BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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. 15-441-EL-UNC

REPLY COMMENTS OF DUKE ENERGY OHIO, INC.

I. Introduction

On March 2, 2015, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) filed its application to amend its corporate separation plan, in fulfillment of its obligation under the stipulation adopted in its 2011 electric security plan proceeding (ESP case).[1] As allowed by the procedural schedule issued in this proceeding, comments on the application were filed by IGS Energy (IGS) and the Retail Energy Supply Association (RESA).[2] The Company respectfully submits that the Public Utilities Commission of Ohio (Commission) should disregard the comments filed by IGS and RESA and should approve the Application.

II. Discussion

A. Comments Regarding Completion of Generation Asset Transfer

IGS and RESA both allege – wrongly – that Duke Energy Ohio has not yet transferred all of its generation assets to a third party and, therefore, should not yet have filed an amended

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[1] *In the Matter of the Application 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 No. 11-3549-EL-SSO, *et al.*

[2] Motions to intervene were also filed, without comments, by the Office of the Ohio Consumers' Counsel and by Direct Energy Services, LLC, and three of its affiliates.

corporation separation plan. This allegation is wrong under the most fundamental precepts of corporate law. It is also undeniably wrong under the clear terms of the stipulation in the ESP case (ESP Stipulation). And it is wrong under the terms of Ohio law and regulations.

1. Corporate law indisputably provides that an ownership interest in the corporate entity does not create any ownership interest in the assets of that entity.

RESA and IGS both appear to misunderstand either the facts surrounding Duke Energy Ohio's ownership interest in the Ohio Valley Electric Corporation (OVEC) or the law that applies to that interest. Duke Energy Ohio, as the Commission is aware, owns 9 percent of the stock in OVEC, an Ohio corporation. In addition, and as noted by IGS, Duke Energy Ohio is a party to a contract with OVEC and the other owners of OVEC stock (the Intercompany Power Agreement, or ICPA). That ICPA provides for the various contracting parties' rights and obligations with regard to capacity, generation, and the costs thereof.[3]

Critically, Duke Energy Ohio's ownership of OVEC stock and Duke Energy Ohio's rights and responsibilities under the ICPA are entirely separate, from a legal point of view. The ownership of stock gives the stockholder absolutely no rights to corporate assets (other than at dissolution) and absolutely no responsibilities for corporate debts. Rather, the ownership of corporate stock simply provides the stockholder with the right to vote, in the same percentage as is represented by his stock ownership.[4]

Disregarding these basic concepts, RESA starts out by incorrectly defining the term "OVEC" as meaning "the Kyger Creek and Clifty Creek generation plants."[5] A few pages later,

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[3] *See* Comments of IGS Energy (IGS Comments), at IGS Ex. A (June 12, 2015).

[4] *See, e.g., United States v. Niarchos*, 125 F.Supp. 214, 228 (D.C. 1954)("The settled rule is that a corporation's property interests and a stockholder's stock interests are distinct. Title to corporate property is held in the name of the corporation and not by its stockholders. Likewise, a stockholder's holdings are in the corporation and not specifically in any of its assets.").

[5] Motion to Intervene of the Retail Energy Supply Association and Initial Comments (RESA Comments), at pg. 1 (June 12, 2015).

it claims the Application to be premature, "as Duke . . . has yet to complete the divesture of its interest in the two Ohio Valley Electric Corporation generation plants, the Kyger Creek Plant in Ohio and the Clifty Creek plant in Indiana."[6] It sums this issue up by arguing that responsibility for the costs of those plants and the ownership of the generation from them must be transferred out of Duke Energy Ohio.[7] Similarly, IGS complains that the Company "still maintains an interest in OVEC—an interest in unregulated generating assets . . .."[8]

IGS and RESA are wrong.

- The Kyger Creek and Clifty Creek plants are not, as RESA would have the Commission believe, legally equivalent to OVEC. It is entirely misleading to use "OVEC" as a defined term, while defining it as the two plants.
- It is untrue to state, as RESA does, that Duke Energy Ohio continues to hold an interest in OVEC's plants. It has never held any interest in the plants and therefore cannot divest any such interest.
- RESA cites no law, rule, or stipulation provision that would require Duke Energy Ohio to "transfer" its contractual rights and responsibilities under the ICPA.
- While the Company does still maintain an interest – an ownership interest, that is – in OVEC, as expressed by IGS, it does not have and has never had any ownership interest in the two generating plants that are owned by OVEC. Duke Energy Ohio has contractual rights and responsibilities related to those plants, but not an ownership interest.

The Company's stock ownership in OVEC is simply not an interest in unregulated generating assets.

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[6] RESA Comments, at pg. 5.
[7] *Id.*
[8] IGS Comments, at pg. 4.

2. The ESP Stipulation specifically defined those assets that Duke Energy Ohio had agreed to divest, which assets did not include OVEC stock.

In the ESP Stipulation, to which both IGS and RESA point to support their positions, the Company agreed to transfer its generating assets to another entity: "The parties agree that Duke Energy Ohio will transfer title, at net book value, to all of its Generation Assets out of Duke Energy Ohio."[9] RESA and IGS assert that this provision required Duke Energy Ohio to transfer its stock in OVEC to a third party. Duke Energy Ohio disagrees. The resolution of these differing points of view is provided in the undisputed and unambiguous terms of that stipulation. The term "Generating Assets" is capitalized in the document and is, thus, used as a defined term. The definition, appearing in the negotiated stipulation, reads as follows:

> For purposes of this Stipulation, "Generation Assets" shall refer to all generation assets currently, directly owned by Duke Energy Ohio, whether operating or retired, but shall not include any generation assets currently owned by an affiliate or subsidiary of Duke Energy Ohio.[10]

The assets of OVEC cannot be deemed to be an asset that is directly owned by Duke Energy Ohio. Such assets can in no way be classified within the "Generation Assets" that were required by the ESP Stipulation to be divested.

And if the undisputed definition of the term were insufficient, the testimony in support of the ESP Stipulation was even more clear. Charles Whitlock testified on behalf of Duke Energy Ohio, specifically addressing the identification of those assets required to be transferred. Mr. Whitlock provided two lists of assets: one was a list of currently operating generating assets and the other was a list of retired generation assets.[11] Furthermore, Mr. Whitlock explained that the operating generating assets comprised those plants that were functionally separated from the

[9] ESP Stipulation, at pg. 25 (emphasis added).
[10] *Id.*, at pg. 9, fn. 4.0.
[11] Duke Energy Ohio ESP II, Testimony of Charles R. Whitlock, at pp. 3-4, Attachments CRW-1 and CRW-2.

distribution utility and whose capacity and energy had been dedicated to serving the Company's retail electric customers since 2001. There can be no doubt that the plants owned by OVEC were not on that list and were not among those dedicated to serving Duke Energy Ohio's retail electric customers.

Furthermore, both IGS and RESA seem to confuse the voluntary commitment by the Company to transfer its identified, directly owned generating assets, as that term was defined in the Stipulation and in the testimony supporting the Stipulation. Aside from this voluntary commitment, the Commission has no authority to compel divestiture, in any form, of generating assets owned directly or indirectly by the utility. Even more to the point, the Commission has no authority to compel the sale of stock owned by the Company – even stock in a company that holds generating assets. If it had such authority, the Commission could, for example, compel the divestiture of the Company's wholly owned subsidiary, Duke Energy Kentucky, Inc. Even IGS and RESA have not gone so far as to suggest such an outcome.

Certainly, if it had been the intention of the Company, the Commission, or any intervenor to include generating facilities that were not directly owned by Duke Energy Ohio, such as the plants owned by OVEC or by Duke Energy Kentucky, the time to raise that issue was at the time the ESP Stipulation was signed. Parties should not be allowed to now revise the terms of the ESP Stipulation in that case to impose new conditions that were plainly not included when signed by the parties and approved by the Commission.

There can be no real dispute that the terms of the ESP Stipulation do not require Duke Energy Ohio to transfer its ownership interest in OVEC.[12]

3. Duke Energy Ohio's continued ownership of stock in OVEC does not violate Ohio law or regulations.

IGS also attempts to prove that Ohio law prohibits Duke Energy Ohio from continuing to own the OVEC stock. It does so by pointing to language in the ESP Stipulation that tied the required transfer of "Generation Assets" to the statutory requirement that a corporate separation plan provide for full legal corporate separation. However, IGS's discussion misses the point entirely. The stock that Duke Energy Ohio owns in OVEC is still not a generation asset; Duke Energy Ohio is not providing a competitive retail electric service by its ownership of that stock. The Company is also not providing a competitive retail electric service by virtue of its contractual rights and obligations under the ICPA, as neither the capacity nor the energy obtained under that contract are used for the benefit of customers.

IGS also claims that the Company's continued ownership of OVEC stock would violate the rules that address whether affiliates' indebtedness may be incurred with recourse to the utility. On this issue, IGS makes three errors.

First, IGS asserts that OVEC is an affiliate of Duke Energy Ohio, pointing to its inclusion in a list of affiliates in the current corporate separation plan.[13] IGS ignores the fact that such list includes a reference to the fact that Duke Energy Ohio only holds a minority interest in OVEC. It also ignores the Commission's own definition of "affiliates," which provides that affiliates are

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[12] RESA correctly pointed out that the Commission recently addressed the interpretation of the ESP Stipulation, in its Opinion and Order in the Company's pending ESP proceeding, Case No. 14-841-EL-SSO, *et al.* However, RESA incorrectly identified that Commission statement as having answered the question "definitively." RESA Comments, at pg. 5. RESA failed to note, in this regard, that Duke Energy Ohio filed an application for rehearing in that proceeding, which application has not yet been substantively addressed by the Commission.

[13] IGS Comments, at pg. 5.

companies that are related to each other due to common ownership or control.[14] There is no ownership or control in common between Duke Energy Ohio and OVEC. There is no control of OVEC by Duke Energy Ohio, through its minimal, 9 percent interest; consequently, per the Commission's rules, there is no affiliate relationship between OVEC and Duke Energy Ohio.

Second, IGS fails to note that the rule regarding indebtedness specifically allows the Commission to approve otherwise. Thus, the rule does not absolutely mandate that a distribution utility not be liable for the debts or obligations of an affiliate (even assuming that OVEC were an affiliate, which it is not).[15]

Third, IGS suggests that the Company's ownership of OVEC stock causes an accounting problem under Ohio law. IGS starts with the premise that R.C. 4928.17(A) requires the Company "to implement 'separate accounting requirements' for services other than [its] non-competitive service."[16] It goes on from there to suggest that the maintenance of OVEC-related accounting entries on the books of Duke Energy Ohio would violate the separate accounting requirement in that section. IGS's error on this issue is partly its understanding of the law and partly its knowledge of the facts. R.C. 4928.17(A) does not require implementation of separate accounting requirements. Rather, it requires an electric distribution utility that offers more than just noncompetitive service to do so only pursuant to the terms of an approved corporate separation plan, which plan must incorporate separate accounting requirements, among other things. With regard to the relevant facts, IGS fails to note that the Duke Energy Ohio corporate separation plan does include such a requirement.[17] And it perhaps is not aware that the Company does indeed maintain those accounts separately.

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[14] O.A.C. 4901:1-37-01(A).
[15] O.A.C. 4901:1-37-04(C). IGS incorrectly refers to "Rule 4901:1-37(C)(1)" but that rule does not exist.
[16] IGS Comments, at pg. 5.
[17] Duke Energy Ohio Corporate Separation Plan, at Sec. III.

Ohio laws and regulations do not prohibit Duke Energy Ohio from continuing to own stock in OVEC.

B. Comments Regarding Other Products and Services

IGS inexplicably reasserts arguments that are currently pending at the Supreme Court of Ohio, concerning Duke Energy Ohio's provision, under its tariffs, of products and services other than retail electric service.

Duke Energy Ohio's Application in this case proposed no change with regard to this issue. It is simply not before the Commission at this time.

The Commission should ignore IGS's comments concerning such products and services.

III. Conclusion

Duke Energy Ohio respectfully requests that the Commission approve its corporate separation plan, as submitted.

Respectfully submitted,

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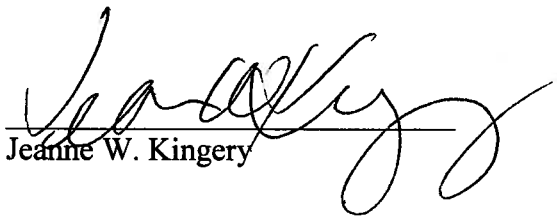
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 10th day of July, 2015, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.



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Summary: Comments Reply Comments of Duke Energy Ohio, Inc. electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Kingery, Jeanne W.