BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Cynthia Wingo,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 17-2002-EL-CSS
	)	
Nationwide Energy Partners, LLC, et al.,	)	
	)	
Respondents.	)	

COMPLAINANT'S SECOND APPLICATION FOR REHEARING

The Commission dismissed Ms. Wingo's Complaint on October 22, 2018. Ms. Wingo timely requested rehearing. The Commission purported to "grant" rehearing in a December 19, 2018 Entry (Rehearing Entry) "for further consideration of the matters specified." By refusing to affirmatively "grant or deny" rehearing of the matters raised in the application within the 30-day period proscribed by R.C. 4903.10, the Commission's jurisdiction is forfeit. Any further action by the Commission in this proceeding would be unreasonable and unlawful because:

1. Upon the filing of an application for rehearing, the Commission has 30 days to "grant and hold such rehearing on the matter specified in such application." R.C. 4903.10. If the Commission does not "grant or deny such application" within 30 days of filing, "it is denied by operation of law." *Id*. An order purporting to grant rehearing "for further consideration of the matters specified" is insufficient to invoke the Commission's rehearing jurisdiction.

2. R.C. 4903.10, 4903.11 and 4903.12 preclude the Commission from exercising jurisdiction on rehearing where the application for rehearing has been denied by operation of law.

3. Because Complainant's November 23, 2018 application for rehearing has been denied by operation of law, the Supreme Court of Ohio has exclusive jurisdiction to review the Commission's October 22, 2018 dismissal order.

Having lost jurisdiction to take any further action on rehearing, this Second Application for Rehearing does not request the Commission to grant any form of relief. This application is

being filed solely to perfect the right of appeal, in accordance with *State ex rel. Consumers' Counsel v. Public Util. Comm.*, 102 Ohio St.3d 301 (2004) (*Consumers' Counsel*).

MEMORANDUM IN SUPPORT

This Second Application for Rehearing challenges the Commission's practice of granting rehearing for "further consideration of the matters specified." The Commission routinely includes this language in initial entries on rehearing—not because it has made a substantive decision to grant or deny rehearing of the matters raised, but to give itself more time to make this decision. In this particular case, the practice was used to deny due process. Anyone who thinks Ms. Wingo will stand for this should think differently.

The practice of granting rehearing for "further consideration" seems to have evolved from dicta in the 2004 *Consumers Counsel* decision. The Court suggested that "[n]othing in R.C. 4903.10 or precedent specifically prohibited the commission" from granting rehearing for the limited purpose of further consideration. *Consumers' Counsel* at ¶19. The Court made this statement after noting that the argument based on this statute had been waived, so the Court's statutory interpretation is not the law of the case. No party has ever properly challenged the Commission's practice.

More importantly, rehearing practice at the Commission has morphed into something that the *Consumers' Counsel* Court would not have tolerated. In *Consumers' Counsel*, the Commission granted rehearing for further consideration—but then promptly considered the application. The final rehearing entry was issued only a few weeks after the initial entry. Today, rehearing is "granted" not to expeditiously consider the matters raised, but to defer or delay consideration for months or even *years*. Justice Pfeifer's concern with "the apparent intent of the

Public Utilities Commission of Ohio to avoid meaningful review of its activities" will likely be of concern to a majority of the present Court. *Id*. at ¶ 24 (Pfeifer, J., dissenting).

The Rehearing Entry serves no purpose but to extend the period for making a decision that R.C. 4903.10 requires the Commission to make within 30 days. The Entry is of no legal effect. The order dismissing the Complaint is now appealable under R.C. 4903.11, and will be appealed.

I. ARGUMENT

Complainant will first explain why the first application for rehearing has been denied by operation of law. A discussion of *Consumers' Counsel* follows.

A. The first application for rehearing has been denied by operation of law.

Under R.C. 4903.10, a litigant must perfect the right to rehearing by filing a "proper" application. "A "proper" application must be filed within the allotted time: "Such application shall be filed within thirty days after the entry of the order upon the journal of the commission." The application must also explain why the order is unreasonable or unlawful: "Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. The failure to raise an issue on rehearing waives the right to appeal the issue: "No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application."

The Commission must also meet requirements to invoke its jurisdiction to consider an order on rehearing. The decision of whether to grant rehearing is largely discretionary:

> Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.

But the time allotted to make this decision is *not* discretionary:

> If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

The statutes governing rehearing and appeal are jurisdictional. *Senior Citizens Coal. v. Public Util. Comm'n*, 40 Ohio St. 3d 329, 333 (1988) ("[B]oth R.C. 4903.10 and 4903.11are jurisdictional."). Therefore, they are strictly construed. *See Discount Cellular, Inc. v. Public Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, ¶ 59 ("[W]e have strictly construed the specificity test set forth in R.C. 4903.10."); *Harris Design Servs. v. Columbia Gas of Ohio, Inc.*, 154 Ohio St.3d 140, 2018-Ohio-2395, ¶ 20 ("We strictly enforce R.C. 4903.10's requirements.").

The Rehearing Entry does not grant rehearing "on the matter specified in such application." The Commission granted the application "*for further consideration* of the matters specified." Rehearing Entry ¶ 1 (emphasis added.) A grant of rehearing for "further consideration" of whether to allow a rehearing or presentation of additional evidence is not an option under R.C. 4903.10(B). If the Commission does anything other than "grant . . . such application for rehearing within thirty days from date of filing thereof," the application is "denied by operation of law." R.C. 4903.10(B).

The sections that follow further support for this interpretation.

B. The *Consumers' Counsel* interpretation of R.C. 4903.10 is dicta.

Consumers' Counsel addressed R.C. 4903.10 in the context of OCC's request for a writ of prohibition. A telephone company sought rehearing of an order denying an emergency rate increase. The Commission granted rehearing for the limited purpose of further consideration. OCC filed a complaint in prohibition. The complaint asked for a writ directing the Commission to not grant the rehearing application. The Commission denied rehearing a few weeks later. The Court dismissed the request for the writ as moot. "[T]he commission has now *denied* the

applications for rehearing. Because OCC sought the writ to prevent the commission from *granting* the applications, its request appears moot. The commission did not grant the applications for rehearing." *Consumers' Counsel* at ¶ 12.

OCC also argued that the Commission's "general practice" of granting rehearing for further consideration was unlawful. But OCC "did not seek rehearing of the order extending the time for review," so this argument was waived. *Id*. at ¶ 13. The Court expressly found, however, that "this practice would not necessarily evade review in the future." *Id*. The Court recognized that future litigants could challenge the practice through rehearing and appeal. *Id*. at ¶¶ 20-22.

The Court nonetheless addressed the rehearing entry and concluded, "R.C. 4903.10 did not expressly preclude the commission from considering the merits of the applications for rehearing. The commission acted within 30 days of the filing of the applications when it granted the applications . . . for the limited purpose of allowing additional time to consider them. Nothing in R.C. 4903.10 or precedent specifically prohibited the commission from so proceeding." *Id*. at ¶ 19.

The Court's interpretation of R.C. 4903.10(B) is dicta. "*Obiter dictum*" has been defined as "'an incidental and collateral opinion uttered by a judge, and therefore (as not material to his decision or judgment) not binding.'" *State ex rel. Gordon v. Barthalow*, 150 Ohio St. 499, 505–506 (1948), *quoting* Webster's New International Dictionary (2d Ed.). Moreover, the Court's interpretation of R.C. 4903.10 is unpersuasive and fails to consider relevant precedent.

C. *Consumers' Counsel* is distinguishable on the facts.

In Consumers' Counsel, the Commission granted rehearing "for the limited purpose of allowing the Commission additional time to consider the issues raised on rehearing." *Consumers' Counsel* at ¶ 3. Within two weeks, the case was back on the Commission's agenda.

The total "delay" between the order granting rehearing for additional time and the order denying the application was less than 30 days. *See id.* at ¶¶ 3-6 (first rehearing entry issued February 11; application denied as moot March 11).

Consumers' Counsel involved a situation where the Commission granted rehearing for further consideration and actually considered the application promptly. That is not what is happening today. Rehearing is being "granted" to *avoid* further consideration for as long as the Commission deems fit. The timeline in Ms. Wingo's case and related cases illustrates the inherent and inevitable prejudice of this practice.

The initial order in the Submetering COI (Case No. 15-1594-AU-COI) came out in December 2016.[1] Ms. Wingo filed a complaint in Case No. 16-2401-EL-CSS about a week later (the Gateway Lakes Complaint). The Commission granted rehearing in the COI in January 2017, and issued a substantive order on rehearing in June 2017. Parties sought rehearing of that order as well, and the Commission again granted rehearing for "further consideration" in August 2017.

The next month, September 2017, Ms. Wingo filed the Complaint in this case. Two months later (November 2017), the Commission dismissed the Gateway Lakes Complaint. The Commission granted rehearing for further consideration of that dismissal in March 2018.

In October 2018, the Commission dismissed the Complaint in this case. Rehearing for further consideration was granted in December 2018.

Most recently, on January 9, 2019, the Commission denied the outstanding applications for rehearing in the COI and Gateway Lakes Complaint. Rehearing in the COI had been pending for 16 months, and the Gateway Lakes rehearing had been pending for 10 months.

[1] The chronology that follows is easily verifiable from the Commission's docket. Footnotes for each event would merely clutter this document.

The timing of these orders suggests a different motive than granting rehearing for "further consideration" to seriously consider the issues. The Commission granted rehearing in the COI with the expectation that parties would not appeal until a substantive rehearing order issued. The Commission then relied on the COI Order to dismiss the Gateway Lakes Complaint. The same process was invoked to avoid appellate review of the Gateway Lakes dismissal, giving the Commission two orders to rely on to dismiss the Complaint here. It was not until after this case had been dismissed that the Commission denied the applications for rehearing in the other two cases.

The Commission may take administrative notice of its own docket, so there is no reason to cite the plethora of cases where litigants have been sidelined on rehearing for far longer than Ms. Wingo. Suffice it to say, what is happening today is not what happened in *Consumers' Counsel*.

D. The *Consumers' Counsel* interpretation of R.C. 4309.10 is erroneous.

Consumers' Counsel states that "[n]othing in R.C. 4903.10 or precedent specifically prohibited the commission from so proceeding." The Court's reasoning is flawed. It did not observe basic rules of statutory construction and failed to consider its own precedent.

1. The court did not fully consider the statutory language.

Consumers Counsel reasons the "commission acted within 30 days of the filing of the applications when it granted the applications . . . for the limited purpose of allowing additional time to consider them." *Consumers Counsel* at ¶19. This analysis is incomplete. There is no dispute that the Commission "acted" within 30-days, but the Court failed to consider whether the act performed was sufficient to invoke the Commission's rehearing jurisdiction. Under the plain language of R.C. 4903.10, it was not.

R.C. 4903.10 does not say that *any* action by the Commission within 30 days is sufficient to invoke the Commission's rehearing authority. The statute defines an actor ("the commission"), an action ("grant or deny") and the subject of the action ("such application"). "Such application" defines the scope of the issues the Commission may consider: the Commission may only grant rehearing to consider "the matter specified in such application." Ms. Wingo's application did not ask the Commission to grant rehearing for "further consideration" of the grounds asserted for rehearing. She was entitled to an affirmative grant or denial of rehearing on the issues raised.

The Commission does not "grant . . . such application" when it issues an order that merely purports to give the Commission more time to consider the issues raised. Describing such an order as a "grant" of rehearing ignores the actual purpose of the order. In practice, when the Commission states it will give "further consideration" to an application for rehearing, what it really means is that the Commission will (maybe) consider the rehearing arguments whenever it gets around to it.

The evident purpose of R.C. 4903.10 and 4903.11 is to promote finality of Commission orders. Finality cannot occur until the right of appeal is either waived or exhausted. The right to appeal is tied to a final decision on rehearing. Absent a limit on the period of time to consider an application for rehearing, the Commission could avoid appellate review of its orders indefinitely by simply failing to address applications for rehearing. That could not have been the General Assembly's intent. The Court has recognized "the duty of the commission to hear matters pending before the commission without unreasonable delay and with due regard to the rights and interests of all litigants before that tribunal." *State ex rel. Columbus Gas & Fuel Co. v. Public Util. Comm'n*, 122 Ohio St. 473, 475 (1930).

2. The Court did not satisfactorily distinguish *General Motors*.

In stating that "[n]othing in . . . precedent specifically prohibited the Commission from so proceeding" (*Consumers' Counsel* at ¶ 19), only one case was cited and distinguished. That case did not involve any statute in Revised Code Title 49, but the reasoning of the case actually supports the arguments raised here.

S*tate ex rel. Gen. Motors Corp. v. Ohio Civ. Rights Comm.* 50 Ohio St.2d 111 (1977) involved R.C. 4112.05(B), a statute requiring the Ohio Civil Rights Commission to attempt to resolve complaints "by informal methods of conference, conciliation, and persuasion" before pursuing formal charges. *Id.* at 113. The statute also required "that a complaint be issued within one year after alleged unlawful discriminatory practices had been committed." *Id*. In order to meet the one year limitations period, OCRC filed complaints without first seeking resolution. The Court granted a writ of prohibition to prevent OCRC from hearing the formal charges. "Due to the mandatory language employed by the General Assembly, and the absence of any provision for time extensions, it is clear that the inability to comply with the statute of limitations is not a circumstance which warrants an exception to the requirement that conciliatory efforts precede the complaint." *Id*.

Consumers' Counsel purported to distinguish General Motors with one sentence: "There is no comparable express requirement in R.C. 4903.10." *Consumers' Counsel* at ¶ 19. But clearly there is. Like the statute requiring OCRC to perform a certain act (attempt informal resolution before pursuing formal action) within a certain period of time (one year), R.C. 4903.10(B) specifies both an act ("grant or deny such application") and a period for performing the act ("thirty days from the date of filing"). R.C. 4903.10 actually goes a step further than the statute

at issue in *General Motors*: the rehearing statute imposes an express consequence for inaction: "… by operation of law."

General Motors is neither distinguishable nor helpful for the Commission. OCRC filed complaints solely to meet a statutory deadline. The agency complied with the deadline, but the action taken was not the action required by the statute. OCRC argued that its "large volume of pending charges" prevented it from doing as the statute required. *General Motors* at 113. The agency's workload was deemed irrelevant. "Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language in a statute." *Id.* The parallels between the OCRC's actions in General Motors and the Commission practice described here are obvious.

3. The Court did not consider other precedent specifically applicable to the Commission.

Consumers' Counsel failed to consider several well-established principles.

First, "[i]t is axiomatic that the PUCO, as a creature of statute, may exercise only that jurisdiction conferred upon it by the General Assembly." *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St. 3d 535, 535 (1993). The Commission has no authority to act unless a statute confers such authority. The Commission has no "inherent" authority as if it were a court of general jurisdiction. *See Ohio Mfrs. Ass'n v. Public Util. Comm'n*, 46 Ohio St. 2d 214, 214 (1976) ("In the absence of *express statutory authority*, the Public Utilities Commission is without power to authorize a public utility to levy monetary penalties against its consumers.") (Emphasis added.) To suggest that "[n]othing in R.C. 4903.10 or precedent specifically prohibited" the Commission's actions ignores this important principle. *Consumers' Counsel* at ¶ 19. The issue is whether the statute *permits* the Commission to grant rehearing solely to extend the statutory period to act. To claim that it does is to read the 30-day limitation out of the statute.

Second, where authority has been granted to the Commission, the Commission must exercise its authority within the scope of the statutory grant. "The PUCO, as a creature of statute, has no authority to act beyond its statutory powers." *Disc. Cellular, Inc. v. Public Util. Comm*., 112 Ohio St. 3d 360, 373, 2007-Ohio-53, ¶ 51. R.C. 4903.10 defines the scope of the Commission's rehearing authority. The Commission cannot supplement this authority by pointing to statutes allowing it to regulate the manner of its proceedings. The Commission may "adopt rules to govern its proceedings and to regulate the mode and manner of investigations, but it has no power to make any general rules other than for such purpose." *Akron & B. B. R. Co. v. Public Util. Comm'n*, 165 Ohio St. 316, 316 (1956).

Third, the Court has strictly construed R.C. 4903.10 and 4903.11. Untold appeals have been dismissed and arguments deemed waived based on the failure to comply with these statutes. *See, e.g., Harris Design Servs. v. Columbia Gas of Ohio, Inc.*, 154 Ohio St.3d 140, 2018-Ohio-2395, ¶ 20 (collecting cases). This body of law includes cases where the Court has found that when an application for rehearing has been denied by operation of law, any subsequent order on rehearing is of no legal effect. *See Mosholder Motor Freight v. Public Util. Comm'n,* 162 Ohio St. 198, 200 (1954); *Pennsylvania R. Co. v. Public Util. Comm'n*, 172 Ohio St. 154, 155 (1961).

Consumers' Counsel is not good law. The current Court will agree.

Dated: January 18, 2019

s/ Mark A. Whitt

Mark A. Whitt
Andrew J. Campbell
Rebekah Glover
WHITT STURTEVANT LLP
88 E. Broad St., Suite 1590
Columbus, Ohio 43215
614.224.3911
614.224.3960 (f)
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

Shawn J. Organ
Carrie M. Lymanstall
ORGAN COLE LLP
1330 Dublin Road
Columbus, Ohio 43215
614.481.0900
614.481.0904 (f)
sjorgan@organcole.com
cmlymanstall@organcole.com

CERTIFICATE OF SERVICE

This document was filed via the Commission's e-filing system on January 18, 2019. Parties who have subscribed to electronic service will receive notice of this filing from the Commission. Service is also being made this day to the following persons by email:

Michael J. Settineri mjsettineri@vorys.com

William A. Sieck wasieck@vorys.com

Gretchen L. Petrucci glpetrucci@vorys.com

Roger P. Sugerman rsugarman@keglerbrown.com

s/ Mark A. Whitt

Summary: Text Second Application for Rehearing electronically filed by Ms. Rebekah J. Glover on behalf of Ms. Cynthia Wingo