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**STATE OF INDIANA**

**INDIANA UTILITY REGULATORY COMMISSION**

**VERIFIED PETITION OF DUKE ENERGY OHIO, )  
 INC. (FORMERLY THE CINCINNATI GAS & )  
 ELECTRIC COMPANY) AND DUKE ENERGY )  
 VERMILLION II, LLC PURSUANT TO IND. )  
 CODE § 8-1-2.5 REQUESTING THAT THE )  
 COMMISSION CONTINUE ITS CURRENT )  
 DECLINATION OF JURISDICTION OVER DUKE ) CAUSE NO. 43965  
 ENERGY OHIO, INC.'S VERMILLION )  
 MERCHANT PLANT GENERATING FACILITY )  
 AND TO THE EXTENT DEEMED NECESSARY ) APPROVED:  
 APPROVE A NEW DECLINATION ) DEC 29 2010  
 JURISDICTION OVER THE PROPOSED )  
 TRANSFER, OF THE DUKE ENERGY OHIO, )  
 INC. VERMILLION MERCHANT PLANT )  
 GENERATING FACILITY FROM DUKE )  
 ENERGY OHIO, INC. TO DUKE ENERGY )  
 VERMILLION II, LLC. )**

**BY THE COMMISSION:**

**David E. Ziegner, Commissioner  
Aaron A. Schmoll, Senior Administrative Law Judge**

On November 12, 2010, Joint Petitioners Duke Energy Ohio, Inc. (“Duke Energy Ohio”), formerly the Cincinnati Gas & Electric Company (“CG&E”) and Duke Energy Vermillion II, LLC (“Vermillion II”) filed their Verified Joint Petition initiating this Cause. The Office of the Utility Consumer Counselor (“OUCC”) filed its notice of intent to not file testimony on November 29, 2010.

Pursuant to notice given as provided by law, proof of which was incorporated into the record, an Evidentiary Hearing was held in this matter on December 9, 2010, at 2:30 p.m., in Room 224 of the PNC Center, 101 W. Washington Street, Indianapolis, Indiana. At the hearing, the Joint Petitioners presented their case-in-chief consisting of prefiled testimony and exhibit of Charles R. Whitlock, President, Midwest Commercial Generation, Commercial Businesses, Duke Energy Business Services, LLC, on behalf of Duke Energy Ohio and Vermillion II and the Verified Joint Petition filed in this Cause. The OUCC appeared and participated at the hearing. No member of the general public appeared or sought to testify at the hearing. On December 16, 2010, Vermillion II filed proof of publication of the filing of its Petition.

Based upon the evidence and being duly advised, the Commission now finds that:

1. **Notice and Jurisdiction.** Proper legal notice of the hearing in this case was given and published by the Commission as required by law. On April 7, 1999 in Cause No. 41388, the Commission found that Duke Energy Vermillion, LLC (“Vermillion”) was a public utility under Ind. Code § 8-1-2-1 for purposes of construction and operation of the Vermillion Facility, but declined to exercise its full jurisdiction subject to certain conditions set forth in the Order. Similarly in its February 8, 2006 Order in Cause No. 42929, the Commission declined to exercise full jurisdiction over CG&E’s acquisition, ownership, operation, financing, accounting, and ratemaking regarding the Vermillion Facility. Accordingly, the Commission has jurisdiction over the subject matter of this proceeding.

2. **Joint Petitioners’ Characteristics.** Duke Energy Ohio is a public utility organized and existing under the laws of the State of Ohio, having its principal office at 139 East Fourth Street, Cincinnati, Ohio, 45202. It is engaged in rendering electric and gas utility service in the State of Ohio, and owns, operates, manages, and controls, among other things, plants and equipment within the State of Ohio used for the production, transmission, delivery, and furnishing of such electric and gas service to the public in Ohio and provides retail electric service to its standard service offer customers in Ohio. Duke Energy Ohio is duly admitted and authorized to do business in Indiana. As a result of a 1994 merger involving the parent company of PSI Energy, Inc. (“PSI”) and CG&E, CG&E became a wholly-owned subsidiary of Cinergy Corp. (“Cinergy”), a Delaware corporation that holds interests in public utility companies, including CG&E and PSI. Thereafter, as a result of a 2006 merger involving Cinergy Corp. and Duke Energy Corporation (“Duke Energy”), CG&E became Duke Energy Ohio, a wholly-owned subsidiary of Duke Energy Corporation, a Delaware corporation that holds interests in public utility companies, including Duke Energy Ohio and Duke Energy Indiana.

While the State of Ohio has deregulated generation for electric utilities, Duke Energy Ohio is still a distribution utility regulated by the Public Utilities Commission of Ohio. Duke Energy Ohio is authorized to sell energy at wholesale rates that are subject to Federal Energy Regulatory Commission (“FERC”) jurisdiction. Duke Energy Ohio does not make any retail sales of electricity within the State of Indiana. Similarly the Vermillion Facility and Vermillion II will not make any retail sales of electricity.

Vermillion II is a Delaware limited liability company and a subsidiary of Duke Energy and a subsidiary of Duke Energy Ohio having its principal office located at 139 East Fourth Street, Cincinnati, Ohio 45215. Vermillion II is the entity that will own the Vermillion Facility. FERC approved the transfer of the Vermillion Facility from Duke Energy Ohio to Vermillion II. 126 FERC ¶ 61,146 (2009).

3. **Background.** In Cause No. 41388, approved April 7, 1999, the Commission found that Vermillion was a public utility under Ind. Code § 8-1-2-1 for purposes of construction and operation of the Vermillion Facility, but declined to exercise its full jurisdiction in accordance with Indiana Code § 8-1-2.5 subject to certain conditions set forth in the Order. Thereafter, in Cause No. 42929, approved February 8, 2006, the Commission approved the transfer of Vermillion’s 75% interest in the Vermillion Facility to Duke Energy Ohio, by merger, with 25% owned by Wabash Valley Power Association (“WVPA”). The

Commission declined to exercise jurisdiction over Duke Energy Ohio's acquisition, ownership, operations, financing, accounting, and ratemaking for the Vermillion Facility in accordance with Ind. Code § 8-1-2.5.

Based upon the Commission's prior orders finding the owner of the Vermillion Facility to be a public utility, Joint Petitioners believe that, upon completion of the proposed transfer of the Vermillion Facility from Duke Energy Ohio to Vermillion II, the Commission may consider Vermillion II a "public utility" within the meaning of the Indiana Public Service Commission Act solely with respect to its ownership interest in the Vermillion Facility.

**4. Relief Requested.** The Joint Petitioners request that the Commission (a) continue to decline to exercise jurisdiction over the ownership, operation, financing and ratemaking for the Vermillion Facility (as approved by the Commission in Cause No. 42929), after the transfer from Duke Energy Ohio to Vermillion II; and (b) to the extent deemed necessary specifically decline jurisdiction over the intra-company transfer by Duke Energy Ohio of its ownership interest in the Vermillion Facility to its affiliate Vermillion II, in accordance with any requirements under Ind. Code §§ 8-1-2.5 and 8-1-2-84.

**5. Joint Petitioners' Evidence.** Joint Petitioners' Witness Charles R. Whitlock described the Vermillion Facility and its background. He testified the Vermillion Facility is a natural gas-fired electric generating facility consisting of eight combustion gas turbine generators with a total capacity of 640 MW. Vermillion was established as an exempt wholesale generator ("EWG") under the Public Utility Holding Company Act of 1935 as amended ("PUHCA"). The FERC initially granted EWG status to Vermillion on May 1, 2000. *Duke Energy Vermillion, LLC*, 91 FERC ¶ 62,069 (2000). The Vermillion Facility is electrically interconnected with the transmission system of Duke Energy Indiana. The output of the Vermillion Facility is sold exclusively in the wholesale electric market at market-based rates. Vermillion was authorized to sell power at wholesale at market-based rates by the FERC. *Duke Energy Vermillion, LLC*, Docket No. ER00-1783-000 (May 4, 2000) (unpublished letter order).

Mr. Whitlock stated that on April 30, 2004, Vermillion sold to WVPA an undivided 25% ownership interest in the Vermillion Facility and WVPA was issued a Certificate of Public Convenience and Necessity for such ownership by the Commission's March 17, 2004 Order in Cause No. 42495. In accordance with the Ownership and Operation Agreement between Vermillion and WVPA ("Ownership Agreement") made effective by the FERC on January 26, 2004 (*Duke Energy Vermillion, LLC*, 106 FERC ¶62,061 (2004)), WVPA's 25% ownership interest in the Vermillion Facility entitles it to 25% of the energy, capacity and ancillary services available from the Vermillion Facility. Operational decisions regarding the Vermillion Facility are made by an executive committee comprised of one representative for each owner, with each representative having a vote commensurate with its ownership percentages. In connection with the sale to WVPA, Vermillion obtained a redetermination from the FERC of Vermillion's EWG status. The FERC granted such determination on February 17, 2004. *Duke Energy Vermillion, LLC*, 106 FERC ¶ 61,153 (2004). Thereafter, in Cause No. 42929, February 8, 2006, the Commission approved Vermillion's transfer by merger of its 75% ownership interest in the Vermillion Facility to Duke Energy Ohio.

He explained that based upon the previously declined jurisdiction over Duke Energy Ohio's acquisition and ownership of the Vermillion Facility, the Joint Petitioners do not believe that Commission approval of this intra-company transfer from Duke Energy Ohio to Vermillion II is required. He described the transaction as a transfer between affiliates with no sales charge or other exchange of consideration, and not a sale.

Mr. Whitlock testified the Vermillion Facility is electrically interconnected to the transmission system of Duke Energy Indiana, an operating utility subsidiary of Duke Energy, and an affiliate of Duke Energy Ohio. The Interconnection Agreement between Cinergy Services, on behalf of Duke Energy Indiana, and Vermillion was made effective by the FERC as of February 28, 2000. *Cinergy Services, Inc.*, FERC Docket No. ER00-1939-000 (June 9, 2000) (unpublished letter order). Upon WVPA's purchase of an undivided 25% interest of the Vermillion Facility, Vermillion's rights and obligations under the Interconnection Agreement were partially assigned to WVPA.

Mr. Whitlock testified that WVPA is aware of the Joint Petition in this Cause. The relief requested herein will have no impact on WVPA's 25% ownership interest in and benefit from the Vermillion Facility. Accordingly, WVPA has authorized Joint Petitioners to advise the Commission that WVPA has no objections to the requested relief.

Mr. Whitlock described the proposed transfer of Duke Energy Ohio's 75% interest in the Vermillion Facility to Vermillion II. Vermillion II is the entity that will hold the Vermillion Facility merchant plant assets. The FERC previously approved the transfer of these and other merchant plant assets from Duke Energy Ohio to a separate affiliate. Holding these merchant plant assets in a separate affiliate results in a clear delineation between Duke Energy Ohio's generation assets that have been used and useful in serving its retail load in Ohio from those generation assets that have not.

Mr. Whitlock stated that after the transfer of the Vermillion Facility to Vermillion II, Vermillion II will not seek any attributes of public utility status in Indiana. Specifically, Vermillion II does not seek to serve the general public in Indiana with electricity generated by the Vermillion Facility or to sell such electricity to any Indiana retail customer. It does not seek the power of eminent domain in Indiana or to use any public roads, rights of way, or similar rights and benefits of public utilities.

Mr. Whitlock further stated that Vermillion II agrees to be bound by the terms of the Commission's original order declining jurisdiction over the Vermillion Facility in Cause No. 41388 and its subsequent order declining jurisdiction in Cause No. 42929.

Mr. Whitlock testified that Vermillion II has the financial, technical, and managerial ability to own and operate the Vermillion Facility. Vermillion II is a subsidiary of Duke Energy Ohio which owns and operates electric power generation, transmission, and distribution facilities. Duke Energy Ohio currently renders management, operations and maintenance services with respect to the Vermillion Facility. After the proposed transfer, Vermillion II will continue to be managed, operated and maintained by the same personnel and will continue to have the financial backing of Duke Energy.

Mr. Whitlock testified that the competitive wholesale energy market is overseen by the FERC and Vermillion II would therefore be regulated by FERC. He stated Vermillion II has the lawful power and authority needed to operate as a public utility in the State of Indiana. Vermillion II is incorporated in the State of Delaware and is duly admitted to do business in Indiana by the Indiana Secretary of State.

Mr. Whitlock testified continued declination of jurisdiction in this case would be consistent with the public interest and the requirements of Ind. Code § 8-1-2.5. As stated in the Joint Verified Petition sponsored by Mr. Whitlock, comprehensive, traditional regulation by the Commission of such activities of Vermillion II with respect to the Vermillion Facility may conflict with and be duplicative of federal and state regulation. Wholesale rates are determined largely by market forces, subject to the FERC's regulatory oversight. Such competitive forces and regulation by the FERC render the exercise, in whole or in part, of jurisdiction by the Commission over Vermillion II duplicative and wasteful of the Commission's time and resources. The Commission's continued declination of its jurisdiction will also promote energy utility efficiency in that market forces will determine if wholesale sales are to be made from the Vermillion Facility. Such limited exercise of the Commission's jurisdiction over such activities of Vermillion II with respect to the Vermillion Facility will also be consistent with its regulation of similar wholesale generators located in Indiana and, thus, will not inhibit Vermillion II in competing with other providers of functionally similar energy services.

Mr. Whitlock stated that Vermillion II agrees to continue to be bound by the Commission's jurisdiction over affiliate transactions between it and any other public utility affiliate of it under Ind. Code § 8-1-2-49. He further testified that Vermillion II did not request authority to sell the electricity generated by the Vermillion Facility to the general public in Indiana or to any Indiana retail customer but rather intends to continue to sell its power only at wholesale.

**6. Commission Discussion and Findings.** Consistent with our prior determinations related to the Vermillion Facility, Vermillion II will be a "public utility" as defined in the Public Service Commission Act and in the Power Plant Act. The Indiana Code authorizes the Commission to decline to exercise, in whole or in part, jurisdiction over an "energy utility" if certain conditions are satisfied. In particular, the Indiana Code provides that "the Commission may enter an order, after notice and hearing, that the public interest requires the Commission to commence an orderly process to decline to exercise, in whole or in part, its jurisdiction over ... the energy utility ..." Ind. Code § 8-1-2.5-5.

In determining whether the public interest will be served by declination of jurisdiction, the Commission shall consider the following:

- (1) Whether technological or operating conditions, competitive forces, or the extent of regulation by other state or federal regulatory bodies render the exercise, in whole or in part, of jurisdiction by the Commission unnecessary or wasteful.

- (2) Whether the Commission's declining to exercise, in whole or in part, its jurisdiction will be beneficial for the energy utility, the energy utility's customers, or the state.
- (3) Whether the Commission's declining to exercise, in whole or in part, its jurisdiction will promote energy utility efficiency.
- (4) Whether the exercise of Commission jurisdiction inhibits an energy utility from competing with other providers of functionally similar energy services or equipment.

Ind. Code § 8-1-2.5-5.

The record establishes that under the ownership of Vermillion II, the Vermillion Facility will continue to be a wholesale generator of electricity. Vermillion II does not seek to offer or to serve the general public in Indiana with electricity generated by the Vermillion Facility or to sell such electricity to any Indiana retail customer. It does not seek the power of eminent domain in Indiana or to use any public roads, rights of way, does not request a service area assignment or similar rights and benefits of public utilities. This transfer of the Vermillion Facility from Duke Energy Ohio to Vermillion II was approved by FERC. Vermillion II's ownership interest in the Vermillion Facility will remain a merchant plant and will not provide retail electric service in Indiana. The transfer of the wholesale market merchant plant is between two corporate affiliates with no sale price or other consideration charged. Consistent with the public interest and the requirements of Ind. Code § 8-1-2.5, competitive forces in the wholesale power market, and federal regulation of Vermillion II operations, the declination of full exercise of jurisdiction by this Commission continues to be appropriate. Accordingly, the Commission finds it appropriate to continue to decline full jurisdiction over the ownership, operations, accounting, finance, rates of the Vermillion Facility.

Consistent with our Order in Cause 41388, Vermillion II shall file an annual report with the Commission as provided by Ind. Code Section 8-1-2-49, and provided such other information as the Commission may from time to time request.

**IT IS, THEREFORE, ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION** that:

1. Petitioner is hereby determined to be a "public utility" within the meaning of Ind. Code § 8-1-2-1 and an "energy utility" within the meaning of Ind. Code § 8-1-2.5-2.
2. The Commission declines to exercise its full jurisdiction over Vermillion II and the operation of the Vermillion Facility, except as specifically stated within this Order.
3. Vermillion II shall not exercise an Indiana public utility's rights, powers, and privileges of eminent domain and of exemption from local zoning and land use ordinances in the operation and construction of the Facility.

4. Vermillion II shall comply fully with the terms of this Order and submit to the Commission all information required by the terms of this Order.

5. This Order shall be effective on and after its date of approval.

**ATTERHOLT MAYS AND ZIEGNER CONCUR; LANDIS ABSENT:**

**APPROVED: DEC 29 2010**

**I hereby certify that the above is a true  
and correct copy of the Order as approved.**



**Brenda A. Howe  
Secretary of the Commission**