BEFORE

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Duke  Energy Ohio for Approval of the Fourth  Amended Corporate Separation Plan under Section 4928.17, Revised Code, and Chapter 4901:1-37, Ohio Administrative Code. | )  )  )  )  ) | Case No. 15-0441-EL-UNC |

**COMMENTS OF IGS ENERGY**

Joseph Oliker (0086088)

Email: [joliker@igsenergy.com](mailto:joliker@igsenergy.com)

Counsel of Record

IGS Energy

6100 Emerald Parkway

Dublin, Ohio 43016

Telephone: (614) 659-5000

Facsimile: (614) 659-5073

***Attorney for IGS Energy***

**June 12, 2015**

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1. **BACKGROUND**

On March 2, 2015, Duke Energy Ohio, Inc. (“Duke”) filed an application seeking approval of an amendment to its corporate separation plan (“Application”). [[1]](#footnote-1) Duke claims that the amendment is necessary because in its electric security plan stipulation “the Company agreed to amend the Plan once again, within ninety days after the effective date of full legal corporate separation.”[[2]](#footnote-2)

Duke’s Application states that “[a]s of December 1, 2014, Duke Energy Ohio owns no generating assets and is not engaged in the generation business.”[[3]](#footnote-3) Duke purports that it has achieved full legal separation and filed its Application in this proceeding in satisfaction of its stipulation obligations.

Duke’s Application, however, does not identify whether Duke has divested its interest in the Ohio Valley Electric Corporation (“OVEC”). Because Duke has publicly represented that it has no intention of divesting its OVEC interest—despite Commission directives[[4]](#footnote-4)—there is no reason to believe that Duke has divested it.[[5]](#footnote-5) Also, while the Application does not discuss Duke’s OVEC interest, it proposes to delete OVEC from Duke’s list of affiliates.[[6]](#footnote-6)

Additionally, Duke’s Application does not request Commission authority to continue to offer products and services other than retail electric service (“non-commodity services”), though its proposed corporate separation plan appears to assume that it will be allowed to do so.[[7]](#footnote-7) Duke’s Application does not identify facts and circumstances to support a waiver of the requirement to provide non-commodity services through a separate affiliate.

As discussed further below, the Commission should dismiss Duke’s Application. It is fatally flawed and not ripe for consideration. Further, consideration of the Application will lead to needless and duplicative litigation.

1. **COMMENTS**
2. **Duke has not satisfied its Stipulation Obligation**

Duke claims it is necessary to amend its corporate separation plan because it has satisfied its Stipulation obligation to achieve full legal separation. As discussed below, Duke has not demonstrated that it has satisfied its Stipulation obligation.

The Stipulation provides:

that the Commission's approval of the stipulation will constitute approval of Duke's Third Amended CSP and **full legal corporate separation**, **as contemplated by Section 4928.17(A)**,Revised Code, such that the transmission and distribution assets of Duke will continue to be held by the distribution utility and **all of Duke's generation assets** will be transferred to an affiliate.[[8]](#footnote-8)

R.C. 4928.17(A)(1), requires an electric distribution utility’s (“EDU”) corporate separation plan to provide at a minimum  ***“*provision of the competitive retail electric service** or the nonelectric product or service **through a fully separated affiliate** of the utility (emphasis added)*.*”[[9]](#footnote-9) Thus, the Stipulation required Duke, the EDU, to cease providing competitive retail electric services and to operate solely as a distribution utility in the business of providing non-competitive service.

Duke’s Application, however, failed to identify whether it has divested its interest in OVEC. To the extent that Duke still maintains an interest in OVEC—an interest in unregulated generating assets—it has not achieved full legal separation. And thus it has not satisfied the stipulation condition that provided the basis for the present Application.

Moreover, R.C. 4928.17(A)(1) requires Duke to implement “separate accounting requirements” for services other than Duke’s non-competitive service. To the extent that Duke has an interest in OVEC, it must maintain accounting entries related to OVEC costs and revenues on the books of the EDU. That would run afoul of R.C. 4928.17(A)(1).

The Commission’s rules further demonstrate that Duke must divest its OVEC interest in order to achieve full legal separation. Chapter 4901:1-37 Ohio Administrative Code (“OAC”) is applicable to an EDU’s corporate separation plan and an EDU’s interactions with its affiliates.[[10]](#footnote-10) Indeed, Duke’s Application includes a reference to these Commission rules in the case title.[[11]](#footnote-11) That chapter provides that “[a]ny indebtedness incurred by an affiliate shall be without recourse to the electric utility.”[[12]](#footnote-12) Duke’s current corporate separation plan lists OVEC as an affiliate.[[13]](#footnote-13) The Intercompany Power Agreement (“ICPA”)—the purchase power agreement at issue in this case—is littered with provisions that hold Duke specifically liable for OVEC’s debts and obligations.[[14]](#footnote-14) Thus, Duke cannot hold onto its interest in OVEC and fulfil its requirement to achieve full legal separation.

In summary, Duke has not satisfied its Stipulation obligation to achieve full legal separation. As such, its Application in this proceeding is not ripe for review. The Commission should dismiss Duke’s Application and direct it to refile after it has transferred its interest in OVEC to a third party in accordance with the Opinion and Order modifying and approving Duke’s third electric security plan.

1. **Duke has not demonstrated that good cause exists for a waiver of the requirement to provide products and services other than retail electric service through an affiliate**

In Duke’s last corporate separation case, the Commission authorized Duke to provide non-commodity services.[[15]](#footnote-15) In that case, the Commission affirmed that Duke was required to separate its generation business from the EDU to achieve full legal separation, but that the Commission did not rule out Duke providing non-commodity services to customers.[[16]](#footnote-16)

The Commission’s decision was appealed to the Supreme Court of Ohio because Duke did not demonstrate that good cause existed to allow Duke to provide non-commodity services.[[17]](#footnote-17) That decision may be remanded to the Commission to correct the flaws identified in the appeal. Duke’s pending Application contains similar flaws. Because Duke’s Application is not ripe for consideration and should be summarily dismissed, there is no need to relitigate those issues at this time. But, to the extent that an order unnecessarily approves Duke’s unripe request to modify its corporate separation plan, IGS may be forced to relitigate those issues here.

1. **CONCLUSION**

For the reasons stated herein, the Commission should dismiss Duke’s unripe Application.

Respectfully submitted,

*/s/ Joseph Oliker*

Joseph Oliker (0086088)

Counsel of Record

Email: joliker@igsenergy.com

IGS Energy

6100 Emerald Parkway

Dublin, Ohio 43016

Telephone: (614) 659-5000

Facsimile: (614) 659-5073

***Attorney for IGS Energy***

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing *Comments of IGS Energy* was served this 12th day of June 2015 via electronic mail upon the following:

*/s/ Joseph Oliker\_\_\_\_\_\_\_*

Joseph Oliker

[Amy.Spiller@duke-energy.com](mailto:Amy.Spiller@duke-energy.com)

[Jeanne.Kingery@duke-energy.com](mailto:Jeanne.Kingery@duke-energy.com)

Jodi.Bair@occ.ohio.gov

Katie.Johnson@puc.state.oh.us

Joseph.Clark@directenergy.com

MHPetricoff@vorys.com

1. Application at 2. The Application title appears to refer to approval of Duke’s Fourth Corporate Separation Plan. The proposed amendment, however, relates to a proposed Fifth Corporate Separation Plan. [↑](#footnote-ref-1)
2. Application at 2. [↑](#footnote-ref-2)
3. Application, Ex. A at Section XIV(A). [↑](#footnote-ref-3)
4. *See In the matter of the application of Duke Energy Ohio, Inc. for authority to establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an electric security plan, accounting modifications and tariffs for generation service*, Case Nos. 14-841-EL-SSO, *et al.*, Opinion and Order at 48 (Apr. 2, 2015). This case is hereinafter referred to as “*ESP III*”. [↑](#footnote-ref-4)
5. *ESP III*,Application for Rehearing and Memorandum in Support of Duke Energy Ohio, Inc. at 11-17 (May 4, 2015). [↑](#footnote-ref-5)
6. Application, Ex. A at Section V. [↑](#footnote-ref-6)
7. *See* Application, Ex. A at Section XIV(C). [↑](#footnote-ref-7)
8. *In the matter of the application, motion for protective order and memorandum in support of Duke Energy Ohio for authority to establish a Standard Service Offer pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al.*, Opinion and Order at 45 (Nov. 21, 2011) (emphasis added). [↑](#footnote-ref-8)
9. While this provision may be waived for good cause shown, Duke does not request a waiver. Rather, it claims to satisfy this provision of the law. [↑](#footnote-ref-9)
10. Rule 4901:1-37-03(A), OAC provided: “[t]he provisions of this chapter shall be applicable in accordance with sections 4928.17 and 4928.18 of the Revised Code and apply to:

    The activities of the electric utility and its transactions or other arrangements with its affiliates

    . . . .” [↑](#footnote-ref-10)
11. See Application case caption. Duke incorrectly refers to 4901:11-37, but that rule does not exist. [↑](#footnote-ref-11)
12. Rule 4901:1-37(C)(1). OAC. That section also provides that “[a]n electric utility shall not enter into any agreement with terms under which the electric utility is obligated to commit funds to maintain the financial viability of an affiliate.” Rule 4901:1-37(C)(2), OAC. An electric utility shall not make any investment in an affiliate under any circumstances in which the electric utility would be liable for the debts and/or liabilities of the affiliate incurred as a result of actions or omissions of an affiliate.” Rule 4901:1-37(C)(3), OAC. These sections undermine Duke’s assertion that it has complied with the Commission’s rules with respect to full legal separation. [↑](#footnote-ref-12)
13. Application, Ex. A at Section V. While it is arguable that Duke operates OVEC as if it is directly owned by Duke, determination of that issue is not relevant to this Application because corporate separation rules also apply to an EDU’s interaction with generation assets held by an affiliate. [↑](#footnote-ref-13)
14. *See* IGS Ex. A (containing theICPA). *See id.* at Article 7. “As soon as practicable after the end of each month Corporation shall render to each Sponsoring Company a statement of all Available Power and Available Energy supplied to or for the account of such Sponsoring Company during such month, specifying the amount due to the Corporation therefor, including any amounts for reimbursement for the cost of replacements and additional facilities and/or spare parts incurred during such month, pursuant to Articles 5 and 7 above.” *Id.* at Article 8.01. [↑](#footnote-ref-14)
15. *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Fourth Amended Corporate Separation Plan Under R.C. 4928.17 and Ohio Adm.Code 4901:11-37*, Finding and Order (Jun. 11, 2014). [↑](#footnote-ref-15)
16. *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Fourth Amended Corporate Separation Plan Under R.C. 4928.17 and Ohio Adm.Code 4901:11-37*, Entry on Rehearing at 5 (Aug. 6, 2014). [↑](#footnote-ref-16)
17. *See generally* Supreme Court Case No. 2014-1651. [↑](#footnote-ref-17)