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Robert T. Lucas III
Associate General Counsel
Assistant Secretary

VIA FEDERAL EXPRESS

November 30, 2001

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Public Avail. Date: 1/9/02 0211200239

Act	Section	Rule
1934	14(a)	14a-8

Re: Duke Energy Corporation 2002 Annual Shareholders' Meeting–Exclusion of Shareholder Proposal–Securities Exchange Act of 1934, Rules 14a-8(i)(3) and 14a-8(i)(13)

Ladies and Gentlemen:

I am submitting this letter on behalf of Duke Energy Corporation (the "Company") pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the "Act"), in response to the shareholder proposal and accompanying supporting statement (the "Proposal"), which was submitted to the Company by David E. Bailey (the "Proponent") for inclusion in the Company's 2002 proxy statement and form of proxy relating to the Company's Annual Meeting of Shareholders presently scheduled for April 25, 2002. The Company currently expects that it will file definitive copies of its 2002 proxy statement and form of proxy pursuant to Rule 14a-6 on or about March 18, 2002. I hereby request confirmation that the staff of the Division of Corporation Finance will not recommend any enforcement action to the Securities and Exchange Commission (the "Commission") if, in reliance on the interpretation of Rule 14a-8 set forth below, the Company excludes the Proposal from its 2002 proxy materials.

Pursuant to Rule 14a-8(j), enclosed herewith are six copies of the following:

(1) this letter, which represents the Company's statement of reasons for omission of the Proposal from its 2002 proxy statement and form of proxy; and

(2) the Proposal, attached as Exhibit A hereto, which was submitted by the Proponent by letter dated May 3, 2001.

The Company intends to omit the Proposal pursuant to Rules 14a-8(i)(3) and 14a-8(i)(13) under the Act and requests that the Division of Corporation Finance

advise the Company whether it would recommend any enforcement action against the Company in such event.

DISCUSSION OF REASONS FOR OMISSION

I. Rule 14a-8(i)(13) – The Proposal May Be Omitted Because It Relates to Specific Amounts of Dividends.

Rule 14a-8(i)(13) provides that a shareholder proposal is excludable if it relates to specific amounts of cash or stock dividends. The Commission has interpreted this Rule broadly such that the phrase "specific amounts of cash or stock dividends" does not simply mean dividends in specific dollar amounts. In particular, Rule 14a-8(i)(13) has been interpreted in a variety of circumstances to exclude shareholder proposals that would have the effect of determining a company's dividend policy by requiring a maximum or minimum dividend payment.

The Proposal states that the Company has maintained an annual dividend of $1.10 per share for each of the past four years, a level which the Proposal maintains is insufficient. The Proposal therefore asks that the Company's Board of Directors make adjustments in how earnings are distributed in order to provide dividend increases, which translates into a requirement for a yearly per share dividend payment exceeding a minimum of $1.10.

Proposals that seek to establish minimum dividends have been found to be excludable under Rule 14a-8(i)(13) (or predecessor Rule 14a-8(c)(13)). In its response to ITT Corporation (January 23, 1986), for example, the Commission found that a proposal relating to "issuance of a special dividend of $12.00 and restoration of an annual dividend of at least $2.76 per share" could be omitted from ITT's proxy materials under Rule 14a-8(c)(13). The proposal requested the ITT Board to restore the annual dividend to its former level of $2.76 per share and to maintain the dividend at that level or higher as long as the corporation remained solvent. The Commission found the proposal to be excludable on the basis of both the one time special dividend and the future minimum annual dividend. With respect to the latter, the Commission noted that the proposal related to "an annual dividend of a specific minimum dollar amount" and would be excludable.

Proposals that seek to establish minimum dividends, whether in cash or in stock, have also been held to be excludable under Rule 14a-8(i)(13) (or predecessor Rule 14a-8(c)(13)) in other no-action letters. See Loews Corporation (December 22, 1986) in which a minimum dividend of 50% was held to be excludable; International Business Machines Corporation (January 2, 2001) in which a proposal that the company return to shareholders an equal or greater percentage of the "dividend earnings" per share each year was held to be excludable; H.J. Heinz Company (May 6, 1987) in which a proposal to increase dividends annually so as to retain a yield of at least 4.5% to 5% was held to be excludable; and Empire Federal Bancorp, Inc. (April 7, 1999) in which a proposal to

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distribute a portion of excess regulatory capital by a special dividend of between $5.00 and $7.00 per share was held to be excludable.

The Proposal is cast in precatory form. Whether a proposal relating to specific amounts of cash or stock dividends is cast in mandatory or precatory form has no bearing, however, on whether the proposal is excludable under Rule 14a-8(i)(13). In National Mine Service Company (September 3, 1981), Safeway Inc. (March 4, 1998) and National Affiliated Corporation (March 28, 1991), for example, precatory proposals were found to be excludable under Rule 14a-8(i)(13) (or predecessor Rule 14a-8(c)(13)), while in Network Systems Corporation (March 12, 1991), Eastman Chemical Company (March 8, 2000), Empire Federal Bancorp, Inc. (April 7, 1999) and Zions Cooperative Mercantile Institution (March 20, 1990) mandatory proposals were found to be excludable under such Rule.

The Company believes that the Proposal is excludable under Rule 14a-8(i)(13) on the above-mentioned basis.

II. Rule 14a-8(i)(3) – The Proposal May Be Omitted Because It Contains Statements That Are False or Misleading.

Rule 14a-8(i)(3) provides that a registrant may omit a proposal and any statement in support thereof from its proxy statement and form of proxy if the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits false or misleading statements in proxy soliciting materials. Specifically, Rule 14a-9 provides that no solicitation shall be made by means of any proxy statement containing "any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary to make the statements therein not false or misleading."

The Proposal contains a number of such false and misleading statements which are enumerated below.

(1) "It is therefore proposed that shareholders ask the Board to distribute earnings more equitably, to include dividend increases for shareholders, by adjusting, e.g., investments for growth, or executive salary increases and awards ..."

The Proposal would have the shareholders ask the Company's Board to distribute earnings "more equitably." What is meant by the term "more equitably" is, however, vague and subjective and hence would be difficult for a board of directors to implement. This is true notwithstanding the Proponent's attempt to attach a list of adjustments or changes relating to the redistribution, some mandatory (i.e., to include dividend increases) and some expressed as examples of the changes that would need to be made to offset dividend increases (e.g. adjustments in investments for growth or executive salary increases and awards). The Proponent believes these changes would

produce a "more equitable" distribution of the Company's earnings, but the same view might not be held by the Company's Board. Moreover, to ask the Company's Board to implement a "more equitable" distribution of earnings implies that the present system is somehow "less equitable," an assumption with which the Company takes issue and which is unsupported by fact.

Phrases like "more equitable" – by virtue of the very connotation of the words – are power-packed phrases that evoke support for the assertions that they describe notwithstanding the actual content of the assertions to be considered or the pertinent facts. This is the case with respect to the phrase "more equitably" in the Proposal. Given this reality, and given the fact that the words "more equitably" are at the heart of the Proposal, the Company asks that the Proposal be held to be excludable pursuant to Rule 14a-8(i)(3) because it is misleading, in violation of Rule 14a-9.

(2) ". . . so that shareholders may benefit in a more immediate and fungible way . . . from the company's success."

The Proposal states that a "more equitable" distribution that includes dividend increases and, for example, adjustments (i.e., decreases) in investments for growth would enable shareholders to "*benefit in a more immediate and fungible way* (italics added) . . . from the company's success." This statement is misleading and unsupported by fact. Indeed, what actually benefits shareholders, whether in an immediate and fungible way or otherwise, may differ substantially from shareholder to shareholder. Specifically, the benefit derived from increased dividends may vary significantly depending on the shareholder's financial and tax circumstances. Similarly, the benefit derived from a higher stock price resulting from investments in growth may vary significantly from shareholder to shareholder because of, for example, tax considerations.

Indeed, when it comes to benefits to shareholders, dividend increases are not necessarily viewed as more beneficial by shareholders. Indeed, certain shareholder proposals which have been the subject of no-action requests to the Division of Corporation Finance under Rule 14a-8 have asked that dividends be *eliminated or decreased,* rather than increased, on the ground that they are not beneficial to shareholders.

A shareholder proposal submitted to National Mine Service Company (available September 3, 1981), for example, requested that the company "eliminate all dividends for the fiscal year 1982." The proposal argued that "under current tax laws the after tax value of the dividend is significantly lower to the stockholder." The proposal concluded that having a dividend was not in shareholders' best interests. A shareholder proposal to American Brands, Inc. (available September 14, 1988), asked the company to "(1) continuously decrease the payout ratio of dividends or (2) stop increasing dividends or (3) stop paying dividends at all." The reasons cited included tax considerations and the reduction of administrative costs. In General Electric Company (January 28, 1997),

the shareholder proposal sought to have the company replace the payment of cash dividends with open market purchases of its common stock and quarterly purchases of shares from shareholders requiring quarterly cash flows. The proposal was entitled "Proposal to Benefit the Shareholders of the General Electric Company" and, was driven by tax considerations. A shareholder proposal to Minnesota Mining and Manufacturing Company (available February 10, 2001) asked the company to eliminate dividends. The preferred uses for earnings that were cited in the proposal were share repurchases. In the foregoing cases the shareholder proposals were found to be excludable pursuant to Rule 14a-8(i)(13), with the exception of the General Electric Company proposal, which was withdrawn, and the American Brands proposal which was found to be excludable for procedural reasons.

Because the Proposal, if implemented, might not be to the benefit of the Company's shareholders, individually or in the aggregate, contrary to the Proponent's assertion, the Company submits that the statement that the Company's shareholders would benefit in a more immediate and fungible way from dividend increases is false and misleading, in violation of Rule 14a-9.

(3) ". . . management used the funds that otherwise would have underwritten higher dividends to finance the growth. . ."

There is no support for the statement that funds that have been used to finance the Company's growth would have otherwise been used for dividends as against other uses.

Recently, the staff indicated that, "when a proposal and supporting statement will require detailed and extensive editing in order to bring them into compliance with the proxy rules," the staff may find it appropriate to grant relief without providing the proponent a chance to make revisions to the proposal and supporting statement. See Division of Corporation Finance: Staff Legal Bulletin No. 14 (July 13, 2001). We urge the staff to provide such relief here.

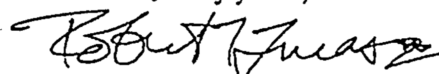
We respectfully request your confirmation that the Division of Corporation Finance will not recommend any enforcement action to the Commission if the Company omits the Proposal from its proxy statement for its 2002 Annual Meeting of Shareholders for the reasons specified above. As required by Rule 14a-8(j), a copy of this letter, including the attached exhibit, is being mailed to the Proponent simultaneously with the sending of this letter to the Commission.

Please acknowledge receipt of this letter by stamping the enclosed copy and returning it in the enclosed self-addressed, stamped envelope. To meet the Company's projected preliminary proxy filing deadline and proxy printing schedule, I would appreciate receipt of the staff's response on or before January 15, 2002.

Should you disagree with the conclusion in this letter, I respectfully request the opportunity to confer with you prior to the issuance of the staff's response.

Please do not hesitate to call me at 704-383-8152 if you have any questions with respect to this matter.

Very truly yours,



Robert T. Lucas III

Enclosures

cc: Mr. David E. Bailey
17712 Cliffbourne Lane
Derwood, Maryland 20855

Duke Energy Corporation
526 South Church Street
Charlotte, NC 28202

EXHIBIT A

SHAREHOLDERS SHOULD NOT BE 'LEFT BEHIND'

Left Behind! is the title of the popular book series by Tim LaHaye and Jerry Jenkins about the End-Times. That's also the cry of many shareholders since Duke announced an annual dividend of $1.10 per share for 2001. This marks the fourth consecutive year the dividend has been at this (equivalent) level. That may not matter to Duke's top executives or large institutional investors. But it does to small investors who need the money for daily expenses, or 'seniors' who bought Duke some time ago as part of a retirement portfolio, counting on the income for things like medical expenses, food, and, generally, greater self-sufficiency. It hurts everyone 'on the edge' financially, who depends on the income for, e.g., health-sustaining medications, and over the past four-years has seen its buying power drop dramatically. For these citizens, trading Duke for higher payout companies may simply be impractical, considering commissions and capital gains taxes.

Duke's growth is partly due to management, and partly, to the national economy and unmet power needs. With dividends constant over this period, management used the funds that otherwise would have underwritten higher dividends to finance the growth, avoiding the cost of external financing. In a sense, growth has been on the backs of the shareholders.

Value can take different forms Duke management believes shareholder value is achieved by growth, that growth leaves investors better off than would higher dividends. This may be true for some - Duke executives, large owners. But as indicated above, as a practical matter it will be difficult for many ever to realize the 'value' of increased share price (except upon death!); many would prefer more spendable 'value' now. Dividends that keep pace with inflation is a measure of 'value' too.

While dividends were being held constant, Mr Priory's annual compensation grew: $1.03M (1997), $1 74M (1998), $2 00M (1999), and $3 16M (2000). Top assistants saw similar upward growth. In addition, 'long-term compensation' for each included anywhere from 400,000 to 1,400,000 share options, large restricted stock awards, and other compensation. These share awards, alone, may explain why management is so intent on growth versus more equitable distribution of profits.

Duke is doing well. However, a rational relationship must exist between profitability, growth, executive compensation, and dividends . It's right that management be rewarded; it's not right that common shareholders be left behind. Duke can continue to grow, but perhaps at a slightly moderated rate, so that reasonable dividend increases can be given. Shareholders should no longer be 'left behind'.

It is therefore proposed that shareholders ask the Board to distribute earnings more equitably, to include dividend increases for shareholders, by adjusting, e.g., investments for growth, or executive salary increases and awards, so that shareholders may benefit in a more immediate and fungible way (i.e., higher dividends with higher profits and/or higher executive compensation) from the company's success.

Office of Chief Counsel

December 6, 2001

Division of Corporate Finance
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Reference is made to Duke Energy's letter to you dated November 30, 2001, regarding its planned 2002 Annual Shareholders' Meeting, and Duke's desire to exclude a proposal I have submitted for the proxy for the meeting.

I believe Duke Energy is wrong in its assertions that my proposal seeks to establish a specific amount of dividend and that it contains statements that are false and misleading.

Some four years ago, upon deciding to turn the company into a "growth" company (versus a typical utility, with annual dividend increases to roughly keep pace with inflation), the Board decided to keep dividends constant at the $1.10 (equivalent) rate. My proposal does not suggest a new, minimum or maximum dividend level but, rather, that the Board consider sharing results of the success of the company with shareholders by increasing annual dividend rates by some reasonable amount (as allowed by earnings and other financial requirements of the company). It appears that now all earnings are used either for growth or ever-increasing executive/Board member compensation. Importantly, this proposal will for the first time give shareholders an opportunity to express their approval or rejection of the dramatically different direction management and the Board have taken Duke.

The content of my proposal reflects material taken from past Duke Energy proxy's, annual statements, and correspondence with Mr Priory, the CEO. No false or misleading statement has knowingly been made. I am certainly willing to clarify anything that can be shown to be so. I believe the comments offered by Mr Lucas in no way support the Duke assertions. My proposal was received by Duke on May 5, 2001.

I offer a few reactions/direct comments to the "Discussion of Reasons For Omission", keyed to Mr Lucas' material.

I. My proposal does not try to set a minimum or maximum dividend. Neither does it say the present dividend is "insufficient"; the use of this word, on the other hand, may be an acknowledgment by Duke that it is. The issue is fairness for the shareholder which is not necessarily seen only in the form of increased share price. Many companies return value to its shareholders via higher dividends, and many times in increased share price and higher dividends. I point out that this year Duke's stock price has decreased dramatically So, in 2001, when Duke is continuing its growth strategy, and increasing payout to key management, it is difficult to get any sense of fair-play or fair value for shareholders, particularly, the small shareholder. The proposal seeks fair participation by the shareholder in the success of the company; it suggest higher dividends if there are higher profits and/or higher executive compensation. A reasonable approach to financing continued growth is also outlined.

II. (1) The proposal makes it clear what "more equitably" means. When the company has profits, when the company is continuing its growth strategy, when executive/Board compensation is ever rising-and at least this year- when the price of a share has plummeted, when the dividend rate remains constant for a forth straight year, there should be no problem for the Board members to figure out what "more equitably" means. I don't think the phrase is "vague and subjective"; the call is not for "most" or "perfectly equitable" (which admittedly would be hard to pin down) but for the rate to be made on a reasonable, relative basis more balanced than is presently the case. The proposal was not intentionally attempting to dictate the adjustments or redistributions, mandatory or otherwise, only give examples of adjustments for consideration.

It is clear the Board has a different view of value to the shareholder, opting for growth and increased share price. What is equitable in terms of dividend rate is thus a matter of opinion. That is the whole point. The proposal is for the purpose of letting shareholders give their opinion. In its proxy rebuttal statement Duke is certainly qualified to give its view and counter arguments.

(2) This whole section talks to the point of the benefits of receiving value in the form of dividends versus higher share price. The proposal addresses this throughout. The comparison is made between the average investor's situation and the large investor's. For the average (small) investor, sale commissions and capital gains taxes substantially reduce overall benefit (value) from higher share price. Long-term requirements restrict sale flexibility; dividends are payable quarterly. In the context of the proposal -written from my point of view, not Duke's- the italicized comment is not misleading and is factual. If the proposal is viewed by a lot of shareholder's as not beneficial, let them vote against the proposal. Duke should be able to make its case for its recommendation.

(3) There is considerable support for the statement "management used the funds that otherwise would have underwritten higher dividends to finance the growth". There is first, common sense. Secondly, in a letter from Mr Priory, dated April 20, 2001, in which he responded to my concern with the current dividend level, he wrote: "We continue to believe that the best way to continue to meet our aggressive growth targets is to invest substantial earnings back into the company, rather than to incur the expense of external financing. The growth leaves investors in a better overall position than would an increased dividend yield." The clear, strong implication is that since dividends were to remain constant for yet another year, the money that could have gone to increased dividends was to be kept back to be used to finance growth. In essence, Duke chose to use "dividend money" versus "external financing" to finance growth. A copy of Mr Priory's letter is attached.

I would ask that your office require Duke Energy to include the proposal in the 2002 proxy statement and let the shareholders decide whether or not to approve it.

Very truly yours,

David E. Bailey
Derwood, MD (ph: 301 926 3428)

January 9, 2002

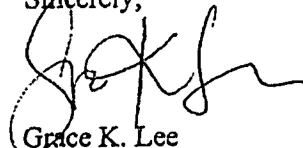
Response of the Office of Chief Counsel
Division of Corporation Finance

Re: Duke Energy Corporation
Incoming letter dated November 30, 2001

The proposal requests that Duke Energy "distribute earnings more equitably, to include dividend increases for shareholders by adjusting, e.g. investments for growth, or executive salary increases and awards, so that shareholders may benefit in a more fungible way ... from the company's success."

There appears to be some basis for your view that Duke Energy may exclude the proposal under rule 14a-8(i)(13). In this regard, we note that the proposal appears to amount to a formula that would result in a specific dividend amount. Accordingly, we will not recommend enforcement action to the Commission if Duke Energy omits the proposal from its proxy materials in reliance on rule 14a-8(i)(13). In reaching this position, we have not found it necessary to address the alternative basis for omission upon which Duke Energy relies.

Sincerely,



Grace K. Lee
Attorney-Advisor