

In the Matter of the Commission’s Review of)
Chapter 4901:1-37 of the Ohio Administrative) Case No. 18-1190-EL-ORD
Code.)

In this rules review case, the rules governing how regulated utilities and their unregulated affiliates operate are at issue. The PUCO took action in its June 17, 2020 Finding and Order (“Order”) to protect consumers. Those actions included rejecting utility recommendations to allow them to provide competitive service behind customers’ meters. But the PUCO could have done more to protect consumers. The PUCO should have adopted such OCC Recommendations as to make sure that utilities and their unregulated affiliates operate separately. That would increase the ability of unrelated businesses to compete on a level playing field, prevent utilities from taking advantage of their captive customers, thereby benefiting consumers.

ASSIGNMENT OF ERROR NO. 1: The PUCO Order was unlawful as contrary to Ohio Supreme Court precedent and unreasonable because it failed to require utilities' unregulated affiliates to operate as structurally separate entities funded by shareholders, not consumers.

ASSIGNMENT OF ERROR NO. 2: Given that the PUCO did not require utilities' unregulated affiliates to operate as structurally separate entities funded by shareholders, the PUCO's Order was unlawful as contrary to Ohio Supreme Court precedent and unreasonable because it failed to adopt OCC's alternative recommendation to add to the definitions section of O.A.C. 4901:1-37 OCC's recommended definition of "unregulated service."

ASSIGNMENT OF ERROR NO. 3: The PUCO's Order was unlawful under R.C. 4903.09 and unreasonable because it failed to add to O.A.C. 4901:1-37 provisions requiring that unregulated services be accounted for on affiliates' books at fully allocated costs.

ASSIGNMENT OF ERROR NO. 4: The PUCO's Order was unlawful under R.C. 4903.09 and unreasonable because it failed to add to O.A.C. 4901:1-37 a provision that requires regulated utilities' affiliates to purchase from the identical electric utility tariff as their competitors do when providing unregulated services.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The Administrative Code provisions under review here govern the relationship between regulated electric utilities and their unregulated, competitive affiliates.¹ The PUCO when adopting rules on this topic should implement balanced solutions to maintain the sanctity of the market for unregulated services for the benefit of customers who rely upon the market for lower prices and greater innovation. Customers of regulated utilities have no choice but to do business with their utility for distribution service – they are “captive.” Therefore, consumer protections related how regulated utilities and their unregulated affiliates must be improved upon. This is especially important given the changing competitive environment for services at the customer’s premise.

The PUCO in its Order should have done more to protect consumers and the competitive market. Various concerns should be addressed by granting OCC’s application for rehearing. The PUCO’s failure to further act to protect consumers and the competitive market was unreasonable and unlawful.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10, which provides that within 30 days after issuance of a PUCO order, “any party who has entered an

¹ O.A.C. 4901:1-37, *et seq.*

appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.” OCC entered an appearance in this case through its Comments filed in response to the June 19, 2019 Entry inviting interested parties to file comments.

R.C. 4903.10(B) also requires that an application for rehearing be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” Further, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.” In considering an application for rehearing, R.C. 4903.10(B) provides that “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.” The statute also provides: “[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating or modifying some portions of the Finding and Order is met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing and abrogate or modify the Finding and Order consistent with OCC’s Recommendations herein.

III. MATTERS FOR RECONSIDERATION

ASSIGNMENT OF ERROR NO. 1: The PUCO Order was unlawful as contrary to Ohio Supreme Court precedent and unreasonable because it failed to require utilities' unregulated affiliates to operate as structurally separate entities funded by shareholders, not consumers.

In its comments, OCC recommended that the PUCO should require affiliates of regulated utilities to operate as structurally separate companies funded by their shareholders.² The PUCO found that OCC had not provided adequate reasons for the proposed rule changes, and that OCC's recommendation was not necessary or reasonable in a rulemaking proceeding.³ That finding is unreasonable and the PUCO erred in making it.

OCC explained in detail that the proposed rule change was to protect and enhance the competitive market.⁴ For example, OCC explained:

Structural separation would minimize the incentive for utilities to game and fragment the developing market for distributed energy resources and the distribution grid that accommodates them. Utility distribution grids should be the conduit for enabling competitive services. And, mandating structural separation is the most effective remedy for potential market power abuses. Further, a structurally separate company will help to safeguard against cross subsidization from monopoly customers to unregulated services and prevent an unwarranted transfer of market business risk to captive customers.⁵

² See OCC's Comments at 2-3.

³ See Order at 6.

⁴ See OCC's Comments at 2-4.

⁵ See *id.* at 2.

Contrary to what the PUCO said in its Order, OCC provided more than adequate reason for its proposed rule change. The PUCO's decision to the contrary is contrary to Ohio Supreme Court precedent.⁶

Further, contrary to what the PUCO said in its Order, this rulemaking proceeding is the *exact* proceeding for evaluating (and adopting) OCC's proposals. Rulemaking proceedings are where rules' definition are modified.⁷ Accordingly, there is no reason to defer (to some undefined time in some undefined case) addressing the consumer protections raised by OCC.

It was unlawful and unreasonable for the PUCO in its Order to ignore OCC's explicitly stated rationale for its proposed rule change. It was unreasonable for the PUCO in its Order to conclude that a rulemaking proceeding is the wrong proceeding to modify rules' definitions. OCC's application for rehearing should be granted, and the Order modified consistent with OCC's recommendations.

ASSIGNMENT OF ERROR NO. 2: Given that the PUCO did not require utilities' unregulated affiliates to operate as structurally separate entities funded by shareholders, the PUCO's Order was unlawful as contrary to Ohio Supreme Court precedent and unreasonable because it failed to adopt OCC's alternative recommendation to add to the definitions section of O.A.C. 4901:1-37 OCC's recommended definition of "unregulated service."

OCC made an alternative recommendation for improving the affiliate rules to protect consumers if the PUCO did not require separate structural entities. Specifically,

⁶ See *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, 147 Ohio St.3d 59, 2016-Ohio-1607, 60 N.E.3d 1221, ¶ 51 (2016) (reversing and remanding PUCO decision when it did not address a party's argument in a substantive way).

⁷ See, e.g., *In Re Commission's Rev. of Certain Rules in Chapter 4901:1-16, Ohio Adm. Code*, Case No. 2006-540-GA-ORD, Entry (April 10, 2006) (modifying definition of "gathering line"); *In the Matter of the Commissions Rev. of Its Rules for Electrical Safety & Serv. Standards Contained in Chapter 4901:1-10 of the Ohio Adm. Code.*, Case No. 17-1842-EL-ORD, Finding and Order (February 26, 2020) (modifying definition of "major event").

OCC recommended adding a definition of “unregulated services” to the rules.⁸ The PUCO found that OCC had not provided adequate reasons for the proposed rule change, and that OCC’s recommendation was not necessary or reasonable in a rulemaking proceeding.⁹ That finding is unreasonable and the PUCO erred in making it.

In its Comments regarding adding a definition of “unregulated services”, OCC explained:

More stringent affiliate transaction rules will help to create a level playing field for the provision of competitive unregulated service and will mitigate against an unwarranted transfer of business risk from unregulated services to captive monopoly local distribution utility customers.¹⁰

Contrary to what the PUCO said in its Order, OCC provided more than adequate reason for its proposed rule changes. The PUCO’s decision to the contrary is contrary to Ohio Supreme Court precedent.¹¹

Further, contrary to what the PUCO said in its Order, this rulemaking proceeding is the *exact* proceeding for evaluating (and adopting) OCC’s proposals. Rulemaking proceedings are where rules’ definition are modified. Accordingly, there is no reason to defer (to some undefined time in some undefined case) addressing the consumer protections raised by OCC.¹²

It was unlawful and unreasonable for the PUCO in its Order to ignore OCC’s explicitly stated rationale for its proposed rule change. It was unreasonable for the

⁸ See OCC’s Comments at 2-4.

⁹ See Order at 6.

¹⁰ See *id.* at 3.

¹¹ See footnote 6, *supra*.

¹² See footnote 7, *supra*.

PUCO in its Order to conclude that a rulemaking proceeding is the wrong proceeding to modify rules' definitions. OCC's application for rehearing should be granted, and the Order modified consistent with OCC's recommendations.

ASSIGNMENT OF ERROR NO. 3: The PUCO's Order was unlawful under R.C. 4903.09 and unreasonable because it failed to add to O.A.C. 4901:1-37 provisions requiring that unregulated services be accounted for on affiliates' books at fully allocated costs.

In its Comments, OCC made a recommendation to protect against cross-subsidization. Specifically, OCC recommended that the PUCO should amend the rules to require that unregulated services be accounted for on the affiliate books at fully allocated costs.¹³ Rejecting OCC's recommendation, the PUCO said that it may prejudice pending matters and be inconsistent with current law.¹⁴

But the PUCO neither identified the pending matters nor the current law. It did not explain how OCC's recommendation may prejudice pending matters or how it may be inconsistent with current law. It is axiomatic that under R.C. 4903.09, the PUCO must explain the bases for its decisions.¹⁵ It did not do so. Its Order is therefore unreasonable and unlawful. OCC's application for rehearing should be granted.

¹³ See OCC's Comments at 3-4.

¹⁴ See Order at 7-8.

¹⁵ R.C. 4903.09; *In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.*, 140 Ohio St.3d 352, 2014-Ohio-3764, 18 N.E.3d 1157, ¶ 45 (2014); *MCI Telecommunications Corp. v. Pub. Utilities Com'n of Ohio*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337, 343 (1987).

ASSIGNMENT OF ERROR NO. 4: The PUCO's Order was unlawful under R.C. 4903.09 and unreasonable because it failed to add to O.A.C. 4901:1-37 a provision that requires regulated utilities' affiliates to purchase from the identical electric utility tariff as their competitors do when providing unregulated services.

To protect against cross-subsidization, OCC recommended in its Comments that utilities' affiliates be required to purchase from the identical electric utility tariff as their competitors when providing unregulated services.¹⁶ Rejecting OCC's recommendation, the PUCO said that it may prejudice pending matters and be inconsistent with current law.¹⁷

But the PUCO neither identified the pending matters nor the current law. It did not explain how OCC's recommendation may prejudice pending matters or how it may be inconsistent with current law. It is axiomatic that under R.C. 4903.09, the PUCO must explain the bases for its decisions.¹⁸ It did not do so. Its Order is therefore unreasonable and unlawful. OCC's application for rehearing should be granted.

IV. CONCLUSION

The competitive market is vitally important to consumers. It facilitates the provision of low cost, reliable electricity. OCC made recommendations to protect the competitive market and consumers. The PUCO should have adopted them. Its failure to do so was unreasonable and unlawful.

¹⁶ See OCC's Comments at 3-4.

¹⁷ See Order at 7-8.

¹⁸ See footnote 13, *supra*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Application for Rehearing was served by electronic transmission upon the parties below this 17th day of July 2020.

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Summary: App for Rehearing Application for Rehearing Regarding PUCO Order Reviewing Rules Governing Utility Affiliates by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.