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 Section 4928.17, Revised Code, and Chapter 4901:1-37, Ohio Administrative Code.	)	Case No. 14-0689-EL-UNC
In the Matter of the Application of Duke Energy Ohio for Authority to Amend its Retail Tariff, P.U.C.O. No. 19.	)	Case No. 14-0690-EL-ATA

JOINT MEMORANDUM CONTRA OF INTERSTATE GAS SUPPLY, INC., DIRECT ENERGY SERVICES, LLC, AND DIRECT ENERGY BUSINESS, LLC

I. INTRODUCTION

On June 11, 2014, the Commission issued a Finding and Order ("Order") authorizing Duke Energy Ohio ("Duke"), an EDU, to amend its corporate separation plan to provide unregulated products and services other than retail electric service ("non-electric services"). Following an appeal, the Supreme Court of Ohio determined that the Order failed to comport with R.C. 4928.17(A), and the Commission did not sufficiently address or discuss whether an exception to the general rule applies under sections (C) or (D).

The Commission issued an Order on Remand addressing IGS's statutory arguments and resolving the outstanding legal questions related to the corporate separation statute (R.C. 4928.17 (C) and (D)). Based upon the application and the Commission's interpretation of these sections, the Commission ultimately concluded that

Duke's Application does not comport with R.C. 4928.17 and therefore should be denied and the proposed amendment withdrawn.

Not satisfied with the Commission's decision, Duke seeks rehearing on four grounds. Duke alleges that the Order on Remand exceeded the scope of the Court's instruction on remand, followed the direction of a concurrence as controlling law, that the Commission failed to hold a hearing, and that the Order on Remand is not supported by the record evidence. As discussed below, each of Duke's arguments lacks merit. Therefore, the Commission should issue an Entry on Rehearing denying Duke's Application for Rehearing.

II. BACKGROUND

As discussed at length in the Court's opinion, the factual and legal background of this case began in 1999 when the General Assembly passed Amended Substitute Senate Bill No. 3, ("S.B. 3"). S.B. 3 "restructured Ohio's electric-utility industry to foster retail competition in the generation component of electric service. As we have repeatedly recognized, S.B. 3 altered the traditional rate-based regulation of electric utilities by requiring the three components of electric service — generation, transmission, and distribution — to be separated." *Industrial Energy Users-Ohio v. Pub Util. Comm'n*, 2008-Ohio-990 at ¶ 5. S.B. 3 determined that "[p]ursuant to R.C. 4928.03 and 4928.05, electric generation is an unregulated, competitive retail electric service, while electric distribution remains a regulated, noncompetitive service pursuant to R.C. 4928.15(A)." *Id.* at ¶ 6. Unbundling regulated and unregulated services "ensured that distribution service would not subsidize the generation portion of the business. In short, each service component

was required to stand on its own." *Migden-Ostrander v. Pub. Util. Comm'n*, 102 Ohio St.3d 451, 453 (2004).

In addition to unbundling regulated and unregulated services, S.B. 3 required EDUs to provide all unregulated services through an affiliate. Specifically, R.C. 4928.17(A)(1) required "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 . . . ." Thus, the clear purpose of R.C. 4928.17 was to require an EDU to be solely in the business of supplying regulated, non-competitive distribution service.

At the time of restructuring EDUs were vertically integrated, meaning EDUs provided distribution service, generation service, and potentially products and services other than retail electric service (non-electric services). Recognizing that EDUs could not immediately separate the unregulated services overnight, R.C. 4928.17(C) provided that, *for good cause shown*, the Commission may authorize a corporate separation plan that does not comply with the full corporate separation requirement set forth in R.C. 4928.17(A)(1) but *only for an "interim period prescribed in the order*." (emphasis added).[1] The exception or waiver to the full separation requirement allowed EDUs to "functionally separate" their unregulated electric generation services and other non-commodity services for an interim period of time until the EDUs were able to transfer these unregulated services to a fully separated corporate entity.

[1] Throughout this pleading IGS and Direct refer to a functional separation plan authorized under Section (C) as either a "waiver" or "exception" to the full legal separation requirement of R.C. 4928.17(A)(1).

After the passage of S.B. 3, Duke operated pursuant to a corporate separation waiver that allowed it to offer competitive retail electric service.[2] But Duke has never received a waiver that would authorize it to offer products *other than retail electric service*.[3]

In Duke's last electric security plan ("ESP") case, 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.[4]

Under the terms of the stipulation approved by the Commission, Duke transferred its generating assets before December 31, 2014.[5] Thus, with the transfer of its generating assets, Duke's corporate separation plan required it to provide only non-competitive services (e.g. electric distribution service). The approval of the Stipulation provided an end date to Duke's functional separation and thus an end to its temporary waiver of R.C. 4928.17(A)(1).

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[2] Application for Approval of an Amendment to Corporate Separation Plan and for Authority to Amend its Retail Tariff, P.U.C.O. No. 19 at 2 (hereinafter "Application").

[3] For example, Duke never received an exception or waiver from the legal requirement to provide unregulated maintenance service inside a customer's home, which does not in fact relate to the delivery of the electric commodity. Application at 2-3; *id.* at Exhibit C p. 3 of 3.

[4] *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).

[5] *Id.*

Shortly before Duke was set to finally leave the competitive retail electric service business, it filed an application to open the door to offer new non-electric services. Specifically, 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. Specifically, Duke proposed that:

> 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.[6]

Moreover, Duke requested authority to amend its filed tariffs to allow it to offer unregulated "Special Customer Services," which are classified as products other than retail electric service (non-electric services):

> **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***

[6] Application, Exhibit A at 84 (emphasis added).

> ***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***.[7]

These services are related to the provision of unregulated non-electric services.

The Application, however, did not request that the Commission grant an exception of the R.C. 4928.17(A)(1) requirement to provide unregulated non-electric services through a separate affiliate. And the Application did not identify good cause for granting Duke an exception to the requirement of full corporate separation.

Over IGS' and Direct Energy's objections, on June 11, 2014, the Commission issued an Order modifying and approving Duke's Application, stating that "we find no substantiated reason, at this time, to find that the proposed revisions to the plan are not

[7] Application, Exhibit C at 3 of 3 (containing proposed tariff language) (emphasis added).

incompliance with state policy or the Commission's corporate separation rules."[8] The Order, however, did not grant Duke a temporary exception to the requirements of R.C. 4928.17(A)(1) or identify good cause for doing so. The Order also did not limit any exception of the general rule to an interim period prescribed in the Order.

On July 8, 2014, Direct Energy filed an Application for Rehearing alleging that the Order was unreasonable inasmuch as it approved Duke's request to offer products and services other than retail electric service, and 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 the case.[9] Direct Energy identified a number of questions left unanswered by the Order, specifically how Duke planned to bill and collect charges for these other products and services; how Duke defined "fully allocated costs," undefined in Duke's tariff filing; and whether Duke would undertake a cost-of-service study to prove the actual costs for services provided, among others. Direct Energy requested that the Commission leave the docket open and provide an opportunity to ask and answer these questions before finalizing its decision.

On July 11, 2014, IGS filed an Application for Rehearing identifying that the Order is unlawful because it authorized Duke to provide unregulated non-electric services without: (1) granting Duke an exception to the requirements in R.C. 4928.17(A)(1); (2) identifying that good cause exists to authorize Duke to provide these services through any entity other than an affiliate; or (3) setting a time period by which Duke must be in

[8] Finding and Order at 6.

[9] Direct Energy Application for Rehearing at 3-9.

compliance with R.C. 4928.17(A)(1).[10] Moreover, IGS further argued that it would be an impermissible interpretation of R.C. 4928.17(C) to permit a utility to move backward in the restructuring process when the statute was intended to provide a glide path for vertically integrated utilities to divest themselves from unregulated businesses in compliance with Ohio's goal of deregulation. Further, IGS's Application for Rehearing asserted that the Order violated R.C. 4903.09 because the Commission failed to address contested arguments and it failed to identify findings of fact to support the Order.[11]

On August 6, 2014, the Commission issued an Entry on Rehearing affirming its prior order.[12] The Entry on Rehearing, however, did not grant Duke an exception to the separation requirement in R.C. 4928.17(A)(1), it did not identify good cause for allowing Duke to enter into a new business otherwise prohibited by statute, and the Commission did not confine its approval to an interim period of time prescribed in the Order as required by R.C. 4928.17(C). IGS appealed.

On November 1, 2016, the Court reversed and remanded the Order.[13] The Court held that the Order failed to comport with R.C. 4928.17(A)(1), and the Order violated R.C. 4903.09 as it did not sufficiently address or discuss whether a narrow exception to this general rule was properly authorized under sections (C) or (D). Moreover, the Court held

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[10] IGS Application for Rehearing at 3-14.

[11] *Id.* at 14.

[12] Entry on Rehearing at 1-9.

[13] *In re Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan*, 148 Ohio St.3d 510 (2016) (hereinafter "*Duke Opinion*").

that any exception under Section (C) must be temporary in nature under the plain language of the law:

> The word "interim" is defined as "a time intervening," "a provisional decision or arrangement," or "in the meantime." *Webster's Third New International Dictionary 1179 (1993)*. The commission's orders essentially authorize Duke to sell nonelectric products and services indefinitely, as long as Duke complies with the conditions imposed in the commission's orders. Under any definition, that is not an "interim" corporate separation plan. . . . . If the commission approved Duke's amended plan under R.C. 4928.17(C), the commission should have made the necessary findings required by that provision."[14]

Thus, an exception to a corporate separation plan that continues indefinitely, "is not an "interim" corporate separation plan." *Id.*

Although the Court indicated that it was "admittedly skeptical as to how the commission could approve Duke's amended plan under R.C. 4928.17(C) or (D) based on the record . . . ."[15], the Court remanded the case to "resolve the meaning of disputed language in R.C. 4928.17(C) or (D)."[16] The Court determined that it was "reluctant to resolve the meaning of the 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 . . . ."[17] In the remand, the Court provided the Commission with specific "instructions to fully address IGS's statutory arguments, to issue

[14] *Duke Opinion* at ¶ 26.

[15] *Id.* at 27.

[16] *Id.* at 28.

[17] *Id.*

findings that thoroughly explain how—if at all—Duke's application complies with the specific relevant provisions in R.C. 4928.17."[18]

Although the Court did not specifically interpret Sections (C)[19] and (D)—prior to giving the Commission an opportunity to do so—Justice Kennedy provided an interpretation of those sections separately in an opinion concurring in part and dissenting in part, which was joined by Justice Pfeiffer.[20] Interpreting the statute, Justice Kennedy stated that the General Assembly clearly did not intend for EDUs to offer new competitive or non-electric services after restructuring—the exception was intended to provide a glide path toward deregulation:

> The wording of R.C. 4928.17(C) makes clear that the intention of the General Assembly, as codified in the statutes at issue in this case, was to aid an incumbent electric utility in phasing in the requirements of electricity deregulation by providing a process for unbundling competitive and noncompetitive retail electric services over a period of time. It was not the intention of the General Assembly to permit a business that supplies noncompetitive retail electric services to, in effect, "rebundle" in order to provide new nonelectric products and services that are required to be offered through a fully separate affiliate.[21]

Given the temporary and nature of the exception in section (C), Justice Kennedy averred that the provision cannot be utilized to move backward in the restructuring and unbundling process:

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[18] *Duke Opinion* at ¶ 29.

[19] The Court, however, specifically determined that R.C. 4928.17(C) requires a functional corporate separation plan to be for an "interim period" and only for "good cause."

[20] Justice O'Donnell issued a concurrence and dissent, which stated that "in accordance with the statute, I would issue an order directing Duke to amend its corporate separation plan to require that it provide nonelectric products or services to its customers through a fully separated affiliate of the utility." *Duke Opinion* at ¶ 32.

[21] *Duke Opinion* at ¶ 34. *See also id.* at ¶ 50.

> Accordingly, R.C. 4928.17(C) does not permit a utility supplying a noncompetitive retail electric service to modify an approved plan in order to provide new nonelectric products and services with no intention of supplying the products and services through a fully separated affiliate of the utility. To find otherwise fails to give effect to the General Assembly's choice of the word "interim" in R.C. 4928.17(C) and allows the temporary reprieve permitting noncompliance to become so large that it swallows the rule set forth in R.C. 4928.17(A).[22]

This conclusion, she determined, is consistent with the State Policy in R.C. 4928.02, which requires the Commission to "[e]nsure the availability of unbundled and comparable retail electric services" as well as "effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service . . . to a product or service other than retail electric service . . . ."[23] In conclusion, Justice Kennedy determined that "Therefore, any order issued pursuant to R.C. 4928.17(C) must be in harmony with these policies, working toward the ultimate goal of deregulation."[24]

On June 14, 2017, the Commission issued its Order on Remand resolving the outstanding issues remanded by the Court related to sections (C) and (D). The Order on Remand stated, based "[u]pon a reexamination of the record in this case, and in light of the Supreme Court's decision in the matter, the Commission finds that Duke's proposed amended plan does not comply with R.C. 4928.17."[25] In considering the Court's instruction "to issue findings that thoroughly explain how—if at all—Duke's application

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[22] *Duke Opinion* at ¶ 46.

[23] *Id.* at ¶ 47 (citing and quoting R.C. 4928.02).

[24] *Id*. at ¶ 48.

[25] Order on Remand at 3.

complies with the specific relevant provisions in R.C. 4928.17,"[26] the Commission found that Justice Kennedy's interpretation of R.C. 4928.17(C) and (D) had merit. The Order on Remand stated, "Justice Kennedy avers Duke's proposal should not be permitted as it runs counter to the state's ultimate goal of deregulation. According to Justice Kennedy, Duke's request is an attempt to rebundle services and is the inverse of what the General Assembly intended with R.C. 4928.17(C). (Duke Opinion at 34, 46-50.) ***In retrospect, we agree***."[27]

Indeed, the Order on Remand specifically states that the Commission accepted Justice Kennedy's opinion as its own, and based upon citations to the record evidence, Duke's Application cannot be authorized under R.C. 4928.17(C):

> Initially, we note that Duke's request does not comply with 4928.17(A) as the Company admittedly is not seeking to offer nonelectric products through an affiliate (Duke reply comments at 5). In accepting Justice Kennedy's opinion, we concur that Duke's proposed plan is not compliant with R.C. 4928.17(C). 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. (Duke application at 3.). First, this does not comply with R.C. 4928.17(C)'s requirement that permission only be granted for an interim period. Further, the Company's request to provide nonelectric products goes against the state's policies outlined 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. As discussed by Justice Kennedy, instead of separating electric and nonelectric services, the Company's proposal seeks to package services that are required to be offered through a fully separated affiliate (Duke Opinion at 1150). Consequently, we find Duke's request, as filed, is impermissible under R.C. 4928.17(C). Finally, though not specifically

[26] *Duke Opinion* at ¶ 29.

[27] Order on Remand at 3 (emphasis added).

> addressed by the Court, we find Duke's plan is also not authorized by R.C. 4928.17(D). While R.C. 4928.17(D) permits the Commission to approve amendments to a corporate separation plan, the resulting plan must still comply with either R.C. 4928.17(A) or (C). To find otherwise would avoid the restrictions included in R.C. 4928.17(A) and (C) and negate the intent of the statute. Therefore, as the proposal does not comply with R.C. 4928.17(A) or (C), R.C. 4928.17(D) is inapplicable.[28]

On July 14, 2017, Duke sought rehearing based upon four assignments of error. First, Duke alleges that the ultimate determination in the Order on Remand was not mandated by the Court.[29] Second, Duke alleges that the Commission violated R.C. 4903.09 by failing to hold evidentiary hearings and additional briefing prior to issuing its Order on Remand.[30] Third, Duke alleges that the Commission inappropriately followed a concurring opinion as controlling in issuing the Order on Remand and that the determination is not supported by Ohio law.[31] Fourth, Duke alleges that Ohio law does not prohibit approval of Duke's proposed corporate separation plan amendment and that the Commission considered no evidence to base its decision.[32] As discussed below, each of these arguments lacks merit.

III. ARGUMENT

A. The Commission appropriately interpreted 4928.17(C) and (D) as directed by the Court. The Commission's reliance on Justice Kennedy's reasoning to issue its Order on Remand was permissible.

[28] Order on Remand at 3-4.

[29] Application for Rehearing at 2-3.

[30] *Id.* at 3-5.

[31] *Id.* at 5-6.

[32] *Id.* at 6-10.

In Duke's first assignment of error, it alleges that the Order on Remand exceeded the directive of the Court.[33] Duke alleges the Court's reversal was purely on procedural grounds (regarding R.C. 4903.09) and that the Order on Remand inappropriately took direction from the Court on Substantive issues.[34] Similarly, in Duke's third assignment of error, Duke alleges that the Order on Remand's substantive outcome is based wholly upon dictum contained in the concurring and dissenting opinion of Justice Kennedy that Duke alleges the Commission followed as controlling law.[35] Given the overlapping nature of these meritless arguments, this memo contrawe will address them together.

While the majority opinion did not definitely rule on the meaning of R.C. 4928.17(C) and (D),[36] the Court reversed and remanded the case to "resolve the meaning of disputed language in R.C. 4928.17(C) or (D)."[37] The Court provided specific "instructions to fully address IGS's statutory arguments, to issue findings that thoroughly explain how—if at all—Duke's application complies with the specific relevant provisions in R.C. 4928.17."[38] Moreover, the Court indicated that it was "admittedly skeptical as to how the commission could approve Duke's amended plan under R.C. 4928.17(C) or (D) based on the record . . . ."[39]

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[33] Application for Rehearing at 2-3.

[34] *Id.*

[35] *Id.* at 5-6.

[36] The majority opinion, however, specifically determined that R.C. 4928.17(C) requires a functional corporate separation plan to be for an "interim period" and only for "good cause."

[37] *Duke Opinion* at ¶ 28.

[38] *Id.* at ¶ 29.

[39] *Id.* at ¶ 27.

On remand, the Commission did exactly as directed by the Court—it "resolved the meaning of the disputed language in R.C. 4928.17(C) and (D) . . . ."[40] The Commission ultimately determined that the statutory exception under (C) to the requirements of 4928.17(A) is not available to Duke to move backward in the restructuring process.[41] While the Commission relied upon and agreed with the reasoning contained in the concurring and dissenting opinion of Justice Kennedy, the Commission was well within its discretion to rely upon this reasoning in reaching its ultimate conclusion.

Contrary to Duke's claim, the Commission did not blindly follow Justice Kennedy's interpretation of sections (C) and (D) as controlling authority. Rather, the Commission relied upon Justice Kennedy's reasoning because it was persuasive for purposes of implementing the Court's directive on remand. Indeed, the Order on Remand is quite clear that the Commission adopted Justice Kennedy's reasoning—not because the Commission was required to—but because the Commission found it had merit: The Commission stated, "*In retrospect, we agree*."[42] And, "*In accepting Justice Kennedy's opinion*, we concur that Duke's proposed plan is not compliant with R.C. 4928.17(C)."[43] Had the Commission followed Justice Kennedy's interpretation of the law solely on the basis that her opinion was controlling authority, the Commission would not have had the luxury to choose to agree or disagree with her reasoning.

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[40] *Id.*

[41] Order on Remand at 3-4.

[42] Order on Remand at 3.

[43] *Id*.

Duke further claims that the Commission improperly "refers to legislative intent that has since been altered through significant changes to Ohio's regulatory framework"[44] "by the later passage of S.B. 221."[45] Duke's claim is incorrect. Although S.B. 221 modified to some extent the manner in which default service prices are established, that law did not modify the substantive provisions within R.C. 4928.17(A) through (D). The interim and good cause language contained in Section (C) was not eliminated or modified. And the statute continued to require utilities to provide competitive retail electric services and non-electric services through separate affiliates, but for narrow exceptions authorized under an electric security plan. Likewise, there is nothing in the balance of Chapter 4928 that supports Duke's contention that R.C. 4928.17(C) can be utilized to move backward in the restructuring process.

Accordingly, the Commission should reject assignments of error 1 and 3.

B. The Commission was not required to hold a hearing, given that it had sufficient evidence to render a reasoned decision addressing the outstanding legal and factual issues—a hearing would have added no additional value.

In its second assignment of error, Duke alleges that the Order on Remand violated the Court's instruction to hold additional proceedings, take additional arguments, and hold hearings to take additional evidence, as the Commission has historically done when its orders are remanded.[46] Duke, therefore, avers that the Order on Remand violated R.C. 4903.09.[47] This argument lacks merit.

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[44] Application for Rehearing at 5-6.

[45] *Id.* at 6.

[46] *Id.* at 3-5.

[47] *Id.*

Initially, the Court did not instruct the Commission to hold hearings and take additional arguments. Rather, the Court instructed the Commission to address IGS' statutory arguments and to ensure that its decision—either approving or rejecting Duke's proposal—is based upon findings of fact contained in the record.[48] While Duke would like to submit additional argument and hold a hearing, that would be a waste of time for one simple reason: No amount of hearings, additional evidence, or argument can change the nature of Duke's Application. The fact that Duke sought to offer new non-electric services through an EDU indefinitely is completely uncontroverted. The Commission needed no new evidence to reach its conclusion that the Application fails to comport with R.C. 4928.17(A) and is not entitled to an exception under section (C).

Even under the Supreme Court of Ohio precedent cited by Duke, additional proceedings would not be necessary. Such proceedings are only necessary "if the record before it was not sufficient to enable it to intelligibly exercise such judgment . . . ."[49] As discussed above, the uncontroverted record evidence was sufficient for the Commission to address IGS' statutory arguments and to render an informed decision in the proceeding. And the Commission explained its statutory analysis and the factual basis to support its conclusion.

Because the Order on Remand providing reasoning for its statutory interpretation based upon evidence in the record, Duke's R.C. 4903.09 claim falls flat. R.C. 4903.09 requires the Commission to provide "findings of fact and written opinions setting forth the

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[48] *Duke Opinion* at ¶ 28-29.

[49] *Cincinnati & Suburban Bell Tel. Co. v. Pub. Util. Comm'n*, 107 Ohio St. 370, 374 (1923).

reasons prompting the decisions arrived at, based upon said findings of fact." As the Court has stated, "[t]he purpose of R.C. 4903.09 is to provide the court with sufficient details to enable it to determine how the commission reached its decision." *Allnet Communications Servs., Inc. v. Pub. Util. Comm'n,* 70 Ohio St.3d 202, 209, 638 N.E.2d 516 (1994). Here, the Commission went to great lengths to explain its interpretation of R.C. 4928.17(C) and (D), and applied that interpretation to the facts in this case to reach the determination that the Application does not pass muster.[50] While Duke may not like that result, the Order on Remand makes quite clear the basis for its conclusion within the context of the law and facts. Therefore, the Commission should reject assignment of error 2.

C. Duke incorrectly claims that Ohio law permits its proposed corporate separation plan and that the Commission considered no evidence in reaching its determination

In its fourth assignment of error, Duke alleges that the Ohio law does not prohibit Duke's proposed corporate separation plan and that the Order on Remand 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.[51] Duke claims that the Order on Remand's determinations with respect to state policy are not substantiated.[52] Duke further argues that it was not its obligation to propose an interim time period and that it was the Commission's obligation to provide one in an order approving the Application.

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[50] *See* Order on Remand at 3-4.

[51] Application for Rehearing at 6-10.

[52] *Id.* at 8.

First, Duke claims that if a plan does not comply with R.C. 4928.17(A)(1), it "**shall** nevertheless be approved" if it 1) complies with the Commission's requirements, 2) is for an interim period, and 3) will provide for ongoing compliance with state policy.[53] This statement completely misstates the unambiguous letter of the law and is in conflict with the correct interpretation of Section (C) provided in the Order on Remand. While Duke alleges that the Commission "shall" approve an interim functional separation plan that otherwise complies with state policy and the balance of 4928.17, the language of the statue states otherwise—the Commission "may" do so based upon a finding of good cause. Such an exception, however, has been determined to be unavailable for an EDU to move backwards in the restructuring process in contravention of state policy in favor of unbundled rates and anti-subsidization.

Second, Duke claims that nowhere in the Application did Duke seek approval to offer non-electric services indefinitely and it was the Commission's obligation to impose an interim period.[54] This argument is unavailing.

While the Commission is required to limit any exception to R.C. 4928.17(A)(1) to an interim period, the Commission is not obligated to provide an exception. In the present Order on Remand, the Commission appropriately determined that Duke's Application should be rejected in its entirety, given that it seeks to move backward in the restructuring process. Moving backward for a finite period would change the fact that Duke's proposal contravenes State policy.

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[53] Application for Rehearing at 7 (emphasis added).

[54] *Id.* at 7-8.

Finally, Duke alleges that the Order on Remand did not determine that the Application contravenes state policy based upon the record evidence. And "without such evidence and arguments, the Commission has no basis on which to conclude that effective competition will be harmed."[55] These alleged flaws in the Order on Remand are not substantiated.

The Commission's determination that Duke's Application contravenes state policy is fully supported by the record. Based upon the fact that Duke proposed to offer new non-electric services through the EDU—services already offered by its affiliate[56]—the Commission correctly determined that the application violated several provisions of state policy. First, Duke proposed to move backward in the restructuring process, despite the "overarching goal of deregulation" strewn throughout R.C. 4928.02 and the balance of Chapter 4928.[57] Further, the Order on Remand determined that Duke's proposal would contravene the requirement to provide unbundled services, "instead of separating electric and nonelectric services, the Company's proposal seeks to package services that are required to be offered through a fully separated affiliate."[58] Finally, the Order on remand correctly determined that the Application contravenes R.C. 4928.02(H).[59] Regarding this violation, it is apparent that offering nonelectric products and services through an EDU may allow that entity to subsidize nonelectric product offerings through the utilization of

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[55] *Id*. at 9.

[56] Application, Exhibit A at 29.

[57] Order on Remand at 4.

[58] *Id.*

[59] *Id.*

distribution revenues and assets. The Commission appropriately determined that the more prudent course of action is to require such services to be provided exclusively through affiliated entities.

Lastly, Duke alleges that the Order on Remand changed course without justifying its new direction.[60] This argument is flawed because the order in the case below had not resolved the substantive meaning of Sections (C) and (D); therefore, the Order on Remand did not deviate from a concrete legal determination. As the instruction on remand stated, the Commission was required to issue substantive determinations regarding the meaning of R.C. 4928.17(C) and (D) because the Commission did not do so in its prior order.

Regardless, the Order on Remand correctly interpreted R.C. 4928.17(C), given the Court's substantive holding that any exception under R.C. 4928.17(C) must be interim in nature. This guidance provides sufficient justification for the Commission's ultimate conclusion that an "interim" exception cannot be used to allow an EDU to move backward in the restructuring process nearly twenty years after the General Assembly restructured and unbundled the market.

Accordingly, the Commission should reject assignment error 4.

IV. CONCLUSION

The General Assembly restructured and unbundled the market nearly twenty years ago. To assist EDUs in the restructuring process, Ohio's corporate separation statute provided a glide path—a temporary exception—to allow EDUs to transition to full legal

[60] Application for Rehearing at 10.

separation of regulated and unregulated services. As the Order on Remand determined, the exception cannot be utilized to allow an EDU to backslide in the restructuring process. The Commission's interpretation of the law is supported by Ohio law, policy, and the facts. Accordingly, Duke's Application for Rehearing lacks merit and therefore the Commission should reject it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Joint Memorandum Contra of Interstate Gas Supply, Inc., Direct Energy Services, LLC and Direct Energy Business, LLC* was served this 24th day of July 2017 via electronic mail upon the following:

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Summary: Memorandum Contra Application for Rehearing of Duke Energy Ohio, Inc. electronically filed by Mr. Joseph E. Oliker on behalf of IGS Energy and Direct Energy