

## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF  
DUKE ENERGY OHIO, INC. FOR  
APPROVAL OF ITS FOURTH AMENDED  
CORPORATE SEPARATION PLAN UNDER  
R.C. 4928.17 AND OHIO ADM.CODE  
4901:1-37.

CASE No. 14-689-EL-UNC

IN THE MATTER OF THE APPLICATION OF  
DUKE ENERGY OHIO, INC. FOR  
AUTHORITY TO AMEND ITS RETAIL  
TARIFF, P.U.C.O. 19.

CASE No. 14-690-EL-ATA

### ENTRY ON REHEARING

Entered in the Journal on August 9, 2017

#### I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by Duke Energy Ohio, Inc.

#### II. PROCEDURAL HISTORY

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is an electric distribution utility as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} On April 16, 2014, Duke filed an application for approval of its fourth amended corporate separation plan, pursuant to R.C. 4928.17 and Ohio Adm.Code 4901:1-37-06. As part of its amendment proposal, Duke requested authority to amend its tariff to allow it flexibility to offer nonelectric products and services to residential and nonresidential customers.

{¶ 4} By Finding and Order issued June 11, 2014, the Commission approved Duke's April 16, 2014 application, subject to the revisions and directives set forth in the Order.

{¶ 5} On July 8, 2014, and July 11, 2014, Direct Energy, LLC and Direct Energy Business (jointly, Direct) and Interstate Gas Supply, Inc. (IGS), respectively, filed

applications for rehearing of the Commission's June 11, 2014 Finding and Order. Duke filed a memorandum contra the applications for rehearing on July 18, 2014.

{¶ 6} On August 6, 2014, the Commission issued an Entry on Rehearing that denied the applications for rehearing filed by Direct and IGS.

{¶ 7} Thereafter, on November 1, 2016, the Supreme Court of Ohio issued an opinion reversing the decision of the Commission. *In re Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan*, \_\_\_Ohio St.3d, 2016-Ohio-7535, \_\_\_N.E.3d\_\_\_ (Duke Opinion). The Court's opinion found the Commission's order contravened R.C. 4903.09 and remanded the case back to the Commission with specific instructions to "issue findings that thoroughly explain how – if at all – Duke's application complies with the specific relevant provisions of R.C. 4928.17, and to identify the evidence that the commission considered to support its decision." Duke Opinion at ¶ 29.

{¶ 8} In response to the Supreme Court's decision in the Duke Opinion, the Commission issued an Order on Remand on June 14, 2017. After direction from the Supreme Court to more fully explain its rationale, the Commission found Duke's application to amend its corporate separation plan, as proposed, to be impermissible under R.C. 4928.17 and denied the application. The Commission directed Duke to withdraw its application and file a new plan that complies with the Commission's Order.

{¶ 9} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 10} On July 14, 2017, Duke filed an application for rehearing. In response, on July 24, 2017, IGS and Direct filed a memorandum contra Duke's application.

### III. APPLICATION FOR REHEARING

{¶ 11} In its application for rehearing, Duke tenders four assignments of error.

{¶ 12} Duke first asserts that the Supreme Court, in reversing and remanding the Commission's order, did not mandate that the Commission change the outcome of its decision. Duke states the Court did not address the substantive issues in the case and only overturned the decision because the Commission did not sufficiently explain its rationale. According to Duke, the Commission was only directed to more fully explain the basis for its original decision, which approved Duke's application. Duke maintains that the Commission erred in taking substantive direction from the Court and reversing its prior approval.

{¶ 13} In response, IGS and Direct argue that the Commission followed the Court's directive to resolve the disputed language in R.C. 4928.17(C). They assert that the Commission did not treat Justice Kennedy's reasoning as controlling authority, but rather the Commission found it persuasive and chose to adopt it. IGS and Direct note that, in the Order on Remand, the Commission specifically states that it agrees with Justice Kennedy and accepts Justice Kennedy's opinion—options that are not available if her opinion was controlling. Accordingly, IGS and Direct assert that Duke's claim is incorrect and should be rejected by the Commission.

{¶ 14} In its second assignment of error, Duke avers the Commission ignored the Court's instruction to hold further proceedings. According to Duke, the Commission was obligated to re-open proceedings and to consider additional evidence and arguments from the parties. Duke contends that this has been the Commission's process in the past after cases have been reversed and remanded by the Court. In changing its decision without considering new evidence, Duke submits the Commission wrongly issued an opinion without a supporting record.

{¶ 15} IGS and Direct submit that Duke's second assignment of error should also be rejected. They state that the Court did not instruct the Commission to hold hearings or take additional arguments. IGS and Direct maintain that further proceedings are only necessary if the record before the Commission was not sufficient enough for the Commission to make a proper judgment. According to them, additional evidence would not have changed the nature of Duke's application and the Commission properly followed the instructions of the Court.

{¶ 16} Next, Duke argues the Commission improperly relied on dictum expressed in a minority opinion. Duke notes that the majority opinion is the controlling opinion and that the majority opinion did not provide input on the substantive issues of the case. According to Duke, the minority opinion of Justice Kennedy mistakenly relies on legislative intent that has since been changed. Thus, Duke holds that the Commission incorrectly changed its decision based on a judicial opinion that was not controlling and is based on flawed logic.

{¶ 17} In their memorandum contra, IGS and Direct reiterate their argument that it was proper for the Commission to find Justice Kennedy's opinion persuasive and to apply it to the case. Further, they aver that Justice Kennedy's opinion is correct and that Duke is wrongly asserting that Justice Kennedy's opinion is flawed. According to IGS and Direct, subsequent changes in law had no affect on the substantive provisions within R.C. 4928.17. They assert Justice Kennedy provided a thorough and correct analysis of R.C. 4928.17(C) and it was appropriate for the Commission to adopt the same reasoning. Accordingly, IGS and Direct request that the Commission deny Duke's application for rehearing on this issue.

{¶ 18} Finally, Duke maintains in its last assignment of error that the Commission's decision to deny approval of Duke's corporate separation plan was not based on evidence in the record. Duke notes that R.C. 4928.17(C) permits the Commission, for an interim period, to modify or approve a corporate separation plan that does not comply with R.C. 4928.17(A). Duke avers that the Commission denied Duke's application partly because the Commission found the application did not comply with R.C. 4928.17(C)'s requirement that

the plan only be approved for an interim period. Duke argues, however, that the application does not speak towards any time period and that, pursuant to R.C. 4928.17(C), it is the Commission's responsibility – not the applicant's – to ensure that the plan is only approved for an interim basis. Duke submits that the Commission did not justify why it strayed from the statutory language of R.C. 4928.17(C) and, therefore, the Commission should reverse its order.

{¶ 19} Duke further comments that the Commission did not rely on the evidence in the record in finding that Duke's plan failed to advance state policy. Duke remarks that, in the Order, the Commission found Duke's application ignored the state policy outlined in R.C. 4928.02(H) to ensure effective competition. Duke states the Commission failed to demonstrate what products and services violate state policy and how they violate state policy. Duke contends that the Commission found that the application complied with state policy in its original decision as well as on rehearing and no new evidence was put forth to alter the Commission's reasoning. Accordingly, Duke requests the Commission reconsider its Order on Remand and grant rehearing.

{¶ 20} IGS and Direct reply that the Commission properly denied Duke's application. They assert that the Commission's finding that Duke's proposal contravenes state policy is supported by the record. They aver that Duke was proposing to go backwards in the deregulation process, in violation of the state policies outlined in R.C. 4928.02. According to IGS and Direct, the Commission is not obligated to provide an exception to R.C. 4928.17(A) and the Commission fittingly found good cause did not exist to grant an exception. Therefore, IGS and Direct request that Duke's application for rehearing be denied.

#### IV. CONCLUSION

{¶ 21} Duke's application for rehearing should be denied.

{¶ 22} Regarding Duke's first assignment of error, the Commission finds it has no merit and should be denied. Duke correctly states that the Commission was not mandated to change its decision. Nor, however, was the Commission mandated to affirm its decision. The Supreme Court states, in the conclusion of its opinion, that the Commission was to "thoroughly explain how – if at all – Duke's application complies" with the statute. Duke Opinion at ¶ 29. Thus, the Court contemplates that upon reconsideration of the evidence the Commission may not reach the same conclusion that it did in the original order. And, subsequently, that was what happened. In our Order on Remand, we reexamined our prior ruling and provided a more comprehensive explanation that more appropriately relied on the evidence in the record. In doing so, the Commission also considered the majority opinion, which did not delve into the substantive issues but was "admittedly skeptical of how the [C]ommission could approve Duke's amended plan," as well as the legal analyses in the minority opinions. Consequently, upon considering the opinions of the Court and upon a more robust analysis of the record, the Commission denied approval of Duke's amended plan.

{¶ 23} Duke's argument that the Commission, on remand, was obligated to entertain additional evidence and arguments is also unconvincing. The Court's opinion gave three direct and unambiguous directives: (1) to fully address IGS's statutory arguments; (2) to issue findings that thoroughly explain how Duke's application – if at all – complies with R.C. 4928.17; and (3) to identify the evidence the Commission considered to support its decision. Duke Opinion at ¶ 29. In the Order on Remand, the Commission complied with those instructions. The Court did not obligate the Commission to consider new evidence or arguments; rather, the Commission was directed to address the arguments that were already in the record. The previous cases cited by Duke, where Commission decisions were also found to be noncompliant with R.C. 4903.09, differ from this proceeding. In *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608, the Court remanded the case not only because it did not comply with R.C. 4903.09 but also because the Court found the Commission's analysis was flawed. *In re Application of Columbus S. Power Co.*, 2016-Ohio-

1608 at ¶ 55-57. Accordingly, in that case, the attorney examiner reopened proceedings in order to address all of the issues on remand. *In re Ohio Power Co. and Columbus Southern Power Co.*, Case No. 10-2929-EL-UNC, Entry at ¶ 8 (August 29, 2016). In the other case cited by Duke, the attorney examiner determined that additional evidence was necessary in order to sufficiently support the Commission's decision. *In re Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, Entry (November 29, 2006). Here, while the original Order was found to be lacking sufficient explanation, there was sufficient evidence in the record for the Commission to issue an opinion. Thus, as discussed below, the Commission issued an Order on Remand that provided a thorough explanation of its rationale with citations to the statutes and evidence it relied on. Order on Remand at ¶ 10. In doing so, the Commission fully complied with the Court's instructions.

{¶ 24} Finally, the Commission finds that Duke's last two assignments of error should also be denied. In its application for rehearing, Duke asserts the Commission's Order on Remand failed to cite to evidence in the record and improperly relied on a minority opinion from the Supreme Court. As discussed, in the Supreme Court's decision, the Court found that the Commission's original order did not adequately explain why Duke's application should be approved. Duke Opinion at ¶ 29. To comply with the Court's directives and to be able to fully explain its reasoning, the Commission reexamined the evidence in the case. At that time, the Commission also found that Justice Kennedy's opinion, while not controlling, was persuasive. In the Order on Remand, the Commission agreed with Justice Kennedy that Duke's proposed corporate separation plan did not comply with R.C. 4928.17. As part of our analysis, we applied Duke's application to each subsection of R.C. 4928.17, and found that it did not comply with R.C. 4928.17(A), (C), or (D). Order on Remand at ¶ 9-10.

{¶ 25} As discussed in the Order on Remand, R.C. 4928.17(A) only permits electric utilities to offer nonelectric products and services through a fully separated affiliate. An exception to R.C. 4928.17(A) is R.C.4928.17(C), which permits the Commission to approve a

corporate separation plan, for an interim period and upon a showing of good cause, provided that the plan complies with the state policies in R.C. 4928.02. R.C. 4928.17(D) allows a party to seek an amendment to reflect a change in circumstances. In our Order, we found that R.C. 4928.17(A) was not applicable, as Duke specifically noted it was not proposing to offer nonelectric products through an affiliate. Order on Remand at ¶ 10, citing Duke reply comments at 5. We also found that Duke's application did not comply with R.C. 4928.17(C) because the plan to offer nonelectric products and services was not proposed for an interim period and did not comply with the state policies in R.C. 4928.02. Order on Remand at ¶ 9-10. Duke avers that it did not propose to offer the nonelectric services for any specific time period and that it is the Commission's obligation to determine an interim period. *Duke further states that the Commission did not explain how Duke's proposal did not adhere to the state's policies in R.C. 4928.02.* Appropriately, however, the Commission found that Duke intended to offer nonelectric products and services on an ongoing basis, and, in doing so, contravene state policy. Order on Remand at ¶ 10. In its application, Duke makes no mention of its offering being temporary. Nor does Duke discuss whether it will eventually offer the services through an affiliate. Thus, there is no end date or transition period after which Duke intends to stop offering these services. Further, as discussed in the Order on Remand, the proposal does not avoid anticompetitive subsidies flowing from a noncompetitive retail electric service to a product or service other than retail electric service. The Commission stated in the Order on Remand that Duke "seeks to package services that are required to be offered through a fully separated affiliate." Order on Remand at ¶ 10, citing Duke Opinion at ¶ 50. As noted by Justice Kennedy, Duke had "no intention of supplying the products and services through a fully separated affiliate of the utility." Duke Opinion at ¶ 46. R.C. 4928.17(C) states the Commission may approve or modify a corporate separation plan that does not comply with R.C. 4928.17(A) upon a showing of good cause. In this case, good cause was not demonstrated, as the Commission found Duke's plan did not provide for ongoing compliance with policies specified in R.C. 4928.02. The Commission noted that Duke was "not seeking to transition away from nonelectric services



or to eventually offer the services through an affiliate.” Order on Remand at ¶ 10. The Commission fully explained why Duke’s application runs afoul of the state’s policies, specifically R.C. 4928.02(H), and failed to find that good cause was shown why Duke’s plan should be approved. Accordingly, Duke’s application for rehearing should be denied.

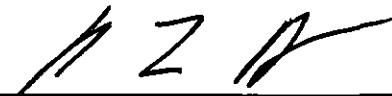
V. ORDER

{¶ 26} It is, therefore,

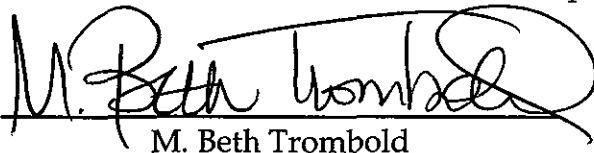
{¶ 27} ORDERED, That the application for rehearing filed by Duke be denied. It is, further,

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


THE PUBLIC UTILITIES COMMISSION OF OHIO



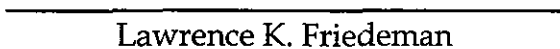
Asim Z. Haque, Chairman



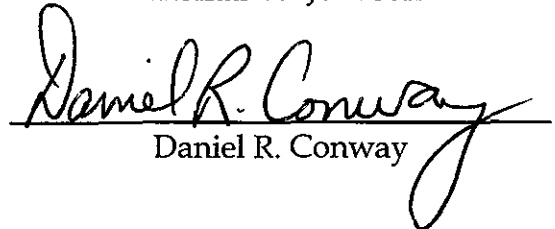
M. Beth Trombold



Thomas W. Johnson



Lawrence K. Friedeman

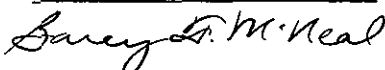


Daniel R. Conway

NW/vrm

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**AUG 08 2017**



Barcy F. McNeal  
Secretary