

ORIGINAL

IN THE SUPREME COURT OF OF OHIO

INTERSTATE GAS SUPPLY, INC.

Appellant,

v.

The Public Utilities Commission of Ohio,

Appellee.

:
:
: Case No. 14-1651
:
: Appeal from the Public Utilities
: Commission of Ohio
:
: Public Utilities Commission of
: Ohio Case Nos. 14-0689-EL-UNC
: 14-0690-EL-ATA

NOTICE OF APPEAL OF INTERSTATE GAS SUPPLY, INC.

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FILED
SEP 25 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Interstate Gas Supply, Inc.

Appellant Interstate Gas Supply, Inc. (“IGS Energy” or “IGS”), hereby gives its notice of its appeal, pursuant to R.C. 4903.11, 4903.13 and S. Ct. Prac. R. 10.02(A), and Ohio Adm. Code 4901-1-02(A) and 4901-1-36, to the Supreme Court of Ohio and Appellee the Public Utilities Commission of Ohio (“Commission”), from the Commission’s Finding and Order issued on June 11, 2014 (“Finding and Order”) (Attachment A), and the Commission’s Entry on Rehearing issued on August 6, 2014 (“Entry on Rehearing”) (Attachment B) (collectively, “Corporate Separation Orders” or “Orders”) in Case Nos. 14-689-EL-UNC, *et al.*. Collectively, the Corporate Separation Orders approved Duke Energy Ohio’s (“Duke”) application to amend its corporate separation plan and to amend its retail tariff. The Corporate Separation Orders are unjust, unlawful and unreasonable because in violation of R.C. 4928.17(A)(1) and without providing Duke a waiver for good cause, the Orders authorized an amendment to Duke’s corporate separation plan, which would allow Duke to provide products and services other than retail electric services.

Appellant was and is a party of record in Case Nos. 14-689-EL-UNC, *et al.*, and on July 11, 2014, filed an Application for Rehearing (“Attachment C”) of the Finding and Order. The Entry on Rehearing denied Appellant’s Application for Rehearing on August 6, 2014. The Corporate Separation Orders are unjust, unlawful and unreasonable for the reasons set out in the following Assignments of Error:

1. The Orders are unlawful and unreasonable because they violated R.C. 4928.17(A)(1):
 - a. The Orders authorized Duke Energy Ohio (“Duke”) to provide non-competitive services, competitive retail electric services, and products and services other than retail electric service without granting Duke a waiver of R.C. 4928.17(A)(1);

- b. Good cause does not exist for granting Duke a waiver of 4928.17(A)(1). A waiver is only available to allow a utility to continue offering existing services for an interim period; it cannot be used to allow a utility to commence offering new services such as products and services other than retail electric service;
- c. Even if the Orders had granted a waiver of R.C. 4928.17(A)(1), 4928.17(C) only allows a waiver to be issued temporarily, but the Orders did not set forth a time period by which Duke must comply with 4928.17(A)(1);
- d. The Orders are unlawful and unreasonable because they violated R.C. 4903.09 by failing to state findings of fact and reasons prompting the Commission's decisions. *In re Application of Columbus Southern Power Company*, 128 Ohio St. 3d 512,519, 526-27 (2011). The Orders failed to address IGS's arguments that Duke did not request a waiver of R.C. 4928.17(A)(1) and that Duke did not demonstrate good cause for a waiver of that requirement.

WHEREFORE, Appellant IGS respectfully submits that Appellee Commission's Corporate Separation Orders are unlawful, unjust, and unreasonable and should be reversed. These cases should be remanded to the Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,



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CERTIFICATE OF FILING

I hereby certify that, in accordance with S.Ct.Prac.R. 3.11(A)(2), the foregoing Notice of Appeal of Interstate Gas Supply, Inc's Notice of Appeal has been filed with the Docketing Division of the Public Utilities Commission of Ohio by leaving a copy at the office of the Commission in Columbus, Ohio, in accordance with Ohio Adm. Code 4901-1-02(A) and 4901-1-36, on September 25, 2014.



Joseph Olikier
Counsel for Appellant
Interstate Gas Supply, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Interstate Gas Supply, Inc. was served upon the parties of record to the proceeding before the Public Utilities Commission of Ohio listed below and pursuant to S.Ct.Prac.R. 3.11(A)(2) and R.C. 4903.13 on September 25, 2014, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.


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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
 Energy Ohio, Inc. for Approval of its)
 Fourth Amended Corporate Separation) Case No. 14-689-EL-UNC
 Plan Under R.C. 4928.17 and Ohio)
 Adm.Code 4901:11-37.)

In the Matter of the Application of Duke)
 Energy Ohio, Inc. for Authority to Amend) Case No. 14-690-EL-ATA
 its Retail Tariff, P.U.C.O. No. 19.)

FINDING AND ORDER

The Commission finds:

- (1) Duke Energy Ohio, Inc. (Duke) is a public utility as defined in R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.
- (2) On April 16, 2014, Duke filed an application for approval of its fourth amended corporate separation plan, pursuant to R.C. 4928.17 and Ohio Adm.Code 4901:1-37-06.
- (3) By Entry issued May 6, 2014, interested entities were given until May 15, 2014, and May 21, 2014, to file comments and reply comments, respectively.
- (4) Comments were timely filed by Staff, Direct Energy, LLC and Direct Energy Business, LLC (jointly referred to as Direct Energy), and Interstate Gas Supply, Inc. (IGS). Reply comments were timely filed by Duke, Direct Energy, and IGS. The following is a summary of the portions of Duke's proposed fourth corporate separation plan that have been commented on, as well as the specific comments provided and any associated replies.

Parts IV and V of the Plan, a List Identifying Financial Arrangements and Transactions and a List of all Current Affiliates Identifying Each Affiliate's Product(s) and/or Service(s):

- (5) Duke proposes to update the plan as a result of the merger between Duke Energy Corporation and Progress Energy, Inc.

As the merger is completed, the listing of current affiliates and their products and services, and the listing of agreements among the various affiliates will be updated. (App., Ex. A at 6-65.)

- (6) Staff concurs with the addition necessitated by the merger; however, Staff is concerned about the intercompany asset transfer agreement language change proposed by Duke. Staff believes the new language may be interpreted as providing for accounting treatment of the transfer of assets that is not in conformance with the Commission's corporate separation rules. Therefore, Staff recommends Duke be directed to modify the proposed language to include a statement that detailed records will be kept which demonstrate that assets will be transferred at fully-allocated cost. (Staff at 4.) Duke agrees to make this revision (Duke Reply at 6).
- (7) The Commission finds that Staff's proposal is appropriate and reasonable. Therefore, Duke should make revisions to the plan reflecting Staff's recommendation.

Tariffed Service Offerings:

- (8) Duke proposes to amend its tariff to allow it flexibility to offer additional electric-related services to residential and nonresidential customers, contingent upon the Commission allowing all costs and revenues related to such services being treated, for ratemaking purposes, in parallel fashion. The proposal provides that these special customer services shall be provided at a rate negotiated with the customer, but no less than Duke's fully-allocated cost. Duke notes that such flexibility to offer additional electric-related services to customers has been allowed for other utilities in Ohio, citing *In re Application of FirstEnergy Corp., et al.*, Case No. 99-1212-EL-ETP, et al., Opinion and Order (July 19, 2000) (*FE ETP Case*). Duke states that such amendment is permissible as an amendment not for an increase in rates under R.C. 4909.18. (App. at 3, Ex. C at 3.)
- (9) Direct Energy opposes Duke's proposal to offer products and services other than retail electric service, opining that Duke should focus on its distribution business. Direct Energy asserts

that Duke fails to provide any justification or examples where customers are asking for these types of services from their distribution utility. Stating that Duke, as the customer's incumbent monopoly utility, possesses an inherent advantage over other competitors in these unregulated environments, Direct Energy believes Duke's entrance into the market for these types of products and services could cause significant harm to other competitors. In addition, Direct Energy argues that Duke fails to adequately explain how these new products and services will not be subsidized by its utility business; rather, Duke only states that it will charge customers at least its fully-allocated costs, with no explanation of what that entails. Direct Energy asserts, and IGS agrees, that, to the extent Duke is permitted to offer these products and services, the Commission should ensure that any Duke assets used to provide these services and products are also available to other competitors on a competitively neutral basis. For example, Direct Energy recommends competitors be permitted to put charges on Duke's bills or include inserts in the bills if Duke is permitted to do so, and, if call center employees take calls about the products and services, they should inform customers about other similar products and services from other companies. Finally, Direct Energy asserts that, if permitted to do so, Duke should only be allowed to offer the products and services through a separate affiliate and, such affiliate, should be prohibited from using any name referring to Duke's name, unless it is accompanied by a disclaimer that the company is not the utility. (Direct Energy at 3-5; IGS Reply at 4.)

Duke states that, contrary to Direct Energy's assertions, justification for the change is not required, as long as the corporate separation plan adequately protects distribution ratepayers and the marketplace. The most important issue being that the services in question will be priced at no less than their fully-allocated cost, as Duke is proposing herein, noting the definition of fully-allocated cost set forth in Ohio Adm.Code 4901:1-37-01(G). In response to the suggestion that the assets used by Duke should be similarly available to competitors, Duke states that, to the extent such is required by law, Duke will make the facilities available to competitors. Duke also states that it does not seek to offer the services through an affiliate in this application, even though these

services can be offered by an affiliate under the terms of the existing corporate separation plan, without Commission authorization. As for any disclaimer that the entities are not related, Duke submits that a disclaimer is only needed if the entities were not related and the customers could be misled; however, in this situation, the companies would actually be affiliated; thus, there is no risk that customers would be misled. (Duke Reply at 4-5.)

- (10) IGS also objects to Duke's proposal, arguing that state policy, R.C. 4928.02, favors competition and prohibits the recovery of generation-related costs through distribution rates. In addition, because Duke is no longer authorized to operate pursuant to functional separation, unless it is granted a temporary waiver, R.C. 4928.17(A)(1) requires Duke to provide competitive retail electric service (CRES) of the nonelectric product or service through a fully-separated affiliate. Despite this requirement, IGS notes that Duke is requesting that its distribution business have authority to offer products that are available from competitive suppliers. Moreover, IGS asserts that Duke's request to recover the cost of providing competitive services through distribution rates is an unlawful anticompetitive subsidy. IGS believes Duke's proposal herein represents a step back from the full legal corporate separation authorized by the Commission in Duke's last electric security plan (ESP) case, *In re Application of Duke Energy Ohio, Inc.*, Case Nos. 11-3549-EL-SSO, et al., Opinion and Order (Nov. 22, 2011) (*Duke ESP Case*). IGS notes that, in the *Duke ESP Case*, Duke agreed to transfer its generating assets to an unregulated affiliate by the end of 2014. IGS also points out that, because all of the investor-owned utilities are on the path toward structural separation and competition, it would be counterproductive and contravene state policy for Duke's distribution business to offer competitive services. While acknowledging that, in the *FE ETP Case*, FirstEnergy was permitted similar tariff language, IGS maintains that such language should not be used as a model; instead, the focus should be on eliminating such language. IGS states that FirstEnergy's language is narrower than Duke's proposal, in that it does not include language such as "providing whole-house surge protection, and providing energy consumption analysis service, tools and reports." (IGS at 2, 5-7; IGS Reply at 3.)

Duke submits that IGS has a mistaken understanding of both Duke's proposal and the law. Duke explains that its modifications to the plan are unrelated to its commitment to transfer its legacy assets to an affiliate by 2014, as agreed to in the *Duke SSO Case*. According to Duke, the Commission's Order in that case requires Duke to transfer generating assets; however, the Order does not address products or services other than retail electric service. In Duke's view, the Order in the *Duke ESP Case* does not limit Duke's business to distribution and transmission only, and any attempt to do so would be contrary to R.C. 4928.17, which allows Duke to provide other retail electric service, directly or through an affiliate, under appropriate terms of a corporate separation plan. Moreover, Duke is not requesting to recover the cost of providing the services through distribution rates; rather, it is proposing that the negotiated rate for any given service may not be less than its fully-allocated cost. Therefore, the services would be self-supporting and may even contribute to reductions in distribution rates. Finally, Duke offers that, by approving the stipulation and tariff language in the *FE ETP Case*, the Commission found that an arrangement, which is directly analogous to the one proposed in the instant case, is legal under Ohio corporate separation requirements. (Duke Reply at 2-4.)

- (11) Staff, in general, is not opposed to Duke's request to offer nonregulated services in the manner it proposes. However, due to the complexity of demonstrating whether a rule violation has occurred and ensuring that customers are aware, in real time, of their competitive supplier options, any customer requesting the proposed unregulated products or services should sign a work order stating that they have been informed that these products or services are unregulated and that they can be performed by other vendors. Therefore, Staff sets forth proposed language to be included in Duke's tariff. In addition, to improve readability, Staff recommends the tariff pages setting forth the special customer services be reformatted so customers will not miss certain relevant details. (Staff at 4-5.) Duke accepts Staff's recommendations (Duke Reply at 2).

In response to Staff's comments, Direct Energy states that Staff's proposal does not adequately mitigate the potential

harm explained in the comments filed by Direct Energy and IGS (Direct Energy Reply at 3). IGS disagrees that potential anticompetitive advantage can be resolved through disclosure requirements. IGS advocates that Duke not be allowed to offer unregulated service through its regulated distribution utility; however, IGS is not opposed to Duke offering unregulated service through its affiliates. (IGS Reply at 2.)

- (12) Initially, the Commission finds that Staff's proposed language requiring the provision of a signed work order from customers stating their understanding that the products and services are unregulated and offered by other vendors is necessary and appropriate; therefore, Duke is directed to incorporate Staff's recommendation into its tariff language. In addition, we agree that the reformatting suggested by Staff improves the readability of the tariff language for the customer and we find that Duke should incorporate this revision in its plan. The Commission notes that, in considering Duke's proposal to add offerings to its tariff for electric-related services to residential and nonresidential customers, Duke's commitment to ensure that these special customer services will be provided at a rate negotiated with the customer, but no less than Duke's fully-allocated cost, is of paramount importance. While we find that Duke's proposal in this regard is reasonable and should be approved, we emphasize that none of the costs associated with the services and products may be passed on by Duke to the regulated utility's customers. Furthermore, as a condition to our approval of this provision of the plan, we direct Duke to establish the necessary agreements and processes to guarantee that, upon the request of the Commission or Staff, Duke has access to the information necessary to prove that no costs associated with these products or services are being borne by the regulated utility's customers.

With regard to the concerns raised by Direct Energy and IGS, the Commission appreciates their comments; however, upon consideration of Duke's proposal, we find no substantiated reason, at this time, to find that the proposed revisions to the plan are not in compliance with state policy or the Commission's corporate separation rules. Having said that, it is our expectation that through its implementation of this corporate separation plan, Duke will adhere to all applicable

rules and regulations. Any concerns raised once Duke has implemented its plan will be reviewed and considered by the Commission on a case-by-case basis.

Employee Transfers:

- (13) Duke sets forth certain items that must be contained in the cost allocation manual (CAM), including a copy of the previous and new job descriptions for all transferred employees from the electric utility to an affiliate or vice versa (App. at 72).
- (14) Direct Energy recommends Duke be required in the CAM to specifically indicate, as applicable to an electric utility employee transfer to an affiliate: whether the employee played any role in the development of an ESP or market rate offer (MRO) filing; the date the employee was transferred to the affiliate; and the role the employee played in the development or preparation of the ESP or MRO. According to Direct Energy, this would ensure transparency and that Duke affiliates do not possess any competitive advantage over the other CRES providers. (Direct Energy at 3.)
- (15) Duke replies that Direct Energy's proposal has already been rejected by the Commission in *In re Investigation of Ohio's Retail Service Market*, Case no 12-3151-EL-COI. Moreover, Duke states that the Commission's rules specifically allow for shared services and the limitations proposed by Direct Energy are more onerous than what are allowed by law. (Duke Reply at 6.)
- (16) The Commission finds that it is unnecessary, at this time, to require Duke to provide the information requested. There has been no evidence indicating that such information is either appropriate or warranted.

Conclusion:

- (17) Accordingly, the Commission finds that the application filed by Duke on April 16, 2014, requesting approval of its fourth amended corporate separation plan should be approved, subject to the revisions and directives set forth in findings (7) and (12) above. Duke should revise its plan, in accordance with the directives of this Order.

It is, therefore,

ORDERED, That the application filed by Duke on April 16, 2014, is approved, subject to the revisions and directives set forth in this Finding and Order. It is, further,

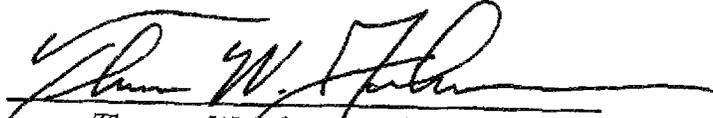
ORDERED, That Duke be authorized to file, in final form, two complete copies of the tariff pages consistent with this Finding and Order and to cancel and withdraw its superseded tariff pages. Duke shall file one copy in its TRF docket and one copy in this docket. It is, further,

ORDERED, That the effective date of the new tariffs shall be a date not earlier than the date of this Finding and Order and the date upon which the final tariffs are filed with the Commission. It is, further,

ORDERED, That nothing in this Finding and Order shall be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this Finding and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Thomas W. Johnson, Chairman


Steven D. Lesser

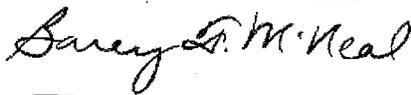

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Entered in the Journal
JUN 11 2014



Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
 Energy Ohio, Inc. for Approval of its)
 Fourth Amended Corporate Separation) Case No. 14-689-EL-UNC
 Plan Under R.C. 4928.17 and Ohio)
 Adm.Code 4901:11-37.)

In the Matter of the Application of Duke)
 Energy Ohio, Inc. for Authority to Amend) Case No. 14-690-EL-ATA
 its Retail Tariff, P.U.C.O. No. 19.)

ENTRY ON REHEARING

The Commission finds:

- (1) Duke Energy Ohio, Inc. (Duke) is a public utility as defined in R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.
- (2) On April 16, 2014, Duke filed an application for approval of its fourth amended corporate separation plan, pursuant to R.C. 4928.17 and Ohio Adm.Code 4901:1-37-06. As part of its amendment proposal Duke requested, inter alia, authority to amend its tariff to allow it flexibility to offer additional electric-related services to residential and nonresidential customers, with these special customer services being provided at a rate negotiated with the customer, but no less than Duke's fully-allocated cost.
- (3) In accordance with the schedule established in these matters by Entry issued May 6, 2014, comments were filed by Staff, Direct Energy, LLC and Direct Energy Business, LLC (jointly referred to as Direct Energy), and Interstate Gas Supply, Inc. (IGS). Reply comments were filed by Duke, Direct Energy, and IGS.
- (4) By Finding and Order issued June 11, 2014, the Commission approved Duke's April 16, 2014 application, subject to the revisions and directives set forth in the Order, including that the plan be modified: to include a statement that detailed records will be kept which demonstrate that assets will be transferred at fully-allocated cost; to include language requiring the provision of signed work orders from customers

stating their understanding that the products and services are unregulated and offered by other vendors; and modified so that the tariff pages setting forth the special customer services are reformatted so customers will not miss certain relevant details. In addition, we emphasized that, in considering Duke's proposal to add offerings to its tariff for electric-related services, of paramount importance was Duke's commitment to ensure that these special customer services will be provided at a rate negotiated with the customer, but no less than Duke's fully-allocated cost, and that none of the costs associated with the services and products may be passed on to the regulated utility's customers. Moreover, Duke was directed to establish the necessary agreements and processes to guarantee that, upon the request of the Commission or Staff, Duke has access to the information necessary to prove that no costs associated with these products or services are being borne by the regulated utility's customer.

- (5) R.C. 4903.10 allows any party who has entered an appearance in a Commission proceeding to apply for rehearing with respect to any matters decided. Any such applications for rehearing are required to be filed within 30 days of the entry of the decision upon the Commission's journal.
- (6) On July 8, 2014, and July 11, 2014, Direct Energy and IGS, respectively, filed applications for rehearing of the Commission's June 11, 2014 Finding and Order. IGS set forth three assignments of error and Direct Energy set forth two assignments of error. Duke filed a memorandum contra the applications for rehearing on July 18, 2014.
- (7) The first assignments of error set forth by IGS and Direct Energy will be considered together, as some of their arguments are in common. In its first assignment of error, IGS asserts the Order violates R.C. 4928.17(A)(1) because: it authorized Duke to provide noncompetitive services, competitive retail electric service (CRES), and products and services other than retail electric service; authorization was given without granting Duke a waiver to do so; good cause does not exist for granting Duke a waiver; a waiver is only available to allow a utility to continue offering existing services for an interim period, not commence offering new services; even if a waiver is granted,

the waiver may only be issued temporarily and the Order set no time period by which Duke must comply with R.C. 4928.17(A)(1); and it violated R.C. 4903.09 by failing to state findings of fact and reasons prompting the decision. Moreover, IGS notes that in *In re Application of Duke Energy Ohio, Inc.*, Case Nos. 11-3549-EL-SSO, et al., Opinion and Order (Nov. 22, 2011) (*Duke ESP Case*), the Commission authorized the transfer of Duke's generating assets by December 31, 2014; thus, Duke's corporate separation plan approved in the *Duke ESP Case* provided that Duke would only provide noncompetitive services. In addition, IGS argues that an electric utility must operate pursuant to a corporate separation plan, which must promote the policy in R.C. 4928.02, including division (H) which favors competition. According to IGS, R.C. 4928.17(A)(1) requires Duke to provide CRES or the nonelectric product or service through a fully-separate affiliate of the utility. In addition, IGS notes that, unlike the delivery of electricity, which Duke had been granted a *limited monopoly on*, there are market participants willing and able to offer the special customer services that the Order authorized Duke to offer customers. IGS advocates that it is arbitrary and unreasonable to allow a utility to misuse the temporary waiver option to commence offering new products and services other than retail electric service.

- (8) Likewise, in its first assignment of error, Direct Energy agrees that the Order is unreasonable because it authorized Duke to provide products and services other than retail electric services. Direct Energy notes that the safeguards put into place by the Commission through the Order demonstrate the seriousness of the concerns raised by Direct Energy and IGS related to Duke entering the market for nonregulated products and services. Direct Energy points out that such parameters would not be necessary if the possibility of inappropriate subsidization of these services by Duke was not ripe. Direct Energy recommends the Commission hold this Order in abeyance pending another adequate comment period, where Duke answers the questions raised by Direct Energy in its application for rehearing.
- (9) Duke responds to the first assignments of error set forth by IGS and Direct Energy, stating that they are without merit and

should be denied. Duke argues that, contrary to IGS' assertions, the Order does not violate R.C. 4928.17(A)(1) and the Commission did, in fact, grant a waiver of the requirement that the services be offered through a fully-separate affiliate by authorizing the offering of the services by Duke. In addition, Duke insists that IGS is incorrect in its interpretation of the Order in the *Duke ESP case*, stating that such Order did not prohibit Duke from offering any products or services other than regulated ones, it only required Duke to transfer generating assets. As for IGS' argument regarding R.C. 4903.09, Duke notes that neither the law nor the Ohio Supreme Court demand that the Commission address every argument and the Order in these cases fulfills the Court's expectations. See *MCI Telecom. Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 513 N.E.2d 337 (1987). Turning to Direct Energy, Duke notes that Direct Energy does not appear to dispute that it is legal and appropriate for the Commission to authorize Duke to offer the services; rather, it appears Direct Energy's disagreement is based on its belief that the Commission must take additional steps to ensure compliance with the law before Duke starts offering the services to customers. However, Direct Energy points to no law, regulation, or precedent that suggests a utility must prove that its business will be conducted so as to comport with the law before it starts operating a line of business. According to Duke, if Direct Energy's first assignment of error is granted, it would result in a shift in the Commission's policy and an unwarranted intrusion into the business decisions made by Duke.

- (10) Initially, the Commission notes that all issues raised by IGS and Direct Energy in their comments filed in these cases were thoroughly set forth and considered in our Order in accordance with R.C. 4903.09. However, on rehearing, IGS and Direct Energy raise new issues, not previously delineated in their comments. For Direct Energy to now request yet another comment period, is clearly inappropriate, when all concerns should have been thoroughly expressed during the established comment period, rather than on rehearing. That being said, we find that nothing IGS or Direct Energy has raised on rehearing leads us to conclude that our decision in these cases is unlawful or unreasonable. Contrary to the assertions of IGS and Direct Energy, our decision fully adheres with all statutory

requirements. As we stated in our Order, after review of Duke's proposal and the comments submitted in the dockets, the Commission found no substantiated reason that led us to conclude that the proposed revisions to the plan are not in compliance with state policy or the Commission's corporate separation rules. In fact, corporate separation plans are intended to enable utilities, such as Duke, to provide such services within the parameters of a plan that includes sufficient safeguards mandating adherence to statutory policies and requirements preventing any undue competitive advantage or abuse of market power. Moreover, after reviewing the stipulation and our Order in the *Duke ESP Case*, we find no prohibition on our approval of Duke's application in these cases. We are cognizant of the requirements set forth in the statute regarding corporate separation and our approval of the application in these cases affords Duke the requisite authority needed to implement its revised corporate separation plan, subject to the requirements set forth in the Order. It is our expectation that Duke continues to comply with all laws and regulations, and any compliance allegations will be reviewed by the Commission in the appropriate forum. Accordingly, the Commission finds that the first assignments of error set forth by IGS and Direct Energy are without merit and should be denied.

- (11) The second assignment of error raised by IGS and Direct Energy will be considered together, as they raise similar issues. IGS states that the Order violated R.C. 4928.17(A)(2) and (3) because the Commission failed to: require Duke to submit pro forma calculations of its fully-embedded cost of supplying CRES, or a product or service other than retail electric service; ensure that Duke will not extend an undue preference or advantage to divisions of its business engaged in the business of supplying CRES, or supplying a product or service other than retail electric service; and review Duke's allocation methodology, thus, allowing Duke to provide an anticompetitive subsidy to its unregulated business in violation of R.C. 4928.02(H). In addition, IGS notes that the Order allows Duke to collect the cost of providing products and services other than retail electric services through distribution rates, and does not require Duke to provide CRES providers comparable and nondiscriminatory access for the same services. While the

Commission recognized that it is important that Duke provide services other than retail electric service at no less than fully-allocated costs, Duke did not disclose and the Commission did not examine Duke's calculation, nor did the Commission provide a forum for addressing the cost allocation concerns. According to IGS, by not reviewing Duke's marketing practices and proposed allocation methodology and stating that Duke should adhere to all applicable rules and regulations and that any concerns would be reviewed on a case-by-case basis, the Commission assumed Duke would comply with the law and shifted the burden onto CRES suppliers to demonstrate otherwise.

- (12) Similarly, in its second assignment of error, Direct Energy asserts the Order is unreasonable because it did not provide an adequate venue for submission of concerns raised about Duke's implementation of the future tariff to be approved in this case. While the Commission states that any concerns will be reviewed on a case-by-case basis, it provides no guidance as to where and how these concerns should be raised, *i.e.*, a formal complaint case. Therefore, Direct Energy recommends the Commission leave this docket open to resolve concerns that might arise should the Commission reject its proposal to hold the Order in abeyance until the concerns are allayed. Such a process should allow stakeholders to file concerns and request a comment period on the expressed concerns.
- (13) Duke responds to the arguments raised by both IGS and Direct Energy stating the Commission was correct that concerns about implementation should be reviewed on a case-by-case basis. Duke argues the Order is not in violation of R.C. 4928.17(A)(2) or (3), as asserted by IGS, because the Commission did not demand proof of compliance with a law; rather, Duke is bound by the law and regulations of the state of Ohio. In response to Direct Energy's proposal that the docket be a repository for concerns, or the Commission consider concerns in its review of the corporate separations plan or an electric security plan, Duke states that Direct Energy fails to explain how these processes would be more fair than other options and it provides no recognizable advantage compared to the Commission's well-established processes. Duke believes the

Commission's formal complaint process would be a reasonable approach, not the processes recommended by Direct Energy.

- (14) The Commission finds that IGS' and Direct Energy's concerns in their second assignments of error are without merit. We agree with Duke, that, due to the broad range of services potentially offered under the tariff, a determination of whether these services are competitive or noncompetitive services can only be made on a case-by-case basis. Likewise, whether Duke complies with the approved corporate separation plan in its implementation of the plan to such services can only be made on a case-by-case basis. The Commission has a formal complaint process whereby it appropriately considers issues raised by complainants against regulated utilities. It is the nature of the regulatory legal system whereby utilities are mandated to comply with all applicable laws and regulations; therefore, IGS' statement that the Commission assumed Duke would comply with the law is a given. As with any compliance situation, if an action is brought before the Commission, the Commission will afford all parties due process and will review all facts and legal precedent presented in rendering a decision. As we mandated in our Order, Duke must establish the necessary agreements and processes to guarantee that, upon the request of the Commission or Staff, Duke has access to the information necessary to prove that no costs associated with these products or services are being borne by the regulated utility's customer. To that end, should issues arise that require either an informal review or a formal proceeding, the requisite information and documentation will be available for our review and consideration in determining how to proceed on the issues. Accordingly, we find that the second assignments of error stated by IGS and Direct Energy should be denied.
- (15) In its third assignment of error, IGS argues the Order is unlawful and unreasonable because, by permitting Duke to offer products and services other than retail electric service through its monopoly distribution company, and not affording the same access to the monopoly resources to other competitors, it violates the antitrust statutes, including 15 U.S.C. 1, et seq., and R.C. Chapter 1331, et al. IGS submits the state action exemption does not allow the Commission to authorize Duke to restrain trade, because the services Duke will

be providing are not authorized by state statute. According to IGS, regardless of how Duke intends to allocate costs, Duke will be utilizing distribution assets to offer products and services other than retail electric service to customers; therefore, because Duke will be able to leverage its distribution resources and avoid fixed and indirect costs, Duke will see significant cost advantages that competitors do not have. IGS states that antitrust law prohibits: trusts and the use of monopolies to restrain trade in a market for goods and services; price discrimination by creating an artificial cost advantage in the market and a conspiracy to restrain trade in the market; and restraining trade by entering into agreements not to use the goods of a competitor. Moreover, as reflected in R.C. Chapter 1331, Ohio law promotes competitive outcomes.

- (16) In response, Duke asserts that the doctrine of state action immunity from antitrust enforcement holds that a state law or regulatory scheme can be the basis for immunity from the federal antitrust laws, if the state has articulated a clear and affirmative policy to allow the conduct and the state provides active supervision of the conduct. *See Parker v. Brown*, 317 U.S. 342, 63 S.Ct. 307, 87 L.Ed. 315 (1943); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). In the instant cases, the Commission, acting pursuant to its authority, has clearly articulated its approval of the tariff and actively supervises the actions of Duke. In addition, Duke contends that IGS misapplies antitrust law, noting that, contrary to IGS' assertions, under federal law a parent corporation and its wholly-owned subsidiary are incapable of conspiring with each other. *See Cooperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). Moreover, Duke states that IGS supplies unsupported facts that it claims show anticompetitive conduct.
- (17) As we mentioned previously, the arguments raised by IGS in its third assignment of error were not raised in its comments; in fact, nowhere in its comments does IGS mention antitrust issues, the federal statute, or R.C. Chapter 1331. Nonetheless, the Commission reviewed the arguments set forth by IGS in its application for rehearing and is confident that our decision in these cases was in keeping with the federal and state laws. The parameters and conditions implemented through our Order,

including the detailed records that must be kept to demonstrate assets are transferred at fully-allocated cost, the signed work orders from the customers, the reformatting of the tariff pages, that none of the costs associated with the services and products may be passed on to the customers, and that Duke establish agreements and processes to guarantee access to necessary information, ensure that the Commission has the information and tools necessary to track, review, and resolve any issues that may arise. Moreover, with regard to IGS' argument regarding the applicability of R.C. 1331 in these cases, consistent with past precedent, the Commission finds that R.C. 1331 is inapplicable to the these cases, as jurisdiction over R.C. 1331 lies with state courts rather than the Commission. *See In re Application of The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al., Second Entry on Rehearing (Mar. 19, 2014) at 3-5. Accordingly, the Commission finds that IGS' third assignment of error is without merit and should be denied.

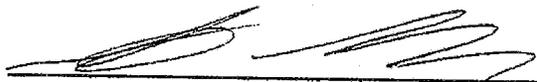
It is, therefore,

ORDERED, That the applications for rehearing filed by IGS and Direct Energy are denied in their entirety. It is, further,

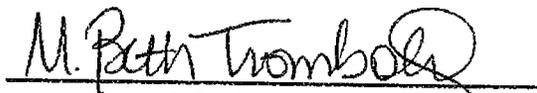
ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

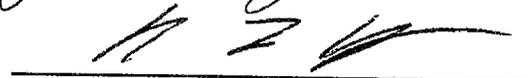
THE PUBLIC UTILITIES COMMISSION OF OHIO


Thomas W. Johnson, Chairman


Steven D. Lesser


Lynn Slaby


M. Beth Trombold


Asim Z. Haque

CMTTP/vrm

Entered in the Journal
AUG 26 2014



Barcy F. McNeal
Secretary

**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) Case No. 14-0689-EL-RDR
under Section 4928.17, Revised Code,)
and Chapter 4901:1-37, Ohio)
Administrative Code.

In the Matter of the Application of Duke) Case No. 14-0690-EL-ATA
Energy Ohio for Authority to Amend its)
Retail Tariff, P.U.C.O. No. 19.)

**APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF IGS
ENERGY**

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TABLE OF CONTENTS

APPLICATION FOR REHEARING 3

I. INTRODUCTION..... 6

II. BACKGROUND..... 7

III. ARGUMENT 11

A. The Order is unlawful and unreasonable because it violated R.C. 4928.17(A)(1): 11

1. The Order authorized Duke Energy Ohio (“Duke”) to provide non-competitive services, competitive retail electric services, and products and services other than retail electric service without granting Duke a waiver to do so 11

2. Good cause does not exist for granting Duke a waiver of 4928.17(A)(1). A waiver is only available to allow a utility to continue offering existing services for an interim period; it cannot be used to allow a utility to commence offering new services such as products and services other than retail electric service..... 12

3. Even if the Order had granted a waiver of R.C. 4928.17(A)(1), 4928.17(C) only allows a waiver to be issued temporarily, but the Order did not set forth a time period by which Duke must comply with 4928.17(A)(1) 13

4. The Order is unlawful and unreasonable because it violated R.C. 4903.09 by failing to state findings of fact and reasons prompting the Commission’s decisions. *In re Application of Columbus Southern Power Company*, 128 Ohio St. 3d 512,519, 526-27 (2011). The Order failed to address IGS’s arguments that Duke did not request a waiver of R.C. 4928.17(A)(1) and that Duke did not demonstrate good cause for a waiver of that requirement 14

B. The Order is unlawful and unreasonable because it violated R.C. 4928.17(A)(2) and (3). By failing to require Duke to submit pro forma calculations of its fully embedded cost of supplying competitive retail electric service or supplying a product or service other than retail electric service, the Order failed to ensure that Duke will not extend an undue preference or advantage to a division of its business engaged in the business of supplying competitive retail electric service or supplying a product or service other than retail electric service. The Commission’s failure to review Duke’s allocation methodology allows Duke to provide an anticompetitive subsidy to its unregulated business in violation of R.C. 4928.02(H); the Order implicitly allows Duke to collect the cost of providing products and services other than retail electric services through distribution rates 14

C. The Order is unlawful and unreasonable because by permitting Duke to offer products and services other than retail electric service through its monopoly distribution company, and not affording the same access to the monopoly resources to other competitors in the market, it is a violation of anti-trust statutes including 15 U.S. Code Chapter 1 et. al and Chapter 1331 Ohio Revised Code, et al. The State Action Exemption does not allow the Commission authorize Duke to restrain trade, because the service Duke will be providing are not authorized by state statute.....17

IV. CONCLUSION.....20

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Retail Tariff, P.U.C.O. No. 19.)

APPLICATION FOR REHEARING

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("OAC"), Interstate Gas Supply, Inc. ("IGS Energy" or "IGS") respectfully submits this Application for Rehearing of the Finding and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission") on June 11, 2014 for the following reasons:

1. **The Order is unlawful and unreasonable because it violated R.C. 4928.17(A)(1):**
 - a. **The Order authorized Duke Energy Ohio ("Duke") to provide non-competitive services, competitive retail electric services, and products and services other than retail electric service without granting Duke a waiver to do so;**
 - b. **Good cause does not exist for granting Duke a waiver of 4928.17(A)(1). A waiver is only available to allow a utility to continue offering existing services for an interim period; it cannot be used to allow a utility to commence offering new services such as products and services other than retail electric service;**
 - c. **Even if the Order had granted a waiver of R.C. 4928.17(A)(1), 4928.17(C) only allows a waiver to be issued temporarily, but the**

Order did not set forth a time period by which Duke must comply with 4928.17(A)(1);

- d. The Order is unlawful and unreasonable because it violated R.C. 4903.09 by failing to state findings of fact and reasons prompting the Commission's decisions. *In re Application of Columbus Southern Power Company*, 128 Ohio St. 3d 512,519, 526-27 (2011). The Order failed to address IGS's arguments that Duke did not request a waiver of R.C. 4928.17(A)(1) and that Duke did not demonstrate good cause for a waiver of that requirement;**
- 2. The Order is unlawful and unreasonable because it violated R.C. 4928.17(A)(2) and (3). By failing to require Duke to submit pro forma calculations of its fully embedded cost of supplying competitive retail electric service or supplying a product or service other than retail electric service, the Order failed to ensure that Duke will not extend an undue preference or advantage to a division of its business engaged in the business of supplying competitive retail electric service or supplying a product or service other than retail electric service. The Commission's failure to review Duke's allocation methodology allows Duke to provide an anticompetitive subsidy to its unregulated business in violation of R.C. 4928.02(H); the Order implicitly allows Duke to collect the cost of providing products and services other than retail electric services through distribution rates;**
- 3. The Order is unlawful and unreasonable because by permitting Duke to offer products and services other than retail electric service through its monopoly distribution company, and not affording the same access to the monopoly resources to other competitors in the market, it is a violation of anti-trust statutes including 15 U.S. Code Chapter 1 et al and Chapter 1331 Ohio Revised Code, et al. The State Action Exemption does not allow the Commission authorize Duke to restrain trade, because the service Duke will be providing are not authorized by state statute.**

As discussed in the Memorandum in Support attached hereto, IGS respectfully requests that the Commission grant this Application for Rehearing and correct the errors identified herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On June 11, 2014 the Commission issued an Order authorizing Duke to amend its corporate separation plan to allow Duke to offer non-competitive services and “products and services other than retail electric service.”¹ The Commission’s Order is unlawful and unreasonable because R.C. 4928.17(A)(1) requires Duke to provide non-competitive retail electric service and competitive retail electric services or products and services other than retail electric service through separate affiliates. Further, Duke has not has not requested or received a temporary waiver of this requirement. And even if it had requested a waiver, R.C. 4928.17(C) is not available to allow a utility to enter into new businesses. Moreover, R.C. 4928.17(C) only allows the waiver to be in-place for an “interim period prescribed in the order” and the Commission has not set a period by which Duke must comply with R.C. 4928.17(A)(1).

¹ Duke Energy Ohio Fourth Corporate Separation Plan at 84; See also Order (June 11, 2014).

Regardless, good cause does not exist for granting a waiver given that competitive retail electric service ("CRES") providers are already offering these products in Duke's service territory. Moreover, the Commission's Order is unlawful and unreasonable inasmuch as Duke's corporate separation plan violates R.C. 4928.17(A)(2) and (3) by not sufficiently preventing Duke from providing its own businesses with a competitive advantage or undue preference, and potentially a subsidy through distribution rates.

II. BACKGROUND

R.C. 4928.17(A)(1) requires a corporate separation plan to provide "at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility" R.C. 4928.17(C) provides that, for good cause shown, the Commission may authorize a temporary waiver of this requirement (functional separation as opposed to legal separation). Since its electric transition plan, Duke has operated pursuant to a waiver that allowed it to offer competitive retail electric service, but it has never received a waiver that would authorize it to offer products other than retail electric service.

In Duke's last electric security plan ("ESP"), the Commission approved an amendment to Duke's corporate separation plan in which Duke agreed to no longer operate pursuant to functional separation. The Commission stated that approval of the stipulation would bring about full legal separation as contemplated by R.C. 4928.17(A):

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.²

Under the terms of the stipulation approved by the Commission, Duke must transfer its generating assets by December 31, 2014. Thus, with the transfer of its generating assets, Duke's corporate separation plan provided that it would provide only non-competitive services.

But, on April 16, 2014, Duke filed an application seeking approval to amend its corporate separation plan and authority to amend its Retail Tariff, P.U.C.O. No. 19, Sheet 23, to correspond with changes in the corporate separation plan ("Application"). Duke requested authorization to amend its corporate separation plan to allow it to provide products and services other than retail electric service:

*Duke Energy Ohio may also offer products and services other than retail electric service, consistent with Ohio policy. Such services will allow additional service options for residential and non-residential customers and will help to ensure customers the ability for an expeditious return from service interruptions, among other benefits. Upon customer request, Duke Energy Ohio may use contractors or employees to provide other utility-related services, programs, maintenance, and repairs related to customer-owned property, equipment, and facilities. In addition, Duke Energy Ohio may provide products and services other than tariffed retail electric service in an effort to advance the State's interests in energy efficiency and peak demand reduction and to comply with the benchmarks set forth in RC. 4928.66. These programs give the Company the opportunity to serve customers more completely and to assist in meeting statutory requirements.*³

Moreover, Duke requested authority to amend its filed tariffs to allow it to offer products other than retail electric service:

² *In the Matter of 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. 11-3549-EL-SSO, et al., Opinion and Order at 29, 45 (Nov. 22, 2011).*

³ Application, Exhibit A at 84 (containing a proposed 4th Corporate Separation Plan)(emphasis added).

Special Customer Services

The Company may, but is not obligated to, furnish residential or nonresidential customers special customer services as identified in this section. No such special customer service shall be provided except where the Company has informed the customer that ***such service is available from and may be obtained from other suppliers***. A customer's decision to receive or not receive special customer services from the Company will not influence the delivery of competitive or non-competitive retail electric service to that customer by the Company. ***Such special customer services shall be provided at a rate negotiated with the customer***, but in no case at less than the Company's fully allocated cost. Such special customer services shall only be provided when their provision does not unduly interfere with the Company's ability to supply electric service under the Schedule of Rates, Classifications, Rules and Regulations for Retail Electric Service. Such special customer services may include, but are not limited to: design, construction and maintenance of customer-owned substations; resolving power quality problems on customer equipment; providing training programs for construction, operation, and maintenance of electric facilities; performing customer equipment maintenance, repair, or installation; providing service entrance cable repair; providing restorative temporary underground service; providing upgrades or increases to an existing service connection at customer request; performing outage or voltage problem assessment; disconnecting a customer-owned transformer at customer request; loosening and refastening customer owned equipment; determining the location of underground cables on customer premises; covering up lines for protection at customer request; making a generator available to customer during construction to avoid outage; providing pole-hold for customer to perform some activity; providing a "service saver" device to provide temporary service during an outage; resetting a customer-owned reclosure device; providing phase rotation of customer equipment at customer request; conducting an evaluation at customer request to ensure that customer equipment meets standards; upgrading the customer to three-phase service; ***providing whole-house surge protection, and providing energy consumption analysis services, tools and reports.***⁴

Many of these services are related to the provision of products and services other than retail electric service, but it also appears that Duke proposed to modify its tariff language to include certain services that can only be defined as competitive retail

⁴ Application, Exhibit C, at P.U.C.O. Electric No. 19, Sheet No. 23 (Containing proposed tariff language) (emphasis added).

electric services. For example, Duke proposed tariff language would authorize it to make a generator available” to a customer.

While Duke proposed to include competitive retail electric services in its tariff, Duke did not request authority to amend its corporate separation plan to allow it to provide competitive retail electric service after it transfers its generating assets. Thus, it appears that Duke requested authorization to provide tariffed competitive retail electric services that its corporate separation plan is destined to prohibit subsequent to the transfer of its generation assets.

Additionally, Duke failed to indicate whether it would invoice and collect the costs of its services through the utility bill or whether it would advertise through bill inserts or on its website. Also, Duke failed to disclose whether it would provide comparable and non-discriminatory access for CRES providers to do the same.

On June 11, 2014, the Commission issued a Finding and Order modifying and approving Duke’s Application, determining that Duke’s proposal to provide products and services other than retail electric service is reasonable. The Commission, however, authorized Duke to offer these services without: (1) granting Duke a waiver of R.C. 4928.17(A)(1); (2) without identifying that good cause exists to authorize Duke to offer products or services other than retail electric service; or (3) without setting a time period by which Duke must be in compliance with R.C. 4928.17(A)(1)—the Commission merely found Duke’s proposal to be “reasonable.”⁵

Additionally, the Commission determined that it is “of paramount importance” that Duke provide services other than retail electric service at no less than Duke’s fully

⁵ Order at 6 (June 11, 2014).

allocated costs. But, Duke did not disclose and the Commission did not examine the manner in which Duke will calculate and allocate its fully embedded costs to its business engaged products and services other than retail electric service. And the Commission did not provide a forum for addressing concerns regarding Duke's cost allocation methodology.

As discussed below, the Commission's Order is unlawful and unreasonable.

III. ARGUMENT

1. The Order is unlawful and unreasonable because it violated R.C. 4928.17(A)(1).

- a. The Order authorized Duke to provide non-competitive services, competitive retail electric services, and products and services other than retail electric service in without granting Duke a waiver to do so.

An electric utility must operate pursuant to a corporate separation plan, which must promote the policy contained in R.C. 4928.02. State policy favors competition.⁶ R.C. 4928.17(A)(1) requires Duke to provide "competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility (emphasis added)."⁷ As discussed below, the Commission's Order violated R.C. 4928.17(A)(1).

Although under 4928.17(C) the Commission may authorize a temporary waiver from the requirement to provide any non-electric services through a fully separated affiliate, Duke failed to request a waiver.⁸ Despite Duke's threshold failure to even request a waiver and the pro-competitive nature of Ohio law, the Commission approved

⁶ R.C. 4928.02(H).

⁷ A utility may obtain a temporary waiver from this requirement under R.C. 4928.17(C).

⁸ Duke has never received a waiver to provide products and services other than retail electric services, and Duke's temporary waiver with respect to competitive retail electric services was terminated with the approval of Duke's last electric security plan.

Duke's request to amend its corporate separation plan to allow it to provide products and services other than retail electric service. Because the Commission authorized Duke to offer products and services other than retail electric service without providing Duke a waiver of R.C. 4928.17(A)(1), the Commission's order is unlawful and unreasonable.

Moreover, Duke is on course to cease offering competitive retail electric service by December 31, 2014 (or sooner depending on the timing of the transfer of Duke's generating assets). Despite this near-term milestone, the Order approved tariff modifications that appear to allow Duke to provide additional competitive retail electric services. The Order in this respect is contrary to the Commission's previous Opinion and Order and Duke's stipulation commitment to cease offering competitive retail electric services after it transfers its generating assets.

- b. Good cause does not exist for granting Duke a waiver of 4928.17(A)(1). A waiver is only available to allow a utility to continue offering existing services for an interim period; it cannot be used to allow a utility to commence offering new services such as products and services other than retail electric service**

The Commission's Order is unlawful because good cause does not exist for granting Duke a waiver of R.C. 4928.17(A)(1). Authorizing Duke to offer products and services other than retail electric service—products and services that are available from other suppliers—contravenes Ohio's pro-competitive policy and represents a step back from the full legal corporate separation authorized by the Commission in Duke's last ESP. As discussed above, Ohio law is pro-competitive. As an exception to this policy, Duke has been granted a limited monopoly for the purpose of providing distribution

service to customers.⁹ Unlike the delivery of electricity, however, there are market participants that are already willing and able to offer the “special customer services” that the Order authorized Duke to offer to customers. Thus, there is no policy reason to authorize Duke to provide these services to customers.

Moreover, R.C. 4928.17 was enacted as part of Amended Substitute Senate Bill 3, which unbundled and deregulated electric service in Ohio. As part of that process, R.C. 4928.17 required utilities to divest their generation assets and to offer competitive services and products and services other than retail electric services through separate affiliates. While R.C. 4928.17(C) allowed for a *temporary* waiver of the requirement to offer these services through separate affiliates, it is arbitrary and unreasonable to allow a utility misuse the temporary waiver option to commence offering new products and services other than retail electric service.

Accordingly, on rehearing, there is no basis upon which the Commission may cure its failure to grant Duke a waiver of R.C. 4928.17(A)(1).

c. Even if the Order had granted a waiver of R.C. 4928.17(A)(1), 4928.17(C) only allows a waiver to be issued temporarily, but the Order did not set forth a time period by which Duke must comply with 4928.17(A)(1)

As noted above, 4928.17(A)(1) requires Duke to offer any non-electric product or service through a fully separated affiliate. Further 4928.17(C) provides that if Duke wanted to offer products and services other than retail electric service through anything other than a fully separated affiliate, Duke would need to get a waiver from the Commission. However, 4928.17(C) provides that the waiver must apply only for an

⁹ R.C. 4933.83.

“interim period prescribed in the order.” The Commission’s Order in this proceeding did not specifically define the scope of the “interim period” that Duke need not comply with the requirements of 4928.17(A)(1). Rather, Commission’s Order appears to indefinitely allow Duke to violate R.C. 4928.17(A)(1). Accordingly, even if a waiver were granted, the Commission’s Order would violate 4928.17(C) because there is no set period in the Order by which Duke must be in comply with R.C. 4928.17(A)(1).

- d. The Order is unlawful and unreasonable because it violated R.C. 4903.09 by failing to state findings of fact and reasons prompting the Commission’s decisions. In re Application of Columbus Southern Power Company, 128 Ohio St. 3d 512,519, 526-27 (2011). The Order failed to address IGS’s arguments that Duke did not request a waiver of R.C. 4928.17(A)(1) and that Duke did not demonstrate good cause for a waiver of that requirement**

R.C. 4903.09 requires the Commission to address competing arguments and provide a record upon which the Supreme Court of Ohio may evaluate the Commission’s decisions. IGS filed objections noting that Duke had failed to request a waiver of R.C. 4928.17(A)(1) and noting that Duke cannot demonstrate good cause for a waiver. The Commission’s Order failed to address IGS’s arguments; thus, the Order is unlawful and unreasonable.¹⁰

- 2. The Order is unlawful and unreasonable because it violated R.C. 4928.17(A)(2) and (3) by failing to require Duke to submit pro forma calculations of its fully embedded cost of supplying competitive retail electric service or supplying a product or service other than retail electric service, the Order failed to ensure that Duke will not extend an undue preference or advantage to division of its business engaged in the business of supplying competitive retail electric service or supplying a product or service other than retail electric service. The Commission’s failure to review Duke’s allocation methodology allows Duke to provide an anticompetitive subsidy to its**

¹⁰ *In re Application of Columbus Southern Power Company*, 128 Ohio St. 3d 512,519, 526-27 (2011).

unregulated business in violation of R.C. 4928.02(H); the Order implicitly allows Duke to collect the cost of providing products and services other than retail electric services through distribution rates.

From a high level, R.C. 4928.17(A)(2) and (3) require a corporate separation plan to prevent a utility from having an unfair competitive advantage or extending a preference or advantage to any portion of its business providing competitive retail electric service or a product or service other than retail electric service.¹¹ To that end, R.C. 4928.17(A)(3) specifically prohibits a utility from extending an undue preference to a portion of its business providing competitive retail electric service or product or service other than retail electric service by providing overhead services to such business at less than fully embedded cost:

*The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.*¹²

As discussed below, the Commission's Order is unlawful and unreasonable because Duke's corporate separation plan does not ensure that Duke will not provide a competitive advantage or undue preference to the parts of its business that are

¹¹ R.C. 4928.17(A)(2) requires that "[t]he plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power."

¹² R.C. 4928.17(A)(3) (emphasis added).

engaged in the business of providing competitive retail electric service and products and services other than retail electric service.

While the Commission recognized that it is "of paramount importance" that Duke provide services other than retail electric service at no less than Duke's fully allocated costs, Duke did not disclose and the Commission did not examine Duke's calculation of its fully embedded costs and the Commission did not provide a forum for addressing concerns regarding Duke's cost allocation. For example, Duke's application did not identify whether fully embedded costs includes employee salaries, office space, health insurance and other insurance costs, workers compensation costs, human resources costs, call center employee costs addressing calls related to the other products and services, office furniture costs, computer costs, advertising costs, bill insert costs. Duke failed to disclose whether it will offer or advertise its new services using existing employees that may provide non-competitive services, and, if so, how it will allocate the costs of such employees and their overhead between Duke's various businesses.

Moreover, Duke failed to indicate whether it will invoice and collect the cost of its services through the utility bill or whether it will provide CRES providers comparable and non-discriminatory access to CRES providers for the same services.

Rather than review Duke's proposed allocation methodology or marketing practices to ensure that Duke will not provide its own business with a competitive advantage or undue preference, the Order states that "it is our expectation that through its implementation of this corporate separation plan, Duke will adhere to all applicable rules and regulations. Any concerns raised once Duke has implemented its plan will be

reviewed and considered by the Commission on a case-by-case basis.”¹³ The Commission has assumed that Duke will comply with the law and shifted the burden onto CRES suppliers to demonstrate otherwise even though they lack access to Duke’s allocation methodology or an appropriate forum to raise their concerns. The Commission’s Order in this respect is unlawful and unreasonable inasmuch as the corporate separation plan approved by the Order does not sufficiently ensure that Duke will not provide its own business with an undue preference or competitive advantage.

The Commission’s failure to review Duke’s allocation methodology may implicitly allow Duke to use its distribution resources to subsidize the part of its business that offers products and services other than retail electric service. By allocating less than the fully embedded cost of providing these services—collecting the indirect cost of providing these services through distribution rates—Duke may gain an unfair competitive advantage in the market of providing products and services other than retail electric service.

- 3. The Order is unlawful and unreasonable because by permitting Duke to offer products and services other than retail electric service through its monopoly distribution company, and not affording the same access to the monopoly resources to other competitors in the market, it is a violation of anti-trust statutes including 15 U.S. Code Chapter 1 et. al and Chapter 1331 Ohio Revised Code, et al. The State Action Exemption does not allow the Commission authorize Duke to restrain trade, because the service Duke will be providing are not authorized by state statute.**

In its application, Duke, an electric distribution monopoly, is asking for permission to provide products and services other than retail electric service utilizing distribution monopoly resources. In the application Duke claims it will allocate the costs of those

¹³ Finding and Order at 6-7.

services in the charges to customers receiving those services. Unfortunately, Duke has provided little to no evidence as to how it will conduct its costs allocation, and a hearing was not held, so parties to this proceeding were unable to conduct discovery regarding Duke's costs allocation methodology.

Regardless of how Duke intends to allocate costs, Duke will be utilizing distribution assets to offer products and services other than retail electric service to customers. In other words, but-for Duke's distribution assets, paid for by all customers, Duke would not be able to provide the services it is now proposing. Further, because Duke will be able to leverage its distribution resources, it will see significant cost advantages that competitors in the market do not have. Therefore, even if Duke allocates its variable costs to the services it seeks to offer, Duke's products and services will likely avoid fixed costs (e.g. office space), and indirect costs (e.g. H.R. accounting, payroll, etc.). This problem is exacerbated because the cost allocation will be almost entirely at Duke's discretion and Duke will have every incentive to not allocate costs to its new business venture, because Duke is able to recover what it deems as "non-competitive costs" through distribution rates.

Entities competing against Duke will not have the same advantage as Duke because competitors do not have the ability to leverage Duke's distribution assets to provide services.

Antitrust law (15 U.S. Code Chapter 1 § 1-38, et sec.) prohibits trusts and the use of monopolies to restrain trade in a market for goods and services. Antitrust law also prohibits price discrimination by creating an artificial cost advantage in the market and a

conspiracy to restrain trade in the market. *Id.* Finally, antitrust law prohibits restraining trade by entering into agreements not to use the goods of a competitor. *Id.*

Likewise, as a matter of law and public policy in unregulated markets, Ohio law has long promoted competitive outcomes as reflected in Ohio's Valentine Act (R.C. 1331, et sec.). R.C. 1331.01 defines a trust as "a combination of capital, skills or acts by two or more persons" for any of six enumerated anticompetitive purposes. The circumstances surrounding the passage of the Valentine Act in 1898 make it clear that this broad language was intended to encompass a much wider array of anticompetitive combinations [everything from a powerful single firm wielding its power to control production or prices (i.e., a combination of the "capital" of shareholders), to collusive agreements among multiple firms in the market (i.e., a combination of "acts" by conspiring firms)].

Historically, distribution monopolies have relied on the state action exemption to exempt the utility from antitrust violations. The state action exemption provides that if the state legislature in its sovereign capacity authorized an action that would otherwise be an antitrust violation, than that action is exempt from antitrust laws.¹⁴ However, the Supreme Court has stated in the antitrust context that state action immunity is disfavored absent a clearly articulated state policy that allows for anti-competitive conduct at issue.¹⁵

¹⁴ *Parker v. Brown*, 317 U.S. 341, 352 (1943).

¹⁵ *FTC Ticor Title Ins. Co.*, 504 U.S. 621, 623, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992) ("The Supreme Court has stated in the antitrust context that 'state action immunity is disfavored . . .'. But "[a]n otherwise monopolistic restraint of trade will not give rise to a Sherman Act violation where it stems from a clearly articulated and affirmatively expressed state policy. . . ." *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). "The relevant question

The Ohio General Assembly has authorized electric utilities to have a regulated monopoly over distribution service.¹⁶ But, in no instance has the Ohio General Assembly authorized a *distribution utility* to directly provide products or services other than retail electric service.¹⁷ Thus, there is no clearly articulated state policy or law that would authorize the Commission to allow Duke to engage in the anticompetitive activities authorized in the Order. In fact, Ohio law specifically requires that if the utility is to provide competitive products and services other than retail electric service, it must do so "through a fully separated affiliate of the utility."¹⁸

By authorizing Duke to provide products and services other than retail electric service through its distribution utility, the Order unlawfully and unreasonably allows Duke to violate the antitrust doctrine. And the state action doctrine does not exempt Duke from engaging in activity that otherwise would be unlawful under antitrust statute. Accordingly, the Commission should grant rehearing and instruct Duke that it is prohibited from offering products and services other than retail electric service.

IV. CONCLUSION

For the reasons stated herein, IGS recommends that the Commission grant this application for rehearing and correct the errors identified herein.

is whether the regulatory structure which has been adopted by the state has specifically authorized the conduct alleged to violate the Sherman Act." *Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 942 (9th Cir.1996). If the alleged anticompetitive conduct is unlawful under state law, "the alleged conduct would not be protected by the state action immunity doctrine." *Id.*

¹⁶ R.C. 4933.83.

¹⁷ Rather, the General Assembly required utilities to cease offering these services after the enactment of Amended Substitute Senate Bill 3; only allowing utilities to continue to offer these services for a temporary period for good cause.

¹⁸ R.C. 4928.17(A)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Application for Rehearing and Memorandum in Support of IGS Energy* was served this 11th day of July 2014 via electronic mail upon the following:

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