

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio for Approval of the Fourth)
Amended Corporate Separation Plan under) Case No. 14-689-EL-UNC
Section 4928.17, Revised Code, and Chapter)
4901:1-37, Ohio Administrative Code.)

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

**APPLICATION FOR REHEARING
OF
DUKE ENERGY OHIO, INC.**

July 14, 2017

INTRODUCTION

On April 16, 2014, Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) filed an application (Application) with the Public Utilities Commission of Ohio (Commission), seeking approval of its Fourth Amended Corporate Separation Plan. The Commission issued its Finding and Order on June 11, 2014.¹ Following appeal to the Supreme Court of Ohio by Interstate Gas Supply, Inc. (IGS), an intervenor in the Commission proceeding, the Court reversed the Commission's decision and remanded the case, on procedural grounds.² Without further proceedings, the Commission issued its Order on Remand on June 14, 2017.

Ohio law, in R.C. 4903.10, allows any party that has entered an appearance in a Commission proceeding to apply for rehearing in respect to any matters determined in the proceeding, within thirty days after the issuance of the order. Duke Energy Ohio is hereby filing its Application for Rehearing of the Order on Remand, pursuant to R.C. 4903.10 and Ohio Administrative Code (O.A.C.) 4901-1-35.

Duke Energy Ohio asserts that the Order on Remand is unlawful and/or unreasonable in the following respects:

1. The Supreme Court's Order on Remand reversed and remanded the Commission's findings based only on the Commission's failure to fully explain its rationale as required under R.C. 4903.09. The Commission's change of outcome was not mandated by that Opinion. (Assignment of Error 1)
2. Notwithstanding Court's explicit requirement for further proceedings and for an explanation of the basis of the Commission decision, including evidence considered, the Commission issued its Order on Remand with no further proceedings whatsoever and no reference to evidence it considered to support its revised conclusion. (Assignment of Error 2)

¹ *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan under R.C. 4928.17 and O.A.C. 4901:1-37*, Case No. 14-689-EL-UNC, *et al.*, (Finding and Order)(June 11, 2014).

² *In re Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan*, 148 Ohio St.3d 510, 2016-Ohio-7535 (November 1, 2016).

3. The Commission's new outcome in this proceeding is based solely on dictum expressed in a minority opinion. (Assignment of Error 3)
4. Regardless of dictum expressed in minority opinion, Ohio law does not prohibit approval of Duke Energy Ohio's proposed Fourth Corporate Separation Plan.
 - a. The Commission considered no evidence or arguments on which to base its decision that the proposed plan is not compliant with R.C. 4928.17(C) because it was not designed for an interim period.
 - b. The Commission considered no evidence on which to base its decision regarding compliance with state policy.

(Assignment of Error 4)

Duke Energy Ohio respectfully requests that the Commission modify its Order on Remand, as discussed herein.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

Handwritten signature of Amy B. Spiller in blue ink.

Amy B. Spiller (0047277)

Deputy General Counsel

Jeanne W. Kingery (0012172) (Counsel of Record)

Associate General Counsel

139 E. Fourth Street, 1303-Main

P.O. Box 961

Cincinnati, Ohio 45201-0960

(513) 287-4359 (telephone)

(513) 287-4385 (facsimile)

Amy.Spiller@duke-energy.com

Jeanne.Kingery@duke-energy.com

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**MEMORANDUM IN SUPPORT OF
APPLICATION FOR REHEARING
OF DUKE ENERGY OHIO, INC.**

As outlined above, Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) submits the following memorandum to the Public Utilities Commission of Ohio (Commission) in support of its Application for Rehearing. The Company alleges four errors for the Commission's consideration and urges the Commission to reverse the conclusions referenced herein in its entry on rehearing.

1. The Supreme Court's Opinion reversed and remanded the Commission's findings based only on the Commission's failure to fully explain its rationale as required under R.C. 4903.09. The Commission's change of outcome was not mandated by that Opinion. (Assignment of Error 1)
2. Notwithstanding Court's explicit requirement for further proceedings and for an explanation of the basis of the Commission decision, including evidence considered, the Commission issued its Order on Remand with no further proceedings whatsoever and no reference to evidence it considered to support its revised conclusion. (Assignment of Error 2)
3. The Commission's new outcome in this proceeding is based solely on dictum expressed in a minority opinion. (Assignment of Error 3)

4. Regardless of dictum expressed in minority opinion, Ohio law does not prohibit approval of Duke Energy Ohio's proposed Fourth Corporate Separation Plan.
 - a. The Commission considered no evidence or arguments on which to base its decision that the proposed plan is not compliant with R.C. 4928.17(C) because it was not designed for an interim period.
 - b. The Commission considered no evidence on which to base its decision regarding compliance with state policy.

(Assignment of Error 4)

DISCUSSION

Assignment of Error 1:

The Supreme Court's Order on Remand reversed and remanded the Commission's findings based only on the Commission's failure to fully explain its rationale as required under R.C. 4903.09. The Commission's change of outcome was not mandated by that Opinion.

On appeal, the Supreme Court of Ohio was presented with both procedural and substantive claims of error on the part of the Commission. The Court decided the case solely on the basis of the procedural argument:

We conclude that IGS has established a violation of R.C. 4903.09. . . . Here, the commission failed to explain a material matter – i.e., how Duke's fourth amended corporate separation plan complied with the specific terms of R.C. 4928.17 – despite numerous requests from IGS asking for it to do so.³

Critically, the Court did not address the substantive questions raised on appeal, finding that:

[W]e are reluctant to resolve the meaning of disputed language in R.C. 4928.17(C) or (D) or to make findings under those provisions when the provisions were not first addressed by the commission in the proceedings below. ...⁴

Nevertheless, the Commission's Order on Remand erroneously assumes direction from the Court as to substantive issues. The Commission stated: "Upon a reexamination of the record in this case, and *in light of the Supreme Court's decision in the matter*, the Commission finds

³ Id., at ¶ 19.

⁴ Id., at ¶ 28.

that Duke's proposed amended plan does not comply with R.C. 4928.17."⁵ But the Court made no decision with regard to the proper interpretation of R.C. 4928.17 or whether or not the Company's plan would comply therewith.

The Commission erred, in its Order on Remand, in its reliance on the Court's Opinion with regard to any and all substantive matters at issue. The Court merely directed the Commission "to fully explain the basis for its decisions under the relevant provisions of R.C. 4928.17"

Assignment of Error 2:

Notwithstanding Court's explicit requirement for further proceedings and for an explanation of the basis of the Commission decision, including evidence considered, the Commission issued its Order on Remand with no further proceedings whatsoever and no reference to evidence it considered to support its revised conclusion.

The majority opinion issued by the Court expressly directed the Commission to hold further proceedings in this docket:

We agree with IGS that the commission violated R.C. 4903.09 by failing to sufficiently explain the basis for this decision. Accordingly, we reverse the commission's orders and remand this case to the commission for further proceedings consistent with this opinion.⁶

But the Commission failed to adhere to the Court's directive – a directive that is firmly established. Indeed, as the Court has unequivocally found:

[W]hen the order of the Public Utilities Commission was reversed by this court, and the cause remanded generally for further proceedings according to law, the cause came against before the Public Utilities Commission for the exercise by it of its judgment, and, if the record before it was not sufficient to enable it to intelligently exercise such judgment, it was its duty to either itself supplement that record or permit the parties interested to make such supplement, and then base its conclusion upon such record.⁷

⁵ *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan under R.C. 4928.17 and O.A.C. 4901:1-37*, Case No. 14-689-EL-UNC, *et al.*, Order on Remand, at ¶ 9 (June 14, 2014)(emphasis added).

⁶ 2016-Ohio-7535, at ¶ 2.

⁷ *Cincinnati & Suburban Bell Tel. Co. v. Public Utilities Commission*, (1923) 107 Ohio St. 370, 374.

The Commission has historically adhered to remand instructions issued by the Court relative to findings that the Commission did not comply with R.C. 4903.09. Notably, in the appeal concerning the rate stabilization plan (RSP) of Duke Energy Ohio's predecessor, the Court concluded that the Commission "failed to comply with R.C. 4903.09 by not providing record evidence and sufficient reasoning when it modified its order on rehearing..."⁸ Within a month of the remand, the attorney examiner found that a hearing would be held "to obtain the record evidence required by the court..."⁹ And in the remanded RSP proceeding, parties were afforded the opportunity to engage in discovery, file testimony, and cross examine witnesses.

The Commission has more recently confirmed its appreciation of remand orders. In *In re Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*,¹⁰ the Court found that the Commission committed reversible error where its underlying order did not include record citations to the evidence, as required under R.C. 4903.09.¹¹ Within months of the remand order, the attorney examiner issued a procedural schedule, acknowledging that "parties should be afforded an opportunity to present testimony and offer additional evidence in regard to the matters remanded to the Commission..."¹²

Here, the Court unambiguously found that "remanding this case to the commission with instructions to fully explain the basis for its decisions under the relevant provisions of R.C. 4928.17 is the appropriate remedy."¹³ Further, the Court instructed the Commission "to identify the evidence that [it] considered to support its decision."¹⁴ But the Commission issued its Order

⁸ *Ohio Consumers' Counsel v. Public Utilities Commission* (2006), 111 Ohio St.3d 300, at ¶ 95.

⁹ *In re The Cincinnati Gas & Electric Company*, Case No. 030-93-EL-ATA, Entry (November 29, 2006).

¹⁰ 2016-Ohio-1607.

¹¹ *Id.*, at ¶ 55.

¹² *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry, at pg. 4 (August 29, 2016).

¹³ 2016-Ohio-7535, at ¶ 28.

¹⁴ *Id.*, at ¶ 29.

on Remand without any further proceedings whatsoever. The Commission issued no scheduling order. It allowed for no additional written arguments that might be made in light of the Court's Opinion. It collected no evidence, either written or oral. Rather, it issued an order reflecting a change of view and adoption of a dissenting opinion; an order that does not comply with R.C. 4903.09.

The law is indisputable – the Commission “cannot render an opinion on an issue without facts in the record to support its decision. ...[T]he commission abuses its discretion if it renders an opinion on an issue without record support.”¹⁵ As discussed more fully below, the Commission did not provide record support for its findings. Indeed, its Order on Remand contains no reference to the evidentiary record in the proceedings below.

Assignment of Error 3:

The Commission's new outcome in this proceeding is based solely on dictum expressed in a minority opinion.

The majority opinion is the law of this case and thus controls on remand. A concurring and dissenting opinion by Justice Kennedy, joined by just one other Justice, is not controlling. Rehearing is thus appropriate. And on rehearing, the Commission should decide “whether a subsequent hearing is necessary to take additional evidence.”¹⁶ Yet the Commission relied solely on the views of Justice Kennedy and, without record support, departed from its prior decision to conclude that the Company's proposal violates R.C. 4928.17. But the dissenting and concurring opinion refers to legislative intent that has since been altered through the significant changes to

¹⁵ *Cleveland Electric Illuminating Company v. Public Utilities Commission*, (1996), 76 Ohio St.3d 163, 166, 1996-Ohio-296 (internal citations omitted).

¹⁶ *Ohio Consumers' Counsel v. Public Utilities Commission*, (2006), 111 Ohio St.3d 300, 304, 2006-Ohio-5789. See also, *State v. Noling*, 2016-Ohio-8252, at ¶ 50 (concurring and dissenting opinion “does not change majority's holding or remedy”).

Ohio's regulatory framework. The opinion does not properly support the Commission's changed outcome.

Justice Kennedy's conclusion that the General Assembly intended electric distribution utilities to be solely in the business of supplying regulated distribution service is predicated only on S.B. 3.¹⁷ Yet these intentions were modified significantly by the later passage of S.B. 221, as the Court has previously found.¹⁸ In addition to establishing provisions for a standard service offer (*i.e.*, R.C. 4928.141 – R.C. 4928.143), S.B. 221 created several other provisions (*e.g.*, R.C. 4928.64 and 4928.66), all of which must be read *in pari materia* with R.C. 4928.17 to give effect to every statutory provision. Although Justice Kennedy recognized the need to harmonize the various statutory provisions, she narrowly applied R.C. 4928.17 to conclude that, under current law, an electric distribution utility must provide only regulated distribution service. But this conclusion cannot be reconciled with other provisions of the law, which expressly permit an electric distribution utility to, among other things, own generation. The Commission erred in basing its Order on Remand on the concurring and dissenting opinion.

Assignment of Error 4:

Regardless of dictum expressed in minority opinion, Ohio law does not prohibit approval of Duke Energy Ohio's proposed Fourth Corporate Separation Plan.

- a. The Commission considered no evidence or arguments on which to base its decision that the proposed plan is not compliant with R.C. 4928.17(C) because it was not designed for an interim period.
- b. The Commission considered no evidence on which to base its decision regarding compliance with state policy.

In its Order on Remand, the Commission makes several substantive pronouncements, all based on dictum expressed in a minority opinion and none based on facts in the record. Through

¹⁷ 2016-Ohio-7535, at ¶¶ 38, 39.

¹⁸ *In re Columbus Southern Power Co.*, (2011), 128 Ohio St.3d 512, at ¶ 2 ("S.B. 221...substantially revised the regulation of electric service in Ohio").

these pronouncements, the Commission concluded, incorrectly, that the proposed corporate separation plan “is not compliant with R.C. 4928.17(C).”¹⁹

Before beginning the discussion of each of the bases for the Commission’s conclusion, it is important to read the cited statute closely.

The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code. However, 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, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.*²⁰

As this unambiguous language confirms, a plan that does not comply with division (A)(1) shall nevertheless be approved if (1) that plan will comply with the Commission’s requirements, as ordered to be applicable for an interim period, and (2) the plan will provide for ongoing compliance with state policy.

The first basis for the Commission’s conclusion is that the Company, according to the Commission, “is seeking authorization to offer nonelectric products and services on an indefinite, ongoing basis.”²¹ Although the Commission cites to the Company’s Application as the basis for this statement, the Application makes no statement whatsoever about the time period during which the offering would be allowed. And, regardless of what the Company might have said in the Application about the duration of such offerings, it is crucial to recognize that

¹⁹ Id.

²⁰ R.C. 4928.17(C) (emphasis added).

²¹ Order on Remand, at ¶ 10.

the law refers to an “interim period” only in the context of the Commission’s requirements, not in the context of the substance of the corporate separation plan.

An associated concept that was discussed in dictum in the minority view at the Court is that the exception in R.C. 4928.17(C) was intended by the General Assembly to help utilities phase in the unbundling of competitive and noncompetitive services. Although the minority opinion pointed to no support for this interpretation, other than the words in the statute itself, the Commission accepted the minority’s viewpoint. The Commission concluded, without any argument or evidence allowed from the Company, that the proposed corporate separation plan was legally non-compliant. The Commission stated, with no support:

In Duke’s request, the Company is not seeking to transition away from nonelectric services or eventually offer the services through an affiliate. Instead, Duke is seeking authorization to offer nonelectric products and services on an indefinite, ongoing basis.²²

This is the Commission’s sole justification for its conclusion that the plan does not comply with the law’s “requirement that permission only be granted for an interim period.” But this justification ignores entirely the statutory language requiring the Commission – not the applicant – to add the interim period to the authority granted and ignores entirely the lack of any statutory language requiring a “transition.”

The Commission’s second basis for finding the plan to be noncompliant is that it does not advance state policy:

Further, the Company’s request to provide nonelectric products goes against the state’s policies outlines in R.C. 4928.02, as permitting Duke to begin offering new nonelectric products and services does not advance the state’s overarching goal of deregulation. Specifically, for example, by not offering the nonelectric services through an affiliate, Duke’s plan disregards the state policy in R.C. 4928.02(H) to ensure effective competition.”²³

²² Id.

²³ Id.

The Commission has allowed for no evidence or arguments to be presented by the Company on this point. Moreover, the Commission failed to articulate the nonelectric products and services that violate state policy or how they violate state policy. Without such evidence and arguments, the Commission has no basis on which to conclude that effective competition will be harmed. And without such evidence and arguments, the Commission cannot properly explain the departure from its prior decision.

In its initial decision to approve the amendments to Duke Energy Ohio's Fourth Corporate Separation Plan, the Commission authorized the Company to provide to customers certain products and services, subject to conditions the Commission imposed. And, in doing so, the Commission rejected IGS's arguments that the revised plan was anti-competitive. As the Commission admitted, "[w]ith 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."²⁴ On rehearing, the Commission again addressed the contentions that the revised plan violated R.C. 4928.17 and state policy and found them without merit:

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 rules 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

²⁴ Finding and Order, at pg. 6 (June 11, 2014).

needed to implement its revised corporate separation plan, subject to the requirements set forth in the Order.²⁵

The evidence before the Commission has not changed. The law against which that evidence is to be reviewed has not changed. Thus, there is nothing in the record on which the Commission can now rely to depart from its prior findings and the Commission has no basis on which to conclude that other state policies, also expressed in R.C. 4928.02, would not be advanced by the proposed plan. The Commission has not fulfilled the Court's instruction to "fully explain the basis for its decision."²⁶

CONCLUSION

Duke Energy Ohio respectfully requests that the Commission reconsider its Order on Remand and grant rehearing, as outlined in Assignments of Error 1 through 4 above.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

Handwritten signature of Amy B. Spiller in blue ink.

Amy B. Spiller (0047277)
Deputy General Counsel
Jeanne W. Kingery (0012172) (Counsel of Record)
Associate General Counsel
139 E. Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, Ohio 45201-0960
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)
Amy.Spiller@duke-energy.com
Jeanne.Kingery@duke-energy.com

²⁵ Entry on Rehearing, at pg. 5 (August 6, 2014).

²⁶ 2016-Ohio-7535, at ¶ 29. See also, *In re Ohio Power Co.*, (2008), 144 Ohio St.3d 1, 5, 2015-Ohio-2056 (Commission must explain why it changes course).

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Application for Rehearing of Duke Energy Ohio, Inc. was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 14th day of July, 2017, to the parties listed below.


Amy B. Spiller

William Wright
Section Chief
Steven Beeler
Assistant Attorney General
Public Utilities Section
180 East Broad St., 6th Floor
Columbus, Ohio 43215
William.wright@ohioattorneygeneral.gov
Steven.beeler@ohioattorneygeneral.gov

Counsel for Staff of the Commission

Mark A. Whitt
Andrew J. Campbell
Rebekah J. Glover
Whitt Sturtevant LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, Ohio 43215
whit@whitt-sturtevant.com
Campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

Counsel for Direct Energy Services, LLC and Direct Energy Business, LLC

Joseph Olikier
6100 Emerald Parkway
Dublin, Ohio 43016
joliker@igsenergy.com

Counsel for Interstate Gas Supply, Inc.

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Summary: App for Rehearing electronically filed by Ms. Emily Olive on behalf of Duke Energy Ohio and Spiller, Amy B. Ms. and Kingery, Jeanne W. Ms.