will be greater than Duke Ohio's retained earnings, and they ask the Commission to confirm that FPA section 305(a) does not bar this aspect of the Initial Proposal.

16. Applicants note in their supplemental application of May 6, 2008 that the New Ohio Law provides in part that no electric distribution utility shall at any time sell or transfer any generating asset it owns in whole or part without obtaining prior approval from the Ohio Commission.¹³ Applicants state that the supplemental application shows that the timing of the Initial Application was not designed to evade the New Ohio Law. Duke Ohio commits that it will not consummate the Initial Proposal without seeking the Ohio Commission's approval. Duke Energy has no objection to the Commission conditioning its approval of the Initial Proposal on the fulfillment of that commitment.

2. Notice of Filings and Pleadings Responding to Initial Proposal

17. Notices of Applicants' section 203 filings were published in the *Federal Register*, 73 Fed. Reg. 24,273, 73 Fed. Reg. 28,105 (2008), with interventions and protests due on or before May 27, 2008. Timely motions to intervene were filed by Constellation Energy Commodities Group, Inc. and Constellation New Energy, Inc. (Constellation); American

¹³ See Amended Substitute Senate Bill No. 221, 127th Ohio General Assembly, Regular session 2007-2008, Section 4928.17(E) (New Ohio Law). The Governor of Ohio signed the New Ohio Law into law on May 1, 2008, and it became effective on July 31, 2008.

Electric Power Service Corporation; NRG Companies; Exelon Corporation (Exelon); and FirstEnergy Service Company (FirstEnergy). A timely motion to intervene and comments were filed by Dayton Power and Light Company. Timely motions to intervene and protests were filed by Ohio Partners for Affordable Energy (Affordable Energy); Industrial Energy Users-Ohio (Industrial Users); The Greater Cincinnati Health Council (Health Council); The City of Cincinnati; Ohio (Cincinnati); The Office of Ohio Consumers' Counsel (Ohio Consumers' Counsel); and The Ohio Energy Group (Energy Group).¹⁴ The Kentucky Public Service Commission and the Ohio Commission filed notices of intervention, and the Ohio Commission also filed a timely protest. Applicants filed an answer to the protests on May 29, 2008.

18. Notice of Applicants' petition regarding section 305(a) was published in the *Federal Register*, 73 Fed. Reg. 32,701 (2008), with interventions and protests due on or before June 13, 2008. Timely motions to intervene were filed by Exelon, Constellation, and Industrial Users. A timely motion to intervene and protest was filed by Ohio Consumers' Counsel.¹⁵ Health Council and FirstEnergy filed motions to intervene out of time. The Ohio Commission filed a notice of intervention.

3. Request for Extension of Time

19. Applicants requested an extension of the deadline for Commission action on the Initial Application. Applicants stated that a portion of a settlement with all parties in its proceeding before the Ohio Commission regarding establishment of an "Electric Security Plan," expected to be made public in the near future, would solve the issues from an Ohio perspective.

20. On October 17, 2008 the Commission issued an order tolling the time required for action on the Initial Application. The time to act on the Initial Application was extended for an additional 180 days until April 17, 2009. The Commission also ordered Applicants to inform it of the status of their settlement discussions in 30 days.

4. Status Report and Amendment to Application

21. On November 17, 2008, Applicants filed a Status Report and Amendment to Application which reported that a settlement had been reached in Ohio (Ohio Settlement) and that the Ohio Settlement was under consideration by the Ohio Commission.¹⁶ The

¹⁴ These protests are considered in the discussion of section 203 below.

¹⁵ This protest is considered in the discussion of section 305(a) below.

¹⁶ The Ohio Settlement, which has now been approved by the Ohio Commission, is included as Attachment A of the Status Report and Amendment to Application.

Applicants stated that all parties to the Commission proceeding, other than the Ohio Commission, are parties to the Ohio Settlement. Applicants argue that this is significant because the issues raised by the protestors were effectively all Ohio and not Commission issues.

22. The Ohio Settlement reduces the number of Facilities being transferred by Applicants.¹⁷ Rather than transferring all of its generating assets to Generating Facility LLC affiliates, Duke Ohio will now transfer only the gas-fired units it acquired by virtue of the 2006 merger between Cinergy and Duke. These were never included in Duke Ohio's regulated retail ratebase and had never been used and useful in serving Duke Ohio's load (Non-Ratebase Assets).

23. Applicants state that they are now seeking authority from the Commission to transfer only the Non-Ratebase Assets. They argue that reduction of the assets being transferred is a change in structure which the Initial Application said might occur and which is not material to the Commission's analysis. Applicants further state that there is no need to change the form of the Asset Contribution Agreement in Exhibit 1 of the Initial Application. The three commitments made in the Initial Proposal remain true in the Proposed Transaction: (1) all Duke Ohio jurisdictional facilities that are transferred will be transferred to Generating Facility LLCs; (2) all Generating Facility LLCs will be wholly-owned direct or indirect subsidiaries of Duke Energy; and (3) no traditional utility affiliate of the Applicants will be involved in the Proposed Transaction, except to the extent expressly discussed in the application.

24. Applicants state that other facts and representations made in the Initial Application also remain unchanged, except for some conforming changes that flow from Duke Ohio keeping of most of its generating facilities. Those changes, which Applicants argue should not affect the Commissions' analysis, are as follows:

- Duke Ohio no longer seeks authorization to transfer its wholesale power sales contracts. However, Unit Specific Reactive Supply Tariffs, which are specific to the Non-Ratebase Assets, will still be transferred with those assets.
- There may be future affiliate contracts between the Generating Facility LLCs and Duke Ohio for sales of power, fuel, or other items (such as parts inventory). Applicants will comply with 18 C.F.R. § 35.39 for any affiliate sales of power or non-power goods and services, to the extent the Commission has not waived such requirements.

¹⁷ Ohio Settlement P 26.

- There are no plans to transfer any debt from Duke Ohio to the Generating Facility LLCs. The Non-Ratebase Assets were not encumbered with debt when Duke Ohio acquired them, and no Duke Ohio debt incurred since then is secured by those Facilities. Pollution control bonds previously planned to be transferred under the Initial Proposal to the Generating Facility LLCs are all associated with Facilities that are no longer being transferred. Accordingly, the form of Debt Assumption Agreement included in Exhibit I to the Initial Application will not be used.
- While the price per asset will remain unchanged, at the book value, the narrowing of the scope of the transaction necessitates revised *pro forma* accounting entries.¹⁸
- Because Duke Ohio is keeping its historical generating facilities, it no longer needs to find an alternative source of generation-based ancillary services.

5. Notice of Filings and Pleadings Responding to Status Report and Amendment to Application

25. Notice of Applicants' Status Report and Amendment to Application was published in the *Federal Register*, 73 Fed. Reg. 73,320 (2008), with interventions and protests due on or before December 8, 2008. Industrial Users filed a timely protest that disputes Applicants' statement that all parties to the Commission proceeding, other than the Ohio Commission, are parties to the Ohio Settlement. Industrial Users states that it has not and will not sign the Ohio Settlement. It also argues that several other parties to the Commission proceeding do not appear to have signed the Ohio Settlement.

26. Applicants filed an Answer to Industrial User's protest on December 12, 2008. Applicants agree that Industrial Users has not signed the Ohio Settlement. Applicants state that every party that filed a protest in the Commission proceeding, other than Industrial Users and the Ohio Commission, has done so.¹⁹

¹⁸ The revised *pro forma* accounting entries are attached to the Status Report and Amendment to Application as Attachment B.

¹⁹ The Commission notes that none of the parties have withdrawn their protests. Industrial Users requested in its initial protest that the Commission deny the application because approval by the Ohio Commission is required before any transfer of generating assets can be consummated. It also requested that, if the application is not denied, the Commission not approve the Proposed Transaction pending action by the Ohio Commission. As discussed below, the action by the Ohio Commission moots these protests. Industrial Users requests in its December 12, 2008 protest that we deny the

6. Supplemental Status Report

27. On December 19, 2008, Applicants filed a Supplemental Status Report that included a copy of the Ohio Commission's opinion and order (Ohio Commission Opinion and Order) approving the Ohio Settlement. Applicants state that the Ohio Settlement provides that approval of it by the Ohio Commission constitutes approval of the Proposed Transaction under Ohio law.

II. Discussion

A. Procedural Matters

28. Under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Under Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214(d) (2008), the Commission will grant Health Council's and FirstEnergy's late-filed motions to intervene, given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the Applicants' answers because they have provided information that assisted us in our decision-making process.

B. Section 203

1. Standard of Review under Section 203

29. Section 203(a) of the FPA provides that the Commission must approve a transaction if it finds that the transaction "will be consistent with the public interest."²⁰ The Commission's analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.²¹ In addition, the Energy Policy Act of 2005 (EPA 2005) amended section 203 to require that the Commission also determine

application in light of inaccuracies in the Status Report and Amendment to Application. Applicants have submitted corrections in response to Industrial Users, so that request also is moot.

²⁰ 16 U.S.C. § 824b (2006).

²¹ See n.4 *supra*.

that the transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.²² The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.²³

30. As discussed below, we find that, with conditions, the Proposed Transaction is consistent with the public interest, and we therefore will authorize it. We find that, with the commitments related to regulation and rates that the Applicants offer and that are discussed below, the Proposed Transaction will not have an adverse effect on competition, rates, or regulation. In addition, subject to several conditions set forth below, we find that the Proposed Transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.

2. Effect on Competition

a. Applicants' Analysis

31. Applicants argue that the Proposed Transaction will not have any adverse effect on competition because it is an internal corporate organization, with no generation entering or leaving the Duke Energy corporate family. Applicants state that the Commission has held that internal corporate reorganizations have no adverse effect on competition.²⁴

²² 16 U.S.C. § 824b(a)(4) (2006).

²³ 18 C.F.R. § 33.2(j) (2008).

²⁴ See, e.g., *Calpine Power Servs. Co.*, 92 FERC ¶ 62,150, at 64,187-88 (2000); *PP&L Res., Inc.*, 90 FERC ¶ 61,203, at 61,649 (2000); *Allegheny Energy Supply Co.*, 89 FERC ¶ 62,063, at 64,105 (1999); see also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111, at 31,902 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). In addition, Applicants argue that because the acquiring companies are not franchised utilities, the Proposed Transaction does not present concerns about a troubled generator selling generation units to a franchised utility that the Commission has expressed in certain cases. See *Cinergy Servs., Inc.*, 102 FERC ¶ 61,128, at P 23 (2003), *reh'g denied*, 108 FERC ¶ 61,250 (2004); see also *Ameren Energy Gen. Co.*, 108 FERC ¶ 61,081, at P 61 (2004).

b. Commission Determination

32. Consistent with our precedent, we find that the Proposed Transaction is an internal corporate reorganization that will have no adverse effect on competition.²⁵

3. Effect on Regulation

a. Applicants' Analysis

33. Applicants state that the Proposed Transaction will have no effect on federal regulation or the Commission's jurisdiction. Applicants argue that the Commission's jurisdiction over Duke Ohio and Cinergy Power will not change as a result of the Proposed Transaction, and that the Commission will have jurisdiction over wholesale sales from the Facilities when they are acquired by the Generating Facility LLCs.

34. Applicants also state that the Proposed Transaction will have no effect on state jurisdiction. Applicants state that the only entity involved in the Proposed Transaction that is subject to state regulation is Duke Ohio, which is subject to Ohio's retail ratemaking jurisdiction.²⁶ Applicants note that under the New Ohio Law, no electric distribution utility shall sell or transfer any generating asset without obtaining prior approval from the Ohio Commission.

b. Protests to the Initial Proposal

35. The Ohio Commission originally requested that the Commission not approve the Initial Proposal until it had acted under the New Ohio Law. It states that, under the New Ohio Law, Duke Ohio cannot transfer the generating assets until it obtains authorization from the Ohio Commission, and that such an authorization could not be obtained until the complicated process of implementing the New Ohio Law has been completed. Additionally, the Ohio Commission argues that, under the New Ohio Law, Duke Ohio must make a filing to allow the Ohio Commission to make decisions to establish Duke

²⁵ See *supra* n.24.

²⁶ Applicants note that the Indiana Utility Regulation Commission (Indiana Commission) also will have jurisdiction over the transfer of the Vermillion Generating Station in Cayuga, Indiana. They state that the Indiana Commission's jurisdiction over that facility will be the same after the Proposed Transaction as before.

Ohio's future retail rate under a standard service offer.²⁷ It said that how or whether generating plants should be transferred can only be determined after a final decision has been made on that retail rate.

36. Cincinnati and Health Council, Affordable Energy, Industrial Users and Energy Group all oppose Commission action on the Initial Proposal prior to action by the Ohio Commission. Energy Group argues that Commission approval would have an adverse effect on state regulation because the transfer of ownership of the generating assets would violate Ohio law. The Ohio Consumers' Counsel states that the application should be denied or, at least, made subject to the determinations of the Ohio Commission, which may include a denial.

37. Applicants argued in response that the Commission and the Ohio Commission have concurrent jurisdiction, and they committed not to consummate the Initial Proposal without seeking Ohio Commission approval.

c. Commission Determination

38. We find that neither state nor federal regulation will be impaired by the Proposed Transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.²⁸ We find that the Proposed Transaction will not create a regulatory gap at the federal level, because the Commission will retain its regulatory authority over the affected companies after the Proposed Transaction. In the Merger Policy Statement, the Commission stated that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.²⁹ The central point made in the protests was that the Proposed Transaction would impair regulation at the state level if the Commission approved it before the Ohio Commission had an opportunity to act on it under the New

²⁷ The standard service offer price is not the same as a deregulated price, but remains subject to the jurisdiction of the Ohio Commission. While the standard service offer price need not reflect the sum of specific cost components, it must produce reasonably priced retail service, avoid anticompetitive subsidies flowing from noncompetitive to competitive services and be consistent with protecting consumers from market deficiencies and market power. Public Utility Commission of Ohio Case No. 03-93-EL-ATA, *et al.*, Order on Remand at 37 (October 24, 2007).

²⁸ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

²⁹ *Id.* at 30,125.

Ohio Law. The Ohio Commission has now approved Duke Ohio's standard service offer and the Proposed Transaction.³⁰ Therefore, the requests by the Ohio Commission and other parties that we delay action on the Initial Proposal until the Ohio Commission acts under the New Ohio Law are now moot, and there is no reason to address those arguments. We find that the Proposed Transaction will not impair state regulation.

4. Effect on Rates

a. Applicants' Analysis

39. Applicants contend that the Proposed Transaction will not have any effect on rates for retail or wholesale power sales. They state that Cinergy Power has a market-based rate tariff for wholesale sales and no captive customers. They also state that Duke Ohio has no captive wholesale or retail power sales customers. Applicants argue that Duke Ohio's wholesale power sales are at market-based rates, with the exception of reserves provided at a cost-based rate through a Contingency Reserve Sharing Group Agreement. Applicants argue that retail customers are doubly protected in that they have retail choice and are served at market-based rates, since Ohio is a retail open access state. They argue that Duke Ohio's retail rates for generation are set under a competitive process that is unrelated to traditional cost-of-service regulation.

40. Applicants state that the Proposed Transaction will not affect transmission rates. The only transmission facilities being transferred in the Proposed Transaction are appurtenant interconnection facilities. Operational control of the Applicants' transmission facilities has been turned over to Midwest ISO. In addition, rates for the use of the transmission facilities owned by Duke Ohio are set forth in the Midwest ISO Tariff, as are rates for ancillary services, except for four ancillary services provided under a joint Duke Ohio, Duke Indiana, and Duke Kentucky (Duke Midwest Companies) tariff.³¹

³⁰ See Supplemental Status Report, Ohio Commission Opinion and Order at pp. 42-43.

³¹ The Duke Midwest Companies jointly submitted on September 18, 2007: (1) a notice of cancellation of their joint Open Access Transmission Tariff (OATT) for ancillary services and (2) a proposed Ancillary Services Tariff. Three of those ancillary services are included in the Midwest ISO Ancillary Services Market. The proposed tariff schedule for Reactive Supply and Voltage Control, which the Duke Midwest Companies will continue to supply, was protested. The Commission accepted the proposed notice of OATT cancellation and the Ancillary Services Tariff, suspended them for a nominal period subject to refund, and established hearing and settlement judge procedures. *Duke Energy Shared Servs., Inc.*, 121 FERC ¶ 61,144 (2007). The Commission has also

(continued...)

41. Duke Ohio commits that for five years it will hold the following customers harmless from including in rates costs that arise from the Proposed Transaction: (1) transmission customers under the Midwest ISO Tariff; (2) customers under the Duke Midwest Companies Ancillary Services Tariff, and (3) customers under the Contingency Reserve Sharing Group Agreement.

b. Pre-Settlement Protests

42. Energy Group argued that the Initial Proposal will have an adverse effect on rates because: (1) the overwhelming majority of Duke Ohio customers take generation at the rate set by the Ohio Commission under the standard service offer, (2) there is no alternative generation service available to residential customers, and (3) the retail generation rates that would result from the Initial Proposal are substantially higher than the rates currently approved by the Ohio Commission. Energy Group requested that a hearing be held to determine whether the Initial Proposal is consistent with the public interest.

43. Similarly, Health Council argued that the divestiture under the Initial Proposal may permit the “non-regulated” entities owning the generation to sell to a higher bidder, thus depriving customers in Duke Ohio’s service area of lower cost energy.

c. Answer

44. Applicants argue that in Duke Ohio’s service territory there are seven active Competitive Retail Electric Service providers certified by the Ohio Commission, one of which serves residential customers, and that Duke Ohio experiences customer switching every week. In addition, Applicants argue that Energy Group has demonstrated that Duke Ohio’s rates are below market. Applicants further contend that if Duke Ohio’s retail rates rise to market levels, retail marketers in Duke Ohio’s territory would become more active and more load-switching would occur. Applicants further argue that future Duke Ohio rates will be subject to Ohio Commission review. They state that Energy Group would make the Commission proceedings a surrogate Ohio retail rate case before the actual Ohio rate case, with troubling implications about Commission preemption of retail ratemaking decisions.

instituted a section 206 investigation concerning the rates under the Ancillary Services Tariff, established a refund effective date, and consolidated the proceedings. *Id.* Settlement proceedings were ongoing as of the date of the Initial Application.

d. Commission Determination

45. We find that the Proposed Transaction will not adversely affect wholesale rates because they are either market-based rates³² or because customers are protected by the Applicants' hold harmless commitments.³³

46. We note that Energy Groups' analysis of the effect on rates was based on Initial Proposal, which proposed to transfer all of Duke Ohio's generating assets rather than only the Non-Ratebase Assets, as currently proposed. We also note that the Ohio Commission has now approved Duke Ohio's standard service offer and has modified and approved Duke Ohio's tariffs.³⁴ This addresses both Energy Group and Health Council's concerns. We thus cannot see any adverse effect on retail rates arising from our approval of the Proposed Transaction. We deny Energy Group's request for an evidentiary hearing.

5. Cross-subsidization

a. Applicants' Analysis

47. Applicants present the standard representations concerning cross-subsidization. Applicants state that based on facts and circumstances that are known to them or are reasonably foreseeable, both at the time of the Proposed Transaction and in the future, the Proposed Transaction will not result in an improper cross-subsidization. They note that the Commission considers four matters when analyzing cross-subsidization issues under section 203: (1) transfers of facilities between a traditional utility associate company with wholesale or retail customers served under cost-based regulation and an associate company; (2) new issuances of securities by traditional utility associate companies with wholesale or retail customers served under cost-based regulation for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional utility associate company with wholesale or retail customers served under cost-based regulation for the benefit of an associate company; or (4) new affiliate contracts between non-utility associate companies and traditional utility associate companies with wholesale or retail

³² See, e.g., *Duquesne Light Holdings, Inc.*, 117 FERC ¶ 61,326, at P 25 (2006); *Exelon Corp.*, 112 FERC ¶ 61,011, at P 210 (2005).

³³ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044, at 30,124.

³⁴ Opinion and Order at 43.

customers served under cost-based regulation, other than non-power goods and services agreements subject to review under FPA sections 205 and 206.³⁵

48. With regard to the first issue, Applicants state that the Proposed Transaction will result in the transfer of facilities from Duke Ohio, the only traditional utility involved in the transaction, to the Generating Facility LLCs. They argue that because Ohio is a retail open access state, Duke Ohio's retail customers have a choice of generation suppliers and Duke Ohio has no retail power sales customers served at cost-based rates. Applicants further argue that Duke Ohio's retail power customers are served at market-based rates that are not tied to ownership of generation and will not be affected by the sale of the Facilities, and retail customers are also protected by having the right to choose an alternative supplier. Applicants also state that all of Duke Ohio's wholesale power sales customers are served at market-based rates, other than those under the Contingency Reserve Sharing Group Agreement, which is subject to the hold harmless commitment. Further, Applicants state that Duke Ohio does have transmission customers served at cost-based rates but that the costs of the Facilities will not be included in those rates. In addition, Applicants point out that Duke Ohio has made a hold-harmless commitment with respect to its cost-based Commission jurisdictional rates, i.e. its Transmission, Ancillary Services, and Contingency Reserve Sharing rates.

49. Regarding the second issue, the issuance of new securities, Applicants stated in the Initial Proposal that they planned to issue securities related to restructuring some existing debt associated with the generating assets' pollution control bonds that is not currently assignable. However, Applicants state in the Status Report and Amendment to Application that the pollution control bonds previously planned to be transferred are all associated with Facilities that now will not be transferred.³⁶

50. With regard to the third issue, Applicants state that Duke Ohio will not enter into any new pledges or encumbrances in connection with the Proposed Transaction.

51. Regarding the fourth issue, new affiliate contracts, Applicants state that, in addition to the Asset Contribution Agreements and Debt Assumption Agreement discussed above, any contracts between Duke Ohio and its affiliates in connection with the Proposed Transaction will be made under prior Commission authorization granted under section 205 of the FPA. In addition, Applicants state that the Commission has determined that Duke Ohio's customers are protected from affiliate abuse related to

³⁵ See *supra* n.12.

³⁶ Applicants state that the Debt Assumption Agreement included in the Initial Proposal will not be used.

affiliate contracts and that the Commission has waived restrictions on affiliate power sales as well as code of conduct restrictions on pricing of sales of non-power goods and services accordingly.³⁷

b. Protests

52. Prior to the Ohio Settlement, Energy Group, which signed the Ohio Settlement, requested a hearing on cross-subsidization issues. It argued that the Initial Proposal would increase costs to Duke Ohio and its retail ratepayers as a result of cross-subsidization of Cinergy Power and the Generating Facility LLCs. Cross-subsidization would occur because the Initial Proposal: (1) fails to transfer all assets and liabilities related to the generating assets properly;³⁸ (2) will result in certain common costs related to generation not transferred to the Generating Facility LLCs; and (3) will result in Duke Ohio being required to pay certain of the transaction costs instead of those costs being appropriately borne by the Generating Facility LLCs. Energy Group also maintains that Section 5.03 (Tax Matters) of the form of the Asset Contribution Agreement requires Duke Ohio to pay all the taxes incurred in connection with the Initial Proposal instead of those costs being appropriately borne by the Generating Facility LLCs.

c. Answer

53. In response to Energy Group, Applicants argue that there is no need for an evidentiary hearing. They maintain that the Ohio Commission's ratemaking authority over Duke Ohio ensures that there is no improper cross-subsidization. The Ohio Commission did not raise the issue of cross-subsidization, nor did it argue that it lacks authority to prevent cross-subsidization in retail rates. Applicants note that the Ohio Commission has authority to set Duke Ohio's retail rates, including authority to disallow the recovery of costs that are imprudent, unreasonable or unrelated to providing utility service, and Ohio law prohibits the recovery of generation costs through distribution or transmission rates. In addition, Duke Ohio commits that it will not seek to recover any generation-related costs associated with this Proposed Transaction in distribution rates. Applicants state that the Facilities being transferred under the Proposed Transaction were not encumbered with debt when Duke Ohio acquired them, and no debt taken on by Duke Ohio since that time is secured by those Facilities.

³⁷ See *Cincinnati Gas & Electric Co.*, 113 FERC ¶ 61,197 (2005).

³⁸ Among these assets and liabilities are \$2.1 billion in goodwill recorded in Account 186, Miscellaneous Deferred Debits, and \$4.1 billion recorded in Account 211, Miscellaneous Paid-in Capital, as reported in Duke Ohio's FERC Form 1.

54. Applicants state that common costs related to generation will not be transferred to the Generating Facility LLCs. Duke Ohio is a party to a Utility Service Agreement that has been approved by the Ohio Commission. Applicants state that the Duke Energy system service companies provide services to Duke Ohio and the other Duke Energy utility operating companies. The Utility Service Agreement requires that the service companies' actual costs be assigned or allocated to the affiliate receiving the service. Costs assigned to Duke Ohio must be documented and are auditable and reviewable in rate proceedings by the Ohio Commission.

55. Regarding Energy Group's claim that Duke Ohio will pay the taxes incurred in connection with the Proposed Transaction, Applicants note that the estimated taxes associated with the Proposed Transaction are small (approximately \$75,000), and they commit that Duke Ohio will not pay taxes associated with the Proposed Transaction.

d. Commission Determination

56. Applicants have made the representations concerning cross-subsidization required by our regulations.³⁹ They also note that the pro forma accounting entry presented with the Proposed Transaction does not reflect any allocation of goodwill. Applicants promise to submit a proposed final accounting within six months of the consummation of the Transaction showing all entries made on the books and records of Duke Ohio under the Commission's Uniform System of Accounts.

57. As a condition of our approval of the Proposed Transaction, we will require that all acquisition premiums related to generating assets being transferred to Cinergy Power be removed from Duke Ohio's books when Duke Ohio submits its final accounting entries in accordance with Electric Plant Instruction (EPI) No. 5 and the instructions to Account 102.⁴⁰ In addition, we require that debt associated with the generation assets

³⁹ See 18 C.F.R. § 33.2(j) (2008). We note, however, that we disagree with Applicants to the extent they are relying on *Cincinnati Gas & Electric Co.*, 113 FERC ¶ 61,197 (2005) to support the proposition that the Commission has waived restrictions on affiliate power sales as well as code of conduct restrictions on pricing of sales of non-power goods and services. That order permits affiliate sales provided they are made at rates no higher than the locational marginal price at the Midwest ISO Cinergy Hub. See *id.* P 4, 18, 22. In addition, that order did not waive code of conduct restrictions on pricing of sales of non-power goods and services.

⁴⁰ Duke Ohio shall account for the transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts within six months of the date on which the Proposed Transaction is consummated. The accounting submissions shall provide all the accounting entries and

(continued...)

being transferred, if any, be transferred to the Generating Facility LLCs before Duke Ohio submits its final accounting entries. Also, as a condition of our approval of the Proposed Transaction, we will hold Applicants to their commitment that Duke Ohio will not pay taxes associated with the Proposed Transaction.

58. With the conditions discussed above, we find that the Applicants have met their burden of proof regarding cross-subsidization issues and the Proposed Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. We deny Energy Group's request that a hearing be held to determine whether the Proposed Transaction could lead to cross-subsidization.

6. Other Issues

a. Pre-Ohio Settlement Protest

59. Health Council stated that "divestiture makes implementation of renewable energy sources exclusively subject to external generating sources and does not protect replacement of existing base load generating capability nor facilitate construction of added base-load generating capability."⁴¹

b. Commission Determination

60. We are not convinced that the concerns raised by Health Council suggest that the Proposed Transaction is not consistent with the public interest for purposes of our section 203 analysis. We find that both its environmental concern and its concern regarding the replacement and addition of base load generating capability are speculative.

C. Confirmation That FPA Section 305(a) Does Not Bar the Transaction

a. Applicants' Analysis

61. Applicants request that the Commission confirm that FPA section 305(a) does not bar Duke Ohio from distributing to Cinergy its 100 percent ownership interest in Cinergy Power. Applicants explain that the Proposed Transaction indirectly distributes Duke Ohio's interest in the generating plants owned by the Generating Facility LLCs, which will become direct or indirect subsidiaries of Cinergy Power.

amounts related to the transaction along with narrative explanation describing the basis for the entries. *See also Westar Energy, Inc.*, 102 FERC ¶ 61,186, *order on reh'g*, 104 FERC ¶ 61,018 (2003).

⁴¹ Health Council Comments at 3-4. The Commission notes that Health Council signed the Ohio Settlement.

62. Applicants note that section 305(a) of the FPA makes it unlawful for an officer or director of any public utility to participate in the making or paying of any dividends of that public utility from funds that are properly included in capital accounts.⁴² The value of the ownership interest in Cinergy Power that Duke Ohio will distribute to Cinergy will exceed Duke Ohio's retained earnings. Applicants argue, however, that where dividends consisting of corporate interests are made as part of a restructuring, the action is "less like a payment of dividends than it [is] a corporate restructuring with a one-time distribution of property."⁴³ They argue that, for this reason, the Commission deemed in *ALLETE* and other cases that such transactions were permissible under section 305(a).

63. Applicants state that the Commission has explained that Congress enacted FPA section 305(a) based, in part, on concerns "that sources from which cash dividends were paid were not clearly identified and that holding companies had been paying out excessive dividends on the securities of their operating companies." A central concern thus "was corporate officials raiding corporate coffers for their personal financial benefit."⁴⁴ They state that, as a result, the Commission has held that a transaction is permissible under section 305(a) where "none of these problems is evident."⁴⁵

64. Applicants argue that the Proposed Transaction involves an internal corporate restructuring with a one-time distribution of property, and the Commission has found that section 305(a) does not bar spin-offs of utility assets to a newly formed affiliate where shareholders have received stock in the spun-off company.⁴⁶ Applicants state that the Proposed Transaction does not reach to the ultimate shareholder level, and Duke Energy's shareholders will continue to own the same stock and have the same ownership interests after the Transaction as they had before it. In addition, the source of the distribution is clearly identified, and there will be no "excessive dividends" resulting from "corporate officials raiding corporate coffers for their personal financial benefit."⁴⁷

⁴² 16 U.S.C. § 825d(a) (2006).

⁴³ Initial Application at 22 (citing *ALLETE, Inc.*, 107 FERC ¶ 61,041, at P 11 (2004) (*ALLETE*)).

⁴⁴ *Id.* (citing *Delmarva Power & Light Co.*, 91 FERC ¶ 61,043, at 61,158 (2000) (*Delmarva*) (quoting *Citizens Utils. Co.*, 84 FERC ¶ 61,158, at 61,865 (1998) (*Citizens*)).

⁴⁵ *Citizens*, 84 FERC at 61,865.

⁴⁶ Initial Application at 22 (citing *ALLETE*, 107 FERC ¶ 61,041 at P 9-12).

⁴⁷ *Id.* at 23 (citing *Delmarva*, 91 FERC at 61,158).

65. Finally, Applicants note that the Commission frequently requires an applicant to agree to maintain a minimum equity to total capital ratio of 30 percent as a condition to a finding that a proposed transaction does not raise the concerns underlying section 305(a).⁴⁸ Duke Ohio makes this commitment and also commits that the amount of debt it retains will be within the range that will accommodate preservation of its current credit ratings.

b. Pre-Ohio Settlement Protest

66. Ohio Consumers' Counsel stated that characterizing the Proposed Transaction as a corporate restructuring and not payment of dividends could have adverse consequences for residential retail rates in Ohio.

c. Commission Determination

67. We will grant Applicants' request because the Proposed Transaction does not present the concerns underlying FPA section 305(a). Section 305(a) reads:

It shall be unlawful for any officer or director of any public utility to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale by such public utility of any security issued or to be issued by such public utility, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of such public utility from any funds properly included in capital account.⁴⁹

68. As Applicants note, the concerns underlying the enactment of section 305(a) included the historical fact "that sources from which cash dividends were paid were not clearly identified and that holding companies had been paying out excessive dividends on

⁴⁸ *Id.* at 23 (referencing, *e.g.*, *National Grid*, 117 FERC ¶ 61,080, at P 83 (2006) (requiring that the approved payment of dividends out of capital must cease if the equity of the public utilities subsidiaries, as a percentage of total capital, would fall below thirty percent), *reh'g denied*, 122 FERC ¶ 61,096 (2008); *Cincinnati Gas & Elec. Co.*, 115 FERC ¶ 61,250, at P 13 (2006) (requiring the public utilities to maintain a minimum equity balance equal to 30 percent of total capital) (*citing Niagara Mohawk*, 95 FERC at 62,416 (same)).

⁴⁹ 16 U.S.C. § 825d(a) (2006).

the securities of their operating companies.”⁵⁰ A central concern thus “was corporate officials raiding corporate coffers for their personal financial benefit.”⁵¹ The record in this case justifies no such concerns.

69. The Commission finds that the source of Applicants’ proposed distribution has been clearly identified. Nothing indicates that the distribution will be excessive or preferential. Moreover, the ownership interests of the ultimate shareholders will not be affected; those shareholders will remain the same, and they will have the same ownership interests after the Proposed Transaction as before it. For these reasons, and under the circumstances of this case, we grant Applicants’ request and find that section 305(a) is not a bar to the distribution by Duke Ohio of its 100 percent ownership interest in Cinergy Power to Cinergy. However, we condition our finding on Duke Ohio complying with its commitment to maintain a minimum equity to total capital ratio of 30 percent and to retain an amount of debt that is within the range that will accommodate preservation of Duke Ohio’s current credit ratings.

70. We note that Ohio Consumers’ Counsel does not expressly discuss section 305(a) in its protest and instead merely repeats its arguments concerning our authority under section 203 and the adverse effect that it claims the Proposed Transaction will have on regulation. We have addressed those arguments above.

The Commission orders:

(A) The Proposed Transaction is hereby authorized, with the conditions discussed in the body of this order.

(B) Duke Ohio shall account for the transaction in accordance with EPI No. 5 and Account 102 of the Uniform System of Accounts. Duke Ohio shall submit its final accounting entries within six months of the date that the transaction is consummated, and the accounting submissions shall provide all the accounting entries and amounts related to the transaction along with narrative explanation describing the basis for the entries. The narrative shall provide details concerning how Duke Ohio’s accounting complies with the conditions set forth in this order.

(C) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the application.

⁵⁰ *Citizens*, 84 FERC at 61,865; *Delmarva*, 91 FERC at 61,158-59; *PPL Electric Utilities Corp.*, 99 FERC ¶ 61,317, at 62,356-57 (2002).

⁵¹ *Id.*

(D) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(E) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(F) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(G) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(H) Applicants shall notify the Commission within 10 days of the date that the Proposed Transaction has been consummated. Applicants will include in this notification a description of any variations to the Proposed Transaction, as discussed in the body of this order, that have occurred.

(I) Applicants' request that the Commission confirm that section 305(a) of the FPA does not bar Duke Ohio from distributing to Cinergy its 100 percent ownership interest in Cinergy Power is hereby conditionally granted, as discussed in the body of this order.

By the Commission. Commissioner Kelliher is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.