

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review)
of Ohio Adm.Code Chapter 4901:1-37.) Case No. 18-1190-EL-ORD

REPLY COMMENTS OF INTERSTATE GAS SUPPLY, INC.

I. INTRODUCTION

On June 19, 2019, the Commission issued amended rules for comment regarding corporate separation for electric utilities and affiliates. On July 12, 2019, stakeholders, including The Dayton Power and Light Company ("DP&L") and Duke Energy Ohio, Inc. ("Duke") filed initial comments. As discussed further below, Interstate Gas Supply, Inc. ("IGS") appreciates the opportunity to provide reply comments and recommends the Commission reject proposed changes submitted by DP&L and Duke.

II. COMMENTS

Ohio's corporate separation laws and state policy prohibit a regulated electric distribution utility ("EDU") from using its monopoly functions to extend an advantage to products and services provided either by the EDU or their affiliate.¹ To that end, Ohio law requires an EDU to provide all competitive retail electric services or nonelectric products and services through a separate affiliate.² An EDU may deviate from this requirement

¹ See R.C. 4928.02(H); 4928.17; and 4928.18.

² See R.C. 4928.17(A)(1).

only if the Commission issues an order that grants a waiver to the EDU based upon a finding of good cause and such a waiver can be granted only for an interim period of time.³ Corporate separation plans protect ratepayers and the competitive markets by preventing an unfair competitive advantage, the abuse of market power, and the extension of a preference or advantage between an EDU and its affiliate.⁴

The changes to the rules provided by DP&L and Duke ignore and deviate from the established law and policy surrounding corporate separation plans. Thus, IGS recommends the Commission reject the amendments.

A. DP&L's proposed provision contradicts Ohio law and policy.

In its initial comments, DP&L recommends the following the addition to Ohio Adm.Code 4901:1-37-05(A):

- (A) Consistent with section 4928.17 of the Revised Code, an electric utility that provides in this state, either directly or through an affiliate, a noncompetitive retail electric service and a competitive retail electric service (or a noncompetitive retail electric service and a product or service other than retail electric service) shall file with the commission an application for approval of a proposed corporate separation plan. The application shall include a narrative describing how the plan ensures competitive equality, prevents unfair competitive advantage, prohibits the abuse of market power, and effectuates the policy of the state of Ohio embodied in section 4928.02 of the Revised Code.

Notwithstanding the above, to the extent an electric distribution utility makes a filing before the public utilities commission and receives approval to offer a regulated behind the meter service, or other similar customer service, it will be

³ R.C. 4928.17(C).

⁴ See R.C. 4928.17(A)(1)-(3).

deemed a noncompetitive retail electric service under section 4928.01(B) of the Revised Code, eliminating the need to file a corporate separation plan.⁵

In support of the proposal, DP&L asserts that “[c]ustomers should be able to choose from a myriad of innovative products to be offered by the entity of their choosing.”⁶ As examples, DP&L provides that “behind the meter services, community solar, and electric vehicle changing infrastructure are just a few of the areas that provide fertile ground for EDUs...”⁷ Additionally, DP&L offers that “EDUs can and should play an important role in helping unlock the competitive electric markets by offering regulated non-competitive options for customers.”⁸ The Commission should reject DP&L’s attempts to evade Commission review because it is contrary to Ohio law and policy.

Ohio’s Corporate Separation statute states that no EDU shall engage, either directly or through an affiliate, in the business of supplying a noncompetitive retail electric service and a competitive retail electric service or supplying a noncompetitive retail electric service and a product or service other than retail electric service, without a Commission-approved corporate separation plan.⁹ “Further, that plan *must* require, at a

⁵ DP&L Initial Comments at 2.

⁶ *Id.* at 1.

⁷ *Id.*

⁸ *Id.* at 2 (emphasis added).

⁹ R.C. 4928.17(A).

minimum, that the utility provide any competitive retail electric service or nonelectric products and services through a fully separated affiliate.”¹⁰

A noncompetitive retail electric service is a retail electric service which has not been deemed competitive by law or the Commission.¹¹ “Retail electric service” is defined as:

any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.¹²

The Commission may deem any of these services competitive through a process provided for in statute, however, the General Assembly explicitly labeled “retail electric generation” as a competitive retail electric service.¹³

The policy surrounding corporate separation plans is included within the law – to prevent an unfair competitive advantage, the abuse of market power, and the extension of a preference or advantage between an EDU and its affiliate.¹⁴ As recently noted by the Justice Kennedy regarding corporate separation plans, “[i]t was not the intention of the

¹⁰ *In re Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan*, 148 Ohio St.3d 510, 2016-Ohio-7535 at ¶ 12 (emphasis included in the original), citing R.C. 4928.17(A).

¹¹ R.C. 4928.01(B).

¹² R.C. 4928.01(A)(27).

¹³ R.C. 4928.04.

¹⁴ R.C. 4928.17(A)(1)-(3).

General Assembly to permit a business that supplies noncompetitive retail electric services to, in effect, ‘rebundle’ in order to provide new nonelectric products and services that are required to be offered through a fully separate affiliate.”¹⁵ Yet DP&L’s proposed provision would do just that.

Initially, it must be noted that DP&L is shamelessly asking the Commission to violate Ohio law. Ohio Adm.Code 4901:1-37-05(A) begins with the phrase “[c]onsistent with section 4928.17 of the Revised Code,” and continues with a summary of that provision. Immediately after the summary of the law, DP&L requests an addition to the rule beginning with “Notwithstanding the above...,” or in other words, regardless of what the cited law above requires. The Commission does not have authority to waive the requirements in R.C. 4928.17, nor can the Commission approve an order or rule that contravenes a statute.¹⁶ Thus, the amendment must be rejected.

DP&L requests that if the Commission approves, through any type of filing, an EDU offering of a “regulated behind the meter service, or other similar customer service,” that it will be automatically deemed a non-competitive retail electric service. DP&L’s proposed change would have a determination made on whether something is a non-competitive retail electric service with no regard to the statutory definition of a non-competitive retail electric service.¹⁷ The law includes specific service components that make up “retail

¹⁵ *In re Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan*, 148 Ohio St.3d 510, 2016-Ohio-7535 at ¶ 34 (Kennedy, J. concurring/dissenting opinion).

¹⁶ See *Monongahela Power Co. v. Pub. Util. Comm.*, 103 Ohio St. 3d 1423, 2004-Ohio-4524, 814 N.E.2d 488 (finding the Commission cannot approve a stipulation that is contrary to statute).

¹⁷ R.C. 4928.01(A)(21).

electric service” and a method for determining whether they are non-competitive or competitive.¹⁸ That determination then prescribes the corporate separation standards and procedures. Under the proposed rule, the result, and apparent goal, of this rogue non-competitive classification means the EDUs could evade the Commission’s review of the practices and policies implemented to protect ratepayers.

Additionally, there is ***no such thing as a regulated behind the meter service*** in Ohio. Noncompetitive retail electric services provided by an EDU are subject to the supervision and regulation of the Commission.¹⁹ “[R]etail electric service includes one or more of the following ‘service components’: generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.”²⁰ Notably, “behind the meter service,” or anything remotely similar, is not included in the explicit list of services that qualify as “retail electric service.” The listed services are not examples of service components; they are *required* service components to be considered a retail electric service. If a behind the meter service is not a “retail electric service,” then it is certainly not a “noncompetitive retail electric.” Therefore, a behind the meter service cannot not regulated by the Commission.

Further, DP&L’s application references community solar as an “area[] that provide[s] fertile ground” for the EDUs, which seems to suggest DP&L believes the

¹⁸ R.C. 4928.01(B).

¹⁹ R.C. 4928.05(A)(2).

²⁰ R.C. 4928.01(A)(27).

proposed addition would allow it to offer community solar.²¹ However, retail electric generation is specifically deemed a competitive retail electric service in R.C. 4928.03. Any attempts to classify an electric generation facility as a distribution service that is subject to the Commission's jurisdiction is contrary to law and negates the General Assembly's deregulation of the electric utility industry.²² Therefore, the Commission must reject DP&L's proposed revision to Ohio Adm.Code 4901:1-37-05(A).

a. Duke's proposed revision is too broad and ambiguous.

In its comments, Duke proposes a revision to Ohio Adm.Code 4901:1-37-04(E).²³ This provision allows an EDU to take actions necessary to ensure public safety and system reliability during a declared emergency situation. Duke recommends expanding this ability to take action to prevent, reduce, or remedy any immediate threat to a person's health and/or safety or significant economic harm to a customer. Duke also recommends adding a rebuttable presumption of reasonableness in favor of the EDU if it takes action under this provision. IGS opposes this recommendation.

Initially, although Duke claims the limited scope of this provision effectively renders it null, Duke does not provide a single example of how the narrow scope has interfered with Duke's ability to take steps to ensure public safety and system reliability. In fact, Duke does not provide any examples of how the narrow scope *could* interfere with its ability to ensure public safety and system reliability. IGS is concerned that incorporating broad

²¹ DP&L Initial Comments at 1.

²² See *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶ 21-23.

²³ Duke Initial Comments at 2-4.

exceptions into the Commission's rules regarding corporate separation will have unintended consequences.

Additionally, IGS questions the source for Duke's repeated references to the need to protect "economic security" of its customers.²⁴ Economic security or economic harm to a customer is not mentioned anywhere in this rule or the corporate separation statutes. Thus, the Commission should decline to accept Duke's recommendation.

III. CONCLUSION

For the foregoing reasons, IGS recommends that the Commission reject the revisions proposed by DP&L and Duke.

Respectfully submitted,

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²⁴ See *Id.*

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Summary: Comments Reply Comments of Interstate Gas Supply, Inc. electronically filed by Bethany Allen on behalf of Interstate Gas Supply, Inc.