

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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|--------------------------------|---|--------------------------------|
| <b>Time Warner Cable, LLC</b>  | ) |                                |
|                                | ) |                                |
| <b>Complainant</b>             | ) |                                |
|                                | ) |                                |
| <b>v.</b>                      | ) | <b>Case No. 11-3797-EL-CSS</b> |
|                                | ) |                                |
| <b>Duke Energy Ohio, Inc.,</b> | ) |                                |
|                                | ) |                                |
| <b>Respondent.</b>             | ) |                                |

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**REPLY TO TIME WARNER CABLE’S MEMORANDUM CONTRA  
MOTION TO DISMISS OF RESPONDENT,  
DUKE ENERGY OHIO, INC.**

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Pursuant to O.A.C. 4901-1-12(B), Respondent Duke Energy Ohio, Inc., (Duke Energy Ohio) respectfully files its Reply to Time Warner Cable LLC’s Memorandum Contra Duke Energy Ohio’s Motion to Dismiss (Memorandum Contra).

Time Warner Cable LLC (TWC) again attempts to distract the Commission’s attention from the real parties in interest in this dispute by referring to Duke Energy Ohio as “Duke.” By so doing, TWC groups all Duke Energy Corporation affiliates under the same umbrella for purposes of securing the Public Utilities Commission of Ohio’s (Commission) jurisdiction. TWC’s attempt to group together all of Duke Energy Corporation’s affiliates blatantly disregards the corporate formalities maintained by all Duke Energy Corporation affiliates. TWC blurs the lines between Duke Energy Corporation affiliates solely to allow the Commission to assert jurisdiction over the matter. As explained in Duke Energy Ohio’s Motion to Dismiss, filed July 12, 2011, and in this Reply, TWC’s Complaint does not involve Duke Energy Ohio, the

regulated entity subject to the Commission's jurisdiction. Accordingly, the Commission must dismiss TWC's Complaint for lack of jurisdiction.

## **I. Underlying Facts**

As delineated in Duke Energy Ohio's Motion to Dismiss, the annual payment that TWC contests in this action arose as a result of the assignment, to Warner Cable Communications of Cincinnati, Inc., (WCC) the predecessor in interest of TWC, of the rights of Enertech Associates International, Inc., (Enertech) to occupy conduit space owned by Cincinnati Gas and Electric (CG&E), a regulated subsidiary of Cinergy Corp. The Conduit Lease Assignment and Consent (Assignment) explicitly stated the following: "*in addition to the lease payments payable under the Conduit Lease Agreement and in consideration of Enertech's involvement in the Project*, WCC shall make the following Annual Payments to Enertech[:]. . . July 1, 2010...\$750,000" (Emphasis added). The "project" referenced above included the development of a fiber optic system in the downtown Cincinnati area. On August 8, 1995, Enertech assigned its remaining rights and obligations, including its rights to receive the annual payments from WCC, to Cinergy Technology, Inc., which subsequently assigned its rights to Duke Energy One, Inc. (Duke Energy One).

## **II. Corporate Structure and Succession of Interest**

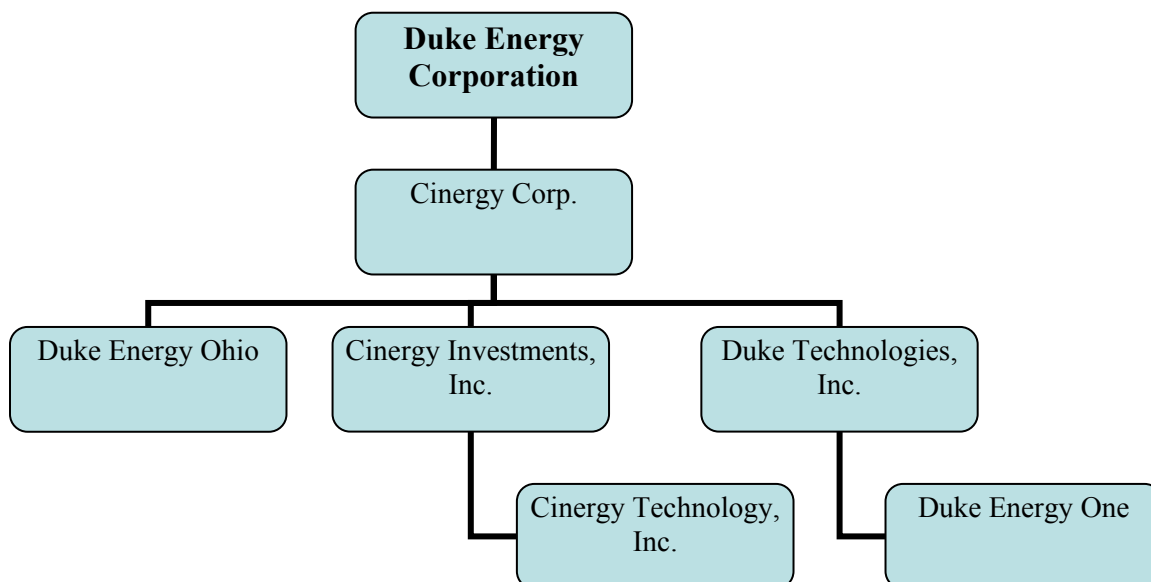
In 2006, Duke Energy Corporation merged with Cinergy Corp. As a result of the merger, CG&E's name was changed to Duke Energy Ohio, Inc. Prior to the merger, CG&E was a subsidiary of Cinergy Corp. Thus, Duke Energy Ohio is a subsidiary of Cinergy Corp.

Cinergy Technology, Inc., the party to which Enertech assigned the legal right to the payments under the Assignment, is a subsidiary of Cinergy Investments, Inc., which itself is a subsidiary of Cinergy Corp.

Duke Energy One, the current holder of the right to the payments, is also a second-tier subsidiary of Cinergy Corp. through Duke Technologies, Inc.

All of the subsidiaries of Duke Energy Corporation are considered affiliates, in that they are related to one another by shareholdings or other means of control. The diagram below sets forth an abridged organizational chart capturing the relationships of these parties:

**Abridged Organizational Chart – Duke Energy Corporation<sup>1</sup>**



**III. The Commission has no jurisdiction over this matter, as it has no authority to regulate Duke Energy One**

The powers of the Public Utilities Commission of Ohio are conferred by statute, and it possesses no authority and may exercise no jurisdiction beyond that conferred by statute.<sup>2</sup> Of Cinergy Corp.; Cinergy Investments, Inc.; Cinergy Technology, Inc.; Duke Technologies, Inc.; Duke Energy One; and Duke Energy Ohio, which are all, as explained above, affiliates of Duke

<sup>1</sup> This abridged organizational chart is limited to reflect only those relationships shared by the Duke Energy Corporation affiliates named in the pleading herein. It does not reflect the entire corporate structure of Duke Energy Corporation, nor does it reflect the entire corporate structure of any affiliate represented herein. It is provided strictly for ease of understanding the relationship between Duke Energy Ohio and Duke Energy One.

<sup>2</sup> See *City of Cincinnati v. Public Utilities Commission* (1917), 96 Ohio St.270, 117 N.E. 381; *Penn Central Transp. Co. v. Public Utilities Commission* (1973), 35 Ohio St.2d 97, 298 N.E.2d 587.

Energy Corporation, the *sole* entity that is a public utility under R.C. 4905.02, over which the Commission may properly exercise jurisdiction, is Duke Energy Ohio. The Commission has not historically regulated Duke Energy One or any other Duke Energy Corporation affiliate that is not a public utility. Further, the Commission has no authority to regulate these affiliates, as its regulation would not advance the purposes set forth R.C. 4901.02, which the Commission is specifically entrusted to carry out. As explained previously in this pleading and the Motion to Dismiss, the legal right to the annual payment, which arose pursuant to the Assignment, resides with Duke Energy One, not Duke Energy Ohio. Accordingly, the Commission has no jurisdiction over the challenge regarding the annual payment.

The dispute over the annual payment concerns only TWC (as the successor in interest of WCC) and Duke Energy One. The Commission has no jurisdiction over Duke Energy One or its transactions. Although TWC improperly skews the entities' relationship in order to attempt to bring Duke Energy Ohio into the issues addressed by the Complaint and thereby assert Commission jurisdiction, Duke Energy Ohio has no legal interest, nor has it represented that it has any such interest, in the annual payment that is due to Duke Energy One under the terms of the Assignment.

TWC alleges that the Commission has jurisdiction over the Complaint because Duke Energy Ohio has charged TWC a conduit occupancy fee in excess of the rate set forth in its Pole Attachment Tariff (PA Tariff), which establishes the rates Duke Energy Ohio can charge for pole attachments and conduit occupancy. As described throughout this Reply, however, Duke Energy Ohio has no legal interest in the annual payment TWC is contesting. Thus, its tariff has no relevance here.

Assuming, however, that the PA tariff is somehow implicated, the mere existence of the tariff does not extinguish the rights and duties of parties other than Duke Energy Ohio relating to pole attachments and conduit occupancy that arose pursuant to contracts or assignments existing prior to the tariff's effective date. In accordance with this principle, Duke Energy One's right to collect annual payments required pursuant to the contract for conduit access, and TWC's duty to pay these annual payments, remain in force, as they were not displaced by the PA Tariff. TWC's refusal to pay the \$750,000 payment therefore amounts to the breach of a contract between two non-regulated entities. As such, the Commission has no jurisdiction over the matter, and should grant Duke Energy Ohio's Motion to Dismiss.

**IV. Piercing the corporate veil is not warranted, nor permitted by Ohio law relative to the relationship of Duke Energy Ohio and Duke Energy One.**

TWC also asserts in its Memorandum Contra that the Commission should "pierce the corporate veil" that, it argues, was purposely created by CG&E, in order to demonstrate that Duke Energy Ohio is charging TWC an impermissible fee in excess of the PA Tariff rate.<sup>3</sup> TWC's reasoning behind its assertion is entirely convoluted and has no basis in fact.

TWC contends that CG&E intentionally granted the right to lease conduit space to Enertech in its Conduit Lease Agreement, and Enertech subsequently assigned such rights to WCC, so that CG&E could shield the "conduit arrangement" from the Commission's jurisdiction.<sup>4</sup> TWC's claims are entirely unfounded. As specified in the Assignment, which was signed by TWC's predecessor in interest, "*in consideration of Enertech's involvement in the Project,*" WCC explicitly agreed to tender annual payments to Enertech. Each party to the Assignment was clear at the time the Assignment was executed that Enertech's interest in the annual payment arose as a result of its extensive involvement in the fiber optic project leading to

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<sup>3</sup> Memorandum Contra at 5.

<sup>4</sup> *Id.*

the Conduit Lease Agreement; that fact is memorialized in the Assignment. TWC's claim, asserted fifteen years after the agreements were executed, that the transaction was purposely structured to elude the Commission's jurisdiction is wholly unsupported.

The legal authority upon which TWC relies in support of its argument that the Commission should pierce the corporate veil is likewise flawed. The circumstances of *Pottschmidt v. Klosterman*,<sup>5</sup> as well as *Farmers Fertilizer Co. v. Ruh*,<sup>6</sup> both of which TWC cites in support of its argument that the 1994 transaction was structured to evade Commission jurisdiction, are distinguishable from the circumstances of the matter herein. In both *Pottschmidt* and *Farmers Fertilizer*, a separate corporation was intentionally formed and utilized for the purpose of evading liability.<sup>7</sup> In contrast, under the facts of this case, Enertech existed as a going concern prior to the execution of the original lease and Assignment, and, as noted several times throughout this Reply, participated extensively in the fiber optic project leading to the agreements. Thus, *Pottschmidt* and *Farmers Fertilizer* are inapposite.

Further, as explained above, Duke Energy Ohio and Duke Energy One are affiliates. To determine whether a corporation's veil can be pierced in a specific situation, a court or administrative body must apply the following three-pronged test: (1) control over the corporation by those held to be liable was so complete that the corporation had no separate mind, will, or existence of its own; (2) control over the corporation by those held to be liable was exercised in such a manner as to commit fraud against the person seeking to disregard the corporate entity; and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.<sup>8</sup> A plaintiff's

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<sup>5</sup> *Pottschmidt v. Klosterman* (2006), 169 Ohio App.3d 824, 865 N.E.2d 111.

<sup>6</sup> *Farmers Fertilizer Co. v. Ruh* (1917), 7 Ohio App. 430, 29 Ohio C.A. 165.

<sup>7</sup> *Pottschmidt*, 169 Ohio App.3d at 838; *Farmers Fertilizer*, 7 Ohio App. at 433.

<sup>8</sup> See *Minno et al. v. Pro-Fab, Inc.* (2009), 121 Ohio St.3d 464, 467, 905 N.E.2d 613, fn. 4, citing *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 287, 617 N.E.2d 1075.

successful proof of each of the three elements of the test will result in individual shareholders being held liable for corporate wrongdoings.<sup>9</sup>

As evidenced in the Corporate Structure and Succession of Interest section *supra*, Duke Energy Ohio and Duke Technologies are both subsidiaries of Cinergy Corp. and second-tier subsidiaries of Duke Energy Corporation. As such, they are “sister corporations,” in addition to being characterized as affiliates, because they are controlled by the same, or substantially the same, owner.<sup>10</sup> Ohio common law prevents a plaintiff from piercing the corporate veil of one corporation to reach its sister corporation.<sup>11</sup> Specifically, “[a] corporation’s veil may not be pierced in order to hold a second corporation liable for the corporate misdeeds of the first when the two corporations have common individual shareholders but neither corporation has any ownership interest in the other corporation.”<sup>12</sup> Because Duke Technologies and Duke Energy Ohio are sister corporations, and Duke Energy One is a subsidiary of Duke Technologies, the relationship shared between Duke Energy One and Duke Energy Ohio is even further removed than that shared between sister corporations. Duke Energy Ohio has absolutely no control over Duke Energy One. By extension of the rationale precluding the application of the piercing the corporate veil doctrine to sister corporations, which disallows such action based on the inability of one sister to control another, the doctrine cannot be applied to reach Duke Energy Ohio through Duke Energy One. Thus, TWC’s assertion that the Commission should pierce the corporate veil is without merit.

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<sup>9</sup> *Id.*

<sup>10</sup> *Minno*, 121 Ohio St.3d at 467.

<sup>11</sup> *Id.* at 468.

<sup>12</sup> *Id.*

## **Conclusion**

The Commission's lack of jurisdiction over this dispute between two non-regulated entities, as well as the legal inability of any jurisdictional body to pierce Duke Energy One's corporate veil to reach Duke Energy Ohio, justify the Commission's dismissal of TWC's Complaint against Duke Energy Ohio. Accordingly, Duke Energy Ohio respectfully requests that the Commission dismiss TWC's complaint with prejudice.

Respectfully submitted,

/s/ Amy B. Spiller

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply to Time Warner Cable's Memorandum Contra Motion to Dismiss of Respondent, Duke Energy Ohio, Inc. was provided to the persons listed below via email on August 12, 2011:

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