BEFORE

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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.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. 14-0689-EL-RDRCase No. 14-0690-EL-ATA |

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

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**APPLICATION FOR REHEARING**

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

1. **The Order is unlawful and unreasonable because it violated R.C. 4928.17(A)(1):**
	1. **The Order authorized Duke Energy Ohio (“Duke”) to provide non-competitive services, competitive retail electric services, and products and services other than retail electric service without granting Duke a waiver to do so;**
	2. **Good cause does not exist for granting Duke a waiver of 4928.17(A)(1) A waiver is only available to allow a utility to continue offering existing services for an interim period; it cannot be used to allow a utility to commence offering new services such as products and services other than retail electric service;**
	3. **Even if the Order had granted a waiver of R.C. 4928.17(A)(1), 4928.17(C) only allows a waiver to be issued temporarily, but the Order did not set forth a time period by which Duke must comply with 4928.17(A)(1);**
	4. **The Order is unlawful and unreasonable because it violated R.C. 4903.09 by failing to state findings of fact and reasons prompting the Commission’s decisions*. In re Application of Columbus Southern Power Company*, 128 Ohio St. 3d 512,519, 526-27 (2011). The Order failed to address IGS’s arguments that Duke did not request a waiver of R.C. 4928.17(A)(1) and that Duke did not demonstrate good cause for a waiver of that requirement;**
2. **The Order is unlawful and unreasonable because it violated R.C. 4928.17(A)(2) and (3). By failing to require Duke to submit pro forma calculations of its fully embedded cost of supplying competitive retail electric service or supplying a product or service other than retail electric service, the Order failed to ensure that Duke will not extend an undue preference or advantage to a division of its business engaged in the business of supplying competitive retail electric service or supplying a product or service other than retail electric service. The Commission’s failure to review Duke’s allocation methodology allows Duke to provide an anticompetitive subsidy to its unregulated business in violation of R.C. 4928.02(H); the Order implicitly allows Duke to collect the cost of providing products and services other than retail electric services through distribution rates;**
3. **The Order is unlawful and unreasonable because by permitting Duke to offer products and services other than retail electric service through its monopoly distribution company, and not affording the same access to the monopoly resources to other competitors in the market, it is a violation of anti-trust statutes including 15 U.S. Code Chapter 1  et. al and Chapter 1331 Ohio Revised Code, et al.The State Action Exemption does not allow the Commission authorize Duke to restrain trade, because the service Duke will be providing are not authorized by state statute.**

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

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

1. **INTRODUCTION**

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

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

1. **BACKGROUND**

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

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

The stipulation provides that the Commission’s approval of the stipulation will constitute approval of Duke’s Third Amended CSP and full legal corporate separation, as contemplated by Section 4928.17(A), Revised Code, such that the transmission and distribution assets of Duke will continue to be held by the distribution utility and all of Duke's generation assets will be transferred to an affiliate. [[2]](#footnote-2)

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

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

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

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

**Special Customer Services**

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

Many of these services are related to the provision of products and services other than retail electric service, but it also appears that Duke proposed to modify its tariff language to include certain services that can only be defined as competitive retail electric services. For example, Duke proposed tariff language would authorize it to make a generator available” to a customer.

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

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

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

Additionally, the Commission determined that it is “of paramount importance” that Duke provide services other than retail electric service at no less than Duke's fully allocated costs. But, Duke did not disclose and the Commission did not examine the manner in which Duke will calculate and allocate its fully embedded costs to its business engaged products and services other than retail electric service. And the Commission did not provide a forum for addressing concerns regarding Duke’s cost allocation methodology.

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

1. **ARGUMENT**

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

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

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

Although under 4928.17(C) the Commission may authorize a temporary waiver from the requirement to provide any non-electric services through a fully separated affiliate, Duke failed to request a waiver.[[8]](#footnote-8) Despite Duke’s threshold failure to even request a waiver and the pro-competitive nature of Ohio law, the Commission approved Duke’s request to amend its corporate separation plan to allow it to provide products and services other than retail electric service. Because the Commission authorized Duke to offer products and services other than retail electric service without providing Duke a waiver of R.C. 4928.17(A)(1), the Commission’s order is unlawful and unreasonable.

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

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

The Commission’s Order is unlawful because good cause does not exist for granting Duke a waiver of R.C. 4928.17(A)(1). Authorizing Duke to offer products and services other than retail electric service—products and services that are available from other suppliers—contravenes Ohio’s pro-competitive policy and represents a step back from the full legal corporate separation authorized by the Commission in Duke’s last ESP. As discussed above, Ohio law is pro-competitive. As an exception to this policy, Duke has been granted a limited monopoly for the purpose of providing distribution service to customers.[[9]](#footnote-9) Unlike the delivery of electricity, however, there are market participants that are already willing and able to offer the “special customer services” that the Order authorized Duke to offer to customers. Thus, there is no policy reason to authorize Duke to provide these services to customers.

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

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

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

As noted above,4928.17(A)(1)requires Duke to offer any non-electric product or service through a fully separated affiliate. Further 4928.17(C) provides that if Duke wanted to offer products and services other than retail electric service through anything other than a fully separated affiliate, Duke would need to get a waiver from the Commission. However, 4928.17(C) provides that the waiver must apply only for an “interim period prescribed in the order.”The Commission’s Order in this proceeding did not specifically define the scope of the “interim period” that Duke need not comply with the requirements of 4928.17(A)(1). Rather, Commission’s Order appears to indefinitely allow Duke to violate R.C. 4928.17(A)(1).Accordingly, even if a waiver were granted, the Commission’s Order would violate4928.17(C) because there is no set period in the Order by which Duke must be in comply with R.C.4928.17(A)(1).

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

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

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

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

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

As discussed below, the Commission’s Order is unlawful and unreasonable because Duke’s corporate separation plan does not ensure that Duke will not provide a competitive advantage or undue preference to the parts of its business that are engaged in the business of providing competitive retail electric service and products and services other than retail electric service.

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

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

 Rather than review Duke’s proposed allocation methodology or marketing practices to ensure that Duke will not provide its own business with a competitive advantage or undue preference, the Order states that “it is our expectation that through its implementation of this corporate separation plan, Duke will adhere to all applicable rules and regulations. Any concerns raised once Duke has implemented its plan will be reviewed and considered by the Commission on a case-by-case basis.”[[13]](#footnote-13) The Commission has assumed that Duke will comply with the law and shifted the burden onto CRES suppliers to demonstrate otherwise even though they lack access to Duke’s allocation methodology or an appropriate forum to raise their concerns. The Commission’s Order in this respect is unlawful and unreasonable inasmuch as the corporate separation plan approved by the Order does not sufficiently ensure that Duke will not provide its own business with an undue preference or competitive advantage.

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

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

In its application, Duke, an electric distribution monopoly, is asking for permission to provide products and services other than retail electric service utilizing distribution monopoly resources. In the application Duke claims it will allocate the costs of those services in the charges to customers receiving those services. Unfortunately, Duke has provided little to no evidence as to how it will conduct its costs allocation, and a hearing was not held, so parties to this proceeding were unable to conduct discovery regarding Duke’s costs allocation methodology.

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

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

Antitrust law (15 U.S. Code Chapter 1 § 1-38, et sec.) prohibits trusts and the use of monopolies to restrain trade in a market for goods and services. Antitrust law also prohibits price discrimination by creating an artificial cost advantage in the market and a conspiracy to restrain trade in the market. *Id.* Finally, antitrust law prohibits restraining trade by entering into agreements not to use the goods of a competitor. *Id.*

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

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

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

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

1. **CONCLUSION**

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

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

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1. Duke Energy Ohio Fourth Corporate Separation Plan at 84; *See also* Order (June 11, 2014). [↑](#footnote-ref-1)
2. *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al.*, Opinion and Order at 29, 45 (Nov. 22, 2011). [↑](#footnote-ref-2)
3. Application, Exhibit A at 84 (containing a proposed 4th Corporate Separation Plan)(emphasis added). [↑](#footnote-ref-3)
4. Application, Exhibit C, at P.U.C.O. Electric No. 19, Sheet No. 23 (Containing proposed tariff language) (emphasis added). [↑](#footnote-ref-4)
5. Order at 6 (June 11, 2014). [↑](#footnote-ref-5)
6. R.C. 4928.02(H). [↑](#footnote-ref-6)
7. A utility may obtain a temporary waiver from this requirement under R.C. 4928.17(C). [↑](#footnote-ref-7)
8. Duke has never received a waiver to provide products and services other than retail electric services, and Duke’s temporary waiver with respect to competitive retail electric services was terminated with the approval of Duke’s last electric security plan. [↑](#footnote-ref-8)
9. R.C. 4933.83. [↑](#footnote-ref-9)
10. *In re Application of Columbus Southern Power Company*, 128 Ohio St. 3d 512,519, 526-27 (2011). [↑](#footnote-ref-10)
11. R.C. 4928.17(A)(2) requires that “[t]he plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.” [↑](#footnote-ref-11)
12. R.C. 4928.17(A)(3) (emphasis added). [↑](#footnote-ref-12)
13. Finding and Order at 6-7. [↑](#footnote-ref-13)
14. *Parker v. Brown*,317 U.S. 341, 352 (1943). [↑](#footnote-ref-14)
15. *FTC Ticor Title Ins. Co*., 504 U.S. 621, 623,112 S.Ct. 2169, 119 L.Ed.2d 410 (1992) (“The Supreme Court has stated in the antitrust context that ‘state action immunity is disfavored . . . .’”). But "[a]n otherwise monopolistic restraint of trade will not give rise to a Sherman Act violation where it stems from a clearly articulated and affirmatively expressed state policy. . . ." *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). "The relevant question is whether the regulatory structure which has been adopted by the state has specifically authorized the conduct alleged to violate the Sherman Act." *Cost Management Servs.,Inc. v. Washington Natural Gas* Co., 99 F.3d 937, 942 (9th Cir.1996). If the alleged anticompetitive conduct is unlawful under state law, "the alleged conduct would not be protected by the state action immunity doctrine." *Id.* [↑](#footnote-ref-15)
16. R.C. 4933.83. [↑](#footnote-ref-16)
17. Rather, the General Assembly required utilities to cease offering these services after the enactment of Amended Substitute Senate Bill 3; only allowing utilities to continue to offer these services for a temporary period for good cause. [↑](#footnote-ref-17)
18. R.C. 4928.17(A)(1). [↑](#footnote-ref-18)