Supreme Court of Ohio Clerk of Court - Filed March 27, 2015 - Case No. 2014-1651

IN THE SUPREME COURT OF OHIO

INTERSTATE GAS SUPPLY, INC.	:
	:
Appellant,	: Case No. 14-1651
	:
v.	: Appeal from the Public Utilities
	: Commission of Ohio
THE PUBLIC UTILITIES COMMISSION OF OHIO,	:
	: Public Utilities Commission of
	: Ohio Case Nos. 14-0689-EL-UNC
Appellee.	: 14-0690-EL-ATA

REPLY BRIEF OF INTERSTATE GAS SUPPLY, INC.

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I. INTRODUCTION

Duke Energy Ohio, Inc. ("Duke") claims that this case is about competition and allowing it to "enter a competitive market." Duke Brief at 1. Duke's claim demonstrates a fundamental misunderstanding of Ohio law and the path set forth by the General Assembly when it restructured Ohio's electricity market. In 1999, the General Assembly limited electric distribution utilities ("EDUs") to one business only—the delivery of electricity over regulated distribution lines; nothing else. Ohio law specifically required EDUs to provide all unregulated services through a separate affiliate.

The General Assembly provided that the Public Utilities Commission of Ohio ("Commission") can waive the requirement that an EDU to provide competitive retail electric services or products and services other than retail electric service (hereinafter referred to as "unregulated services") through a separate affiliate only in limited instances for an interim period. Specifically, it determined that the Commission could provide an EDU a temporary waiver of the requirement of providing unregulated services through a separate affiliate, but only for good cause.

The issue in this appeal is simple. The Commission's Finding and Order ("Order") authorized Duke, an EDU, to enter the business of providing unregulated services, including products and services other than retail electric service. But the Order failed to find that good cause existed for doing so and the Order did not limit the duration in which Duke may provide these unregulated services.

The Commission's and Duke's Briefs do not directly rebut the assignments of error identified in Interstate Gas Supply, Inc.'s ("IGS") appeal, as they cannot cite to any portion of the Order or Entry on Rehearing where the Commission found good cause to grant Duke

a waiver. Nor did the Commission's Brief or Duke's Brief identify any portion of the Order or Entry on Rehearing that prescribed a specific period of time in which Duke must comply with Ohio's corporate separation laws. Further, the Commission and Duke failed to rebut IGS's argument that the Commission lacks authority to authorize an EDU to offer new unregulated services.

Rather than addressing IGS's arguments, the Commission's Brief and Duke's Brief largely rely upon completely new legal reasoning not contained in the Commission's Order or Entry on Rehearing. Both parties claim that the Order approved Duke's corporate separation plan under a different section of the law not addressed in IGS's appeal. The Court should summarily reject this new reasoning. It is procedurally defective and thus cannot be presented at this late stage. It is also incorrect and contrary to the Court's precedent and Ohio law.

Accordingly, IGS requests that the Court reverse and remand this proceeding and instruct the Commission to require Duke to further amend its corporate separation plan to comply with R.C. 4928.17(A)(1). Thus, the Court should direct the Commission to require Duke to modify its corporate separation plan and to cease providing unregulated products and services..

II. ARGUMENT

IGS's Appeal presented the following four issues for the Court's consideration, each of which is related to the Commission's failure to comply with R.C. 4928.17(A)(1) and (C):

1. The Order failed to grant a waiver based upon a finding of good cause;
2. The Order cannot provide a waiver to allow an EDU to offer new unregulated services;
3. Even if a waiver is permissible, the Order failed to set forth the duration of the waiver in its Order;

4. The Order failed to comply with R.C. 4903.09.

The Commission's and Duke's briefs largely do not address these assignments of error. Rather, they rely upon new reasoning not contained in the Commission's Order or Entry on Rehearing. The portions of the Commission's Brief that address issues ripe for consideration by this Court are actually limited to pages 14-17. Likewise, Duke's Brief addresses issues ripe for consideration in pages 18-24.[1]

This Reply Brief is structured to succinctly address the Commission's and Duke's response to arguments that are properly before this Court. The remainder of this Reply Brief addresses the Commission's and Duke's procedurally inappropriate arguments, to the extent the Court considers this new reasoning.

A. Reply in Support of Proposition of Law I: The Order is Unlawful and Unreasonable Because it Violated R.C. 4928.17(A)(1).

1. The Order authorized Duke to provide non-competitive services, competitive retail electric services,[2] and products and services other than retail electric service without granting Duke a waiver to do so under R.C. 4928.17(C).

In its Brief, IGS demonstrated that the Order allowed Duke to provide products and services other than retail electric service (unregulated services) without granting Duke a waiver based upon a finding of good cause. IGS Brief at 9-11. Thus, IGS demonstrated that the Order violated the plain language of R.C. 4928.17(A)(1) and (C) and must be

[1] The remainder of their Briefs advance the procedurally defective argument that the Commission has discretion to approve an amendment to a corporate separation plan under R.C. 4928.17(D) and thus ignore the requirements of R.C. 4928.17(A) through (C).

[2] While this assignment of error refers to competitive retail electric service, this appeal is limited to the Order's authorization of a modified corporate separation plan that allows Duke to provide products and services other than retail electric service. The Order did not alter the fact that Duke will no longer provide competitive retail electric service subsequent to the transfer of its generating assets.

reversed. As discussed below, the Commission's Brief and Duke's Brief failed to rebut IGS's argument.

The Commission's Brief claims—in conclusory fashion—that "[g]ood cause was found and the Commission's orders satisfy 4928.17(C)." Comm. Brief at 15. But, the Commission's Brief provides no citation to the Order or Entry on Rehearing to support its bald statement—nor can it. The Commission's conclusions in its Brief cannot fill in the gaps in its Order below.

To paper over the cracks in its reasoning, the Commission focuses its argument on safeguards it included in its Order to insulate against the risk of an "undue competitive advantage or undue abuse of market power." Comm. Brief at 14. The Commission's reasoning misses the mark because it fails to address the critical issue in this case—the Commission failed to find in its Order that good cause exists to allow Duke to offer these products and services in the first place. Merely implementing "safeguards" does not demonstrate why there is good cause for a regulated EDU to enter into the marketplace for unregulated services in the first instance.

Duke's Brief argues that the Commission has wide latitude to find that good cause exists. But Duke's Brief does not argue that the Commission actually found good cause in its Order. Duke Brief at 18-19. Thus, Duke concedes that the Commission failed to make the findings required under the statute. Indeed, Duke's argument does not contain a single citation to any portion of the Commission's Order or Entry on Rehearing. *Id.* And, as discussed above, the Commission made no such finding.

Duke's Brief also argues that IGS has not demonstrated that the Commission must find good cause to provide a waiver. Duke Brief at 19-22. Duke incorrectly claims that

IGS has argued that a waiver is required only on the basis that "Ohio law is pro-competitive." Duke Brief at 21. Duke's argument mischaracterizes IGS's appeal. While IGS agrees that Ohio law is undeniably pro-competitive, IGS's appeal is based upon the clear statutory language contained in R.C. 4928.17(A)(1) and (C). As discussed above, those sections state that the Commission can authorize an EDU to offer unregulated services only based upon a finding of good cause, stating, "for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order." Thus, the Court should reject Duke's argument because it contravenes the clear and unequivocal language contained in R.C. 4928.17(A)(1) and (C). Because the Commission violated the clear and unequivocal language of R.C. 4928.17(A)(1) and (C), the Order must be reversed.

2. Good cause does not exist for granting Duke a waiver of 4928.17(A)(l). A waiver is not available to allow an EDU to enter the business of providing new unregulated services

IGS's Merit Brief demonstrated that the Commission could not find good cause to provide a waiver. IGS Brief at 11-14. At the time electric restructuring occurred in Ohio, EDUs were vertically integrated; the General Assembly correctly recognized that regulated EDUs could not transfer their competitive generation and other unregulated businesses overnight to an affiliate. Thus, R.C. 4928.17(C) provided a glide path by which, for an interim period of time, EDUs could continue to offer unregulated services in addition to noncompetitive distribution services. While R.C. 4928.17(C) allowed for a temporary waiver of the requirement to offer these services through a separate affiliate, it is unlawful and unreasonable to allow an EDU to misuse the temporary waiver to commence offering

new unregulated products and services. Moreover, there is no legitimate reason to allow Duke to offer these services because competitors in the market are already offering them. IGS Supplement at 19, 23-24 (hereinafter "Supp."); IGS Second Supp. at 4-5.

Much like its initial Order and Entry on Rehearing, the Commission's Merit Brief does not rebut IGS's argument. Duke's Brief also fails to attempt to rebut IGS's argument. Thus, neither the Commission nor Duke has provided a basis upon which the Court could reject IGS's assignment or error.

3. The Order failed to set forth a waiver of limited duration prescribed in the Order

IGS's Merit Brief demonstrated that the Order was also unlawful because it failed to limit the duration in which Duke may provide unregulated products and services. IGS Brief at 14. The Commission's Brief did not rebut this argument; the Order contains no deadline. And Duke did not address this argument in its brief.

The Commission argues that it satisfied the law because "[o]ngoing monitoring was integral to the Commission's approval." Comm. Brief at 15. The Commission also claims that "any party could challenge the Company's implementation of its corporate separation plan through the Commission's formal complaint process at any time." *Id.* The Court should reject the Commission's argument because it violates the plain language of R.C.4928.17(C). That section states that any waiver of the corporate separation requirements can only apply for "an interim period prescribed in the order" and based upon a finding of good cause. Thus, the plain language in R.C. 4928.17(C) makes clear that any waiver must be temporary. Merely "monitoring" Duke's unregulated activities (without prescribing an end date by which Duke must provide all unregulated services from a separate affiliate) creates an indefinite waiver which is not authorized under the plain language in R.C. 4928.17.

Further, accepting the Commission's rationale would render superfluous the statutory language "interim period prescribed in the order." The Commission already has the statutory authority to monitor the activities of regulated EDUs and jurisdiction over their corporate separation plans. The language "interim period prescribed in the order" places an additional requirement that corporate separation waivers be temporary. It is a bed-rock legal principal that all statutory language must be given meaning. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St. 3d 250, 254 (2002) (holding all words in a statute must be read and given their full meaning). For these reasons, the Commission's order did not satisfy the temporary waiver requirement in 4928.17(C).

Finally, under the statutory structure established by the General Assembly, the burden is on the Commission (and the applicant) to identify specific facts to support a waiver each time one is granted. But the Commission reasons that once a waiver is approved, a party could only challenge the waiver if they file a complaint based upon facts that demonstrate non-compliance with Ohio law. The Commission's reasoning would turn the process set forth in R.C. 4928.17(C) on its head and shift the statutorily imposed burden of proof away from Duke and onto parties such as IGS. Thus, the Court should reverse the Commission's Order on the basis that it failed to satisfy the requirement to provide a waiver of limited duration set forth in the Order.

4. The Order violated 4903.09

IGS's Merit Brief demonstrated that the Order and Entry on Rehearing violated R.C. 4903.09. IGS Brief at 15-16. To allow the Court to properly evaluate the lawfulness and reasonableness of the Commission's orders, R.C. 4903.09 requires the Commission to sufficiently set forth its legal conclusions and to identify portions of the record that support its reasoning. The court has stated that the purpose of R.C. 4903.09 is to enable the Court to

readily review the Commission's legal reasoning and specific findings of fact, based upon the record. *Tongren v. Pub. Util. Comm'n Ohio*, 85 Ohio St.3d 87, 89 (1999); *Ideal Transportation Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 195, 200 (1975). Moreover, 4903.09 requires the Commission to respond in its orders to arguments presented by parties. *In re Application of Columbus Southern Power Co.*, 128 Ohio St. 3d 512, 526-27 (2011). The Order violated each of these requirements. Neither the Order, nor the Entry on Rehearing granted Duke a waiver based upon a finding of good cause to allow Duke offer products and services other than retail electric service. Although IGS brought this failure to the Commission's attention, the Commission simply ignored IGS's arguments.

The Commission's Brief claims that the Order contains sufficient findings of fact and conclusions of law to satisfy R.C. 4903.09. Comm. Brief at 16-18. Specifically, the Commission claims the following two sentences in its Entry on Rehearing that allegedly satisfy the statute:

> 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 of abuse of market power.

IGS App. at 19; *See* Comm. Brief at 16-17. These sentences, however, fail to address IGS's arguments or set forth the legal and factual basis for the Commission's decision.

Regarding the first sentence, passively stating that Duke's proposal did not appear to violate Ohio law does not satisfy the statute. The Order was required to address IGS's claim that the Commission cannot allow Duke to offer unregulated services unless it grants Duke a waiver of corporate separation requirements based upon a finding of good cause.

Otherwise, the Commission could avoid providing any statutory analysis merely by claiming that an EDU's proposal should be approved because it does not appear to violate the law (and without even identifying the law it allegedly does not violate). R.C. 4903.09 requires the Commission's orders to affirmatively explain the statutory basis for the Commission's decisions and the facts relied upon to support the Commission's reasoning.

Moreover, the second sentence does not satisfy the Commission's burden. It merely identifies the Commission's incorrect view that corporate separation plans are intended to allow utilities to provide unregulated services, subject to appropriate safeguards. In fact, the opposite is true. Ohio law highly disfavors regulated EDUs providing unregulated services. R.C. 4928.17(A)(1). This is why the law requires EDUs to establish a plan for corporate separation that prohibits EDUs from offering unregulated services. Ohio law allows an EDU to get a *temporary* waiver from this requirement only in limited situations based upon a finding of good cause, which was not present here. R.C. 4928.17(C).

Duke takes a different approach to IGS's R.C. 4903.09 argument. Duke claims in reliance on *East Ohio Gas Co. v. Pub. Util. Comm.*, 45 Ohio St.2d 86, 92, 341 N.E.2d 585 (1976), that to the extent that the Commission violated R.C. 4903.09, the error was only a technical defect that does not warrant reversal. Duke Brief at 23. Also, Duke claims that IGS misunderstands the purpose of R.C. 4903.09 and has attempted to "bootstrap another attack on a Commission order, simply because the Commission did not eventually agree with the appealing party. Here, the Commission clearly explained the facts in the case and clearly explained its rationale." Duke Brief at 23. Both of Duke's arguments are incorrect.

In *East Ohio Gas*, the Court specifically provided that the Commission's failure to make findings of fact was excusable because the "actual reason underlying the orders is

clear." 45 Ohio St.2d at 92. In this proceeding, however, the basis for the Commission's Order is not clear. Ohio law requires each EDU to offer only non-competitive distribution service. The Commission can only provide a temporary waiver of this requirement based upon finding of good cause to allow an EDU to offer additional services. Here, the Commission did not provide a waiver and it did not identify a need or specific reason to allow Duke to offer these services. And market participants such as IGS are already offering the services that Duke desires to provide. IGS Second Supp. at 5; IGS Supp. at 23-24.

Additionally, the *East Ohio Gas* case does not hold that the Commission may ignore a party's arguments. Thus, that precedent does justify affirmation of the Commission's Order.

Contrary to Duke's claim, IGS is not merely seeking to "bootstrap" another assignment of error onto its appeal. The Order did not contain legal reasoning or factual support and it failed to address IGS's arguments on several occasions—the purpose of R.C. 4903.09 is to guard against such orders, is it not?

Indeed, the Commission's and Duke's reliance upon several completely new arguments and legal reasoning (not present in the Order or Entry on Rehearing) in their Merit Briefs in response to IGS's appeal demonstrates the importance of compliance with R.C. 4903.09.[3] Allowing the Commission to reveal new legal authority on appeal would place any appellant in an impossible position. It is a jurisdictional prerequisite for any appellant to first file an application for rehearing identifying aspects of the Commission's order that are unlawful and unreasonable. *Discount Cellular v. Pub. Util. Comm'n Ohio*,

[3] As discussed in the *infra*, these arguments are also procedurally inappropriate and not properly before the Court.

112 Ohio St. 3d 360 ¶ 56 (2007). To the extent that the Commission is permitted to withhold its actual reasoning until after the rehearing process has completed, an appellant would have no ability to appeal the Commission's order.

5. IGS has demonstrated prejudice

The Commission's Brief and Duke's Brief claim that IGS has not demonstrated that it is prejudiced by the Order; thus, the Court should reject IGS's appeal. Comm. Brief at 18-19; Duke Brief at 24. The Commission and Duke are incorrect.

As IGS stated in its Motion to Intervene in the proceeding below, "[t]he IGS family of companies (which include IGS Generation, IGS Home Services and IGS CNG Services) also provides customers focused energy solutions that complement IGS Energy's core commodity business including distributed generation, demand response, CNG refueling, back-up generation and utility line protection." IGS Second Supp. at 4; *see also* IGS Supp. at 23-24. IGS further stated in its Motion to Intervene and Objections that Duke seeks to modify its corporate separation plan in order to compete with CRES providers by offering similar unregulated services. IGS Second Supp. at 5; *see also* IGS Supp. at 23-24. Thus, IGS demonstrated that it currently offers products and services such as those that the Commission authorized Duke to provide in the Order below.

Moreover, the general overarching purpose of R.C. 4928.17 is to promote competition. Indeed, Ohio law recognizes that regulated EDUs (that get cost recovery from all distribution customers) would have an inherent anti-competitive advantage if they were to be allowed to offer unregulated services. Thus, R.C. 4928.17(A)(1) specifically required each EDU to provide such services through a fully separate affiliate. R.C. 4928.17(C) contains a strict process through which the Commission may temporarily waive compliance

with R.C. 4928.17(A)(1). This process is intended to be used sparingly and based upon a finding of good cause in each instance. The Commission's Order, however, would eliminate the General Assembly's statutorily devised process and safeguards and allow Duke to immediately compete against IGS regarding the provision of unregulated services. Thus, all market participants—including IGS—are prejudiced by the Commission's Order.

Finally, this Court has held that a party need not demonstrate prejudice when an order fails to comply with R.C. 4903.09, as is the case here. *Tongren v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87, 92-93 (1999) ("where the Public Utilities Commission fails to meet the requirements of R.C. 4903.09 by not disclosing the sources of its information to those who most require it, thereby preventing the complaining party from demonstrating prejudice, the matter must be remanded for development of an appropriate record, to leave open the potential demonstration of prejudice by a party based upon that record in a subsequent appeal."). Accordingly, even if IGS has not demonstrated prejudice—which it has—this matter should be reversed and remanded to further develop the record.

B. Reply in Opposition to the Commission's and Duke's Procedurally Inappropriate Arguments

1. The Commission's and Duke's argument regarding the applicability of R.C. 4928.17(D) is procedurally defective

The Commission's Brief and Duke's Brief largely rely upon new legal reasoning not present in the Order or Entry on Rehearing below. Their central argument is that the Commission has authority to approve any corporate separation plan amendments as it deems necessary under R.C. 4928.17(D). Comm. Brief at 10-14; Duke Brief at 7-18. The Commission's Brief and Duke's Brief further claim that when an amendment is approved under this provision, a corporate separation plan need not comply with the requirements of R.C. 4928.17(A) through (C). *Id.* This legal reasoning, however, is not present in the Order

or Entry on Rehearing; thus, it cannot be relied upon to affirm the Order. Precedent and Ohio law do not allow a party to raise new legal reasoning during the appeal process.

Initially, under R.C. 4903.09, the Commission is required to set forth its legal reasoning in its Order. As a corollary, the Commission cannot then rely upon new legal reasoning on appeal. The Court's role is to evaluate the lawfulness of the Commission's orders; not its briefs on appeal.

Similarly, this Court's jurisprudence holds that only arguments presented in the case below may be considered on appeal. This Court has held that these rules relate to fundamental fairness in the judicial process:

> These rules are deeply embedded in a just regard for the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error.

State ex rel. Quarto Mining Co. v. Foreman, 79 Ohio St. 3d 78, 81 (1997); *see also Lewis v. Trimble, 79 Ohio St. 3d 231*, 246 (1997) ("We hold that this issue was not raised previously, and therefore has been waived."); *State Ex Rel. Truslow v. Indus. Comm.*, 58 Ohio St. 3d 100, 102 (1991).

In line with its orders promoting fairness in the judicial process, this Court has rejected arguments and factual evidence that appear for the first time in a party's reply brief. In a recent appeal involving Ohio Power Company, this Court stated, "Ohio Power does offer evidence and additional arguments to support this claim in its reply brief. Ohio Power, however, is barred from raising new arguments and offering evidence for the first time on

reply." *In Re Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company* 2014-Ohio-3764 ¶ 37; *In re Application of American Transmission Systems*, 125 Ohio St.3d 333, 339 (2010) ("CARE argues for the first time in its reply brief that public policy should favor burdening public lands as opposed to acquiring private property. CARE has thus waived this argument.").

Accordingly, the Court should not consider the Commission's and Duke's claim that R.C. 4928.17(D) allows the Commission to ignore the requirements of R.C. 4928.17(A) through (C). Consideration of this new argument would be procedurally inappropriate and fundamentally unfair.

2. R.C. 4928.17(D) cannot nullify the requirements of R.C. 4928.17(A) through (C)

Notwithstanding the procedural inappropriateness of raising new legal arguments on appeal, IGS will also address the merits of the new legal arguments raised by Duke and the Commission.

The Commission claims that "[o]nce the Commission has found that the initial corporate separation plan [filed in 1999] satisfies R.C. 4928.17(C), then R.C. 4928.17(D) establishes the mechanism by which that corporate separation plan may be amended." Comm. Brief at 10. The Commission thus argues that the requirements contained in R.C. 4928.17(C) are inapplicable to any corporate separation plan amendment because the Commission may approve an amendment as it deems necessary. The Commission claims there is no specific formula in R.C. 4928.17; thus, its interpretation of the statute should be given deference. Comm. Brief at 13. Duke asserts a similar argument. Duke claims that reading R.C. 4828.17(C) *in pari materia* with the remainder of the statute demonstrates that the Commission has broad discretion to ignore the remainder of R.C. 4928.17. Duke Brief

at 10-12. As discussed below, the Commission's and Duke's argument is contrary to this Court's precedent and also incorrectly reads the unambiguous language of R.C. 4928.17.

On two occasions, this Court has issued orders finding that the requirements of R.C. 4928.17(A)(1) and (C) are applicable to amendments to an EDU's corporate separation plan. In FirstEnergy's rate stabilization plan proceeding, the Court affirmed the Commission's approval of an amendment to FirstEnergy's corporate separation plan, which also provided FirstEnergy with a waiver—based upon a finding of good cause—of the requirement (R.C. 4928.17(A)(1)) to divest its generation assets. In *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 2006-Ohio-2110, ¶¶32-37. The Court stated, "[b]ased upon the evidence, including testimony on the need for, and the effectiveness of, a modified separation plan, the PUCO found that FirstEnergy had established good cause to allow approval of an alternative functional-separation plan pursuant to R.C. 4928.17(C) . . . ." *Id.* at ¶33. In the appeal of Duke Energy Ohio's rate stabilization plan, the Court affirmed a similar amendment, which included a waiver based upon a finding of good cause. *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, ¶¶72-76 ("The commission has discretion to approve an alternative functional corporate separation plan for an interim period upon a determination of "good cause."). Thus, the Court evaluated these corporate separation amendments pursuant to the requirements contained in R.C. 4928.17(A) and (C).

Duke's Brief does not acknowledge the existence of the above precedent, some of which pertains to a prior amendment to its own corporate separation plan. Instead, Duke claims that the Commission's own precedent implicitly indicates that the Commission may allow an EDU to offer unregulated services without providing a waiver. Duke Brief at 19-

20. Duke largely relies upon the Commission's approval of FirstEnergy's initial corporate separation plan in 1999 as part of FirstEnergy's Electric Transition Plan. That order, however, specifically held that FirstEnergy "has met its burden of showing 'good cause' for this Commission to approve the interim functional separation plan" and that FirstEnergy has set forth a specific timeline for achieving full structural separation. Duke Appendix at 17. Regardless, the Commission's orders cannot modify Ohio law, which has been properly interpreted by this Court.

Moreover, a closer examination of R.C. 4928.17 demonstrates that the Court (and the Commission) previously interpreted the law correctly and thus the Court should not disturb its precedent. R.C. 4928.17(A) states that after the commencement of restructuring Ohio's electric market, an EDU must operate pursuant to an approved corporate separation plan that complies with the requirements of R.C. 4928.17(A)(1) through (3), which includes that requirement that the EDU offer all unregulated services through an affiliate:

> [B]eginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:
>
> > 1) The plan provides, 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, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.
> >
> > (2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

> (3) 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.

An EDU may obtain a waiver to excuse non-compliance with R.C. 4928.17(A)(1) only to the extent that the Commission finds that good cause exists under R.C. 4928.17(C). The requirements above do not apply solely to an EDU's initial corporate separation plan. Rather, these are ongoing statutory requirements that provide the bedrock to a functionally competitive restructured energy market. Indeed, similar requirements are contained in the state policy of R.C. 4928.02.

Further, applying the standards in R.C. 4928.17(A) only to initial corporate separation plans, and not subsequent corporate separation plan amendments, would render R.C. 4928.17(A) ineffectual and meaningless. An EDU could simply file its initial corporate separation plan in compliance with R.C. 4928.17(A) and (C) and then, immediately upon approval, file for amendments to its corporate separation plan that would violate the requirements of R.C. 4928.17(A). This absurd scenario clearly contradicts the plain language in R.C. 4928.17(A) and (C) and the General Assembly's intent when effectuating the statute.

Contrary to the Commission's claim, the language in R.C. 4928.17(D) is fairly limited in breadth and it does not impact the Commission's substantive analysis of either an initial corporate separation plan or an amendment thereto. It merely states that the Commission *may* approve an amendment to a corporate separation plan; it does not allow the Commission to ignore the balance of R.C. 4928.17:

> Any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.

This limited language does not allow the Commission to read the balance of R.C. 4928.17(A) and (C) out of the law.

Ignoring the balance of R.C. 4928.17 would lead to an absurd result. This Court has stated that "courts must avoid statutory interpretations that create absurd or unreasonable results." *State v. Cabrales*, 2008 Ohio 1625 ¶ 20 (2008); *State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St. 3d 382, 384 (1985). Accordingly, the Court should reject the Commission's and Duke's arguments and grant the relied requested in this appeal.

III. CONCLUSION

In 1999, the General Assembly mandated that EDUs separate unregulated services and provide them through a separate affiliate. The Order violated this requirement. Thus, Appellant IGS respectfully submits that the Commission's Order is 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.

Because there is no basis upon which the Commission can cure its error, IGS respectfully requests that the Court reverse this proceeding and instruct the Commission to

order Duke to amend its corporate separation plan to require that Duke provide unregulated products and services other than retail electric service through a fully separated affiliate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Interstate Gas Supply, Inc. was served upon the parties of record to the proceeding on March 27, 2015, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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