

128 FERC ¶ 61,102  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket No. EC08-78-001

ORDER GRANTING CLARIFICATION

(Issued July 29, 2009)

1. On February 19, 2009, the Commission conditionally authorized an internal reorganization by Cinergy Corp., Duke Energy Ohio, Inc. (Duke Energy Ohio), Cinergy Power Investments, Inc, and certain entities not yet formed (collectively, Applicants).<sup>1</sup> On March 23, 2009, Duke Energy Ohio requested that the Commission clarify a statement in the February 19 Order.<sup>2</sup> In this order, we grant Duke Energy Ohio's request for clarification.

**I. Background**

2. On April 24, 2008, as supplemented May 6, 2008 and amended November 17, 2008, Applicants requested authorization, under section 203 of the Federal Power Act (FPA),<sup>3</sup> for an internal reorganization involving transfers of certain generating facilities. In the February 19 Order, the Commission found that, with Applicants' commitments related to regulation and rates, the transaction would not have an adverse effect on competition, rates, or regulation. In addition, subject to several conditions, the

---

<sup>1</sup> *Cinergy Corp.*, 126 FERC ¶ 61,146 (2009) (February 19 Order).

<sup>2</sup> While Duke Energy Ohio structured its pleading as a request for rehearing, we will treat it here as a request for clarification.

<sup>3</sup> 16 U.S.C. § 824b (2006).

Commission found that the transaction would 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.<sup>4</sup> However, in footnote 39, the Commission stated:

We note, however, that we disagree with Applicants to the extent they are relying on *Cincinnati Gas & Electric Co.*, 113 FERC ¶ 61,197 (2005) [*Cincinnati*] 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.<sup>5</sup>

## II. Request for Clarification

3. Duke Energy Ohio states that the Commission, in the February 19 Order, gave it the relief it requested and it does not seek to change the outcome of the case. Rather, Duke Energy Ohio seeks clarification with respect to the Commission's statement in footnote 39 regarding whether the Commission, in *Cincinnati*, waived restrictions on affiliate power sales as well as code of conduct<sup>6</sup> restrictions on pricing of sales of non-

---

<sup>4</sup> February 19 Order, 126 FERC ¶ 61,146 at P 30.

<sup>5</sup> *Id.* n.39.

<sup>6</sup> We note that, in Order No. 697, the Commission codified as part of the affiliate restrictions the requirements that previously have been known as the market-based rate "code of conduct" (governing the separation of functions, the sharing of market information, sales of non-power goods or services, and power brokering), as clarified and modified in Order No. 697. *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 23, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, 74 Fed. Reg. 30,924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009).

power goods and services with respect to the relationship between Cincinnati Gas & Electric Co. (Cincinnati Gas & Electric) and seven of its marketing affiliates.<sup>7</sup>

4. Duke Energy Ohio does not dispute the fact that *Cincinnati* did not expressly use the word “waiver,” but it states that it believes that a waiver occurred nonetheless. It points out that Duke Energy Ohio (then called Cincinnati Gas & Electric) and the Marketing Affiliates had stated in their application requesting permission to make affiliate sales that there would be no code of conduct or affiliate sales restrictions between them, and maintained that such restrictions were not required under Commission precedent regarding retail open access states, such as Ohio. Additionally, Duke Energy Ohio points out that the tariffs submitted and accepted in that case did not include such restrictions as between Cincinnati Gas & Electric and the Marketing Affiliates. Thus, Duke Energy Ohio maintains that, while *Cincinnati* does not use the word “waiver,” when the Commission accepted the amended tariffs without affiliate sales or code of conduct restrictions, it waived the Commission’s then-effective policy of not accepting tariffs that did not contain such affiliate restrictions. Duke Energy Ohio states that “[w]e recognize, in retrospect, that it would have been useful to include more of the explanation we provide here when we cited [*Cincinnati*] in our application in the instant docket, because a full appreciation of the import of [*Cincinnati*] requires that the order be read in conjunction with the tariff sheets that the order accepted for filing and in light of the Commission’s policies at the time.”

5. Duke Energy Ohio states that the application and the tariffs accepted in *Cincinnati* indicated that code of conduct and affiliate sales restrictions would apply between Cincinnati Gas & Electric and its Utility Affiliates,<sup>8</sup> but not between Cincinnati Gas & Electric and the Marketing Affiliates, and additionally, the application included the rationale for elimination. Duke Energy Ohio goes on to state that, in *Cincinnati*, the Commission accepted the tariff revisions without relevant condition or caveat. Duke Energy Ohio states that much of the discussion of affiliate issues in the text of *Cincinnati* involved the relationship between the Utility Affiliates and the rest of the affiliates, including Cincinnati Gas & Electric, not the relationship between Cincinnati Gas & Electric and the Marketing Affiliates. It emphasizes that *Cincinnati* includes a discussion placing a restriction on sales between Cincinnati Gas & Electric and the Utility Affiliates but contains no specific discussion of the other class of affiliate sales authority that it

---

<sup>7</sup> These affiliates are: Brownsville Power I, L.L.C.; Caledonia Power I, L.L.C.; CinCap IV, LLC; CinCap V, LLC; Cinergy Capital & Trading, Inc.; Cinergy Power Investments, Inc.; and St. Paul Cogeneration, LLC (Marketing Affiliates).

<sup>8</sup> The Utility Affiliates are PSI Energy, Inc. (now Duke Energy Indiana) and the Union Light, Heat & Power Company (now Duke Energy Kentucky).

authorized, i.e., the authority for unrestricted sales between Cincinnati Gas & Electric and the Marketing Affiliates. Duke Energy Ohio maintains that, even though *Cincinnati* does not expressly state that the code of conduct requirement was waived, it believes that is exactly what happened when the Commission accepted the tariff sheets without codes of conduct on the basis of an application that explained why such codes of conduct were unnecessary.

6. Duke Energy Ohio requests that the Commission confirm that the Commission, in *Cincinnati*, waived code of conduct and affiliate sales restrictions with respect to the relationship between Cincinnati Gas & Electric and the Marketing Affiliates.

### **III. Discussion**

7. We will grant Duke Energy Ohio's request for clarification. Upon further consideration, we agree that the Commission, in *Cincinnati*, accepted tariff provisions that waived the code of conduct and affiliate sales restrictions with respect to the relationship between Cincinnati Gas & Electric and the Marketing Affiliates. Our clarification herein does not affect the outcome of the February 19 Order and, in particular, the Commission's findings regarding Applicants meeting their burden of proof regarding cross-subsidization issues.<sup>9</sup>

#### The Commission orders:

Duke Energy Ohio's request for clarification is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

---

<sup>9</sup> See February 19 Order, 126 FERC ¶ 61,146 at P 58.