

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
APPLICATION FOR REHEARING**

I. INTRODUCTION

The Public Utilities Commission of Ohio (the "Commission") should deny the Application for Rehearing submitted by The Office of the Ohio Consumers' Counsel ("OCC").¹ None of OCC's four assignments of error is well-taken, and OCC has failed to demonstrate that the Commission's Finding and Order² is unreasonable or unlawful. For the reasons more fully set forth below, OCC's AFR should be denied in total.

II. ARGUMENT

A. It was reasonable and lawful for the Commission to decline to require utilities' unregulated affiliates to operate as structurally separate entities.

In its first assignment of error, OCC argues that the Commission should not have rejected its proposal to require utilities' unregulated affiliates to operate as structurally separate entities. Contrary to OCC's position, the Commission's decision to reject this proposal was not only reasonable and lawful, it was also based upon careful consideration of the comments of all parties.³ As multiple commenting parties and the Commission pointed out, OCC's proposal is unnecessary and repetitive of existing law, and OCC did not "provide[] an adequate reason to make such a rule

¹ Application for Rehearing by The Office of the Ohio Consumers' Counsel (July 17, 2020) ("OCC AFR").

² Finding and Order (June 17, 2020) ("Finding and Order").

³ Finding and Order at 4-6.

change.”⁴ Indeed, the OCC AFR simply repeats the same arguments OCC raised in its comments, which the Commission already fully considered and rejected. OCC has not shown that the Commission was unreasonable in rejecting this proposal.

OCC also claims the Commission’s Finding and Order regarding this proposal is “contrary to Ohio Supreme Court precedent.”⁵ However, in support of this argument, OCC cites to *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), a case that turned on the court’s interpretation of R.C. 4903.09. However, as OCC has seen previously, R.C. 4309.09 applies to contested cases, and a rulemaking proceeding such as this is not a contested case.⁶ OCC has not identified an error of law to support this assignment of error.

Nevertheless, the Commission fully considered OCC’s proposal and included in its Finding and Order ample discussion with citations to the parties’ comments explaining its decision. The Commission should reject OCC’s first assignment of error.

⁴ See, e.g., Companies’ Reply Comments at 2 (“However, there is already an entire subsection of Chapter 4901:1-37 that requires structural separation and expressly prohibits cross-subsidies. Rule 4901:1-37-04, OAC provides that each electric utility must function *independently* from its affiliates. It further provides that a utility’s employees and those of its affiliates shall function independently of each other and that a utility and its affiliates shall maintain separate accounting. In addition, cross-subsidies are prohibited. Further, information about the distribution system must be equally available to all competitors. Thus, the Commission already requires the structural separation OCC recommends.”) (citations omitted); Finding and Order at 5, 6 (“The Commission does not support the proposed rule change. In so doing, we find that OCC has not provided an adequate reason to make such a rule change.”).

⁵ OCC AFR at 6.

⁶ See *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies*, 2002 Ohio PUC LEXIS 412, PUCO Case No. 00-1532-TP-COI, Entry on Rehearing at ¶ 9 (Apr. 25, 2002) (finding OCC’s “reliance on the contested, quasi-judicial cases and the provisions of Section 4903.09, Revised Code, is misplaced in the context of” a rulemaking proceeding); see also *In the Matter of the Promulgation of Rules and Regulations of the Public Utilities Commission of Ohio Regarding Purchased Gas Adjustment*, 1978 WL 443441, PUCO Case No. 76-515-GA-ORD, Entry on Rehearing at 2 (Aug. 16, 1978) (“in the promulgation and adoption of rules, the Commission is not subject to the procedural requirements of Section 4903.09, Revised Code, since a rule-making proceeding is not a contested case.”).

B. It was reasonable and lawful for the Commission to reject OCC's proposal to add a new definition of "unregulated service" to OAC Chapter 4901:1-37.

OCC's second assignment of error suffers from similar flaws as its first and should likewise be rejected. OCC argues that the Commission erred by failing to adopt OCC's proposed definition of "unregulated service," which OCC would define as "a competitive service provided to a customer after the electric utility meter[.]"⁷ This assignment of error is simply a repackaging of the same arguments OCC raised in its comments, which the Commission fully considered and rejected.

In rejecting OCC's proposal, the Commission correctly noted that OCC's proposal did not include adequate support, was neither reasonable nor necessary, and was inappropriate for a rulemaking.⁸ The Commission reached this conclusion after careful consideration of and citation to the parties' comments.⁹ Most notably, OCC's proposal lacked statutory support¹⁰ and sought substantive determination of the regulatory status of a variety of retail services, some of which are the subject of current or future proceedings, including quasi-adjudicative proceedings.¹¹

As with its first assignment of error, OCC again incorrectly relies on *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) to support its claim that the Commission's rejection of its proposal was unlawful. As explained above, this case and the statute it relies upon are inapposite. Further, the Commission fully considered OCC's proposal and included in its Finding and Order ample discussion with

⁷ Finding and Order at 3; OCC Comments at 2-4. This proposed definition defined such competitive services to "include, but [not be] limited to, Distributed Energy Resources (including wind and solar generation and battery storage), electric vehicle charging stations and associated equipment, energy management services (including demand response), energy monitoring and control systems and devices, lighting and other smart controls, maintenance services, and warranty programs." *Id.*

⁸ Finding and Order at 6.

⁹ *Id.* at 4-6.

¹⁰ *Id.* at 5 (citing Companies' Reply Comments).

¹¹ *Id.* at 4-6.

citations to the parties' comments explaining its decision. The Commission should reject OCC's second assignment of error.

C. It was reasonable and lawful for the Commission to reject OCC's proposal to require that unregulated services be accounted for on affiliates' books at fully allocated costs.

OCC's third assignment of error should be rejected on similar grounds as its first and second. OCC argues that the Commission should have adopted its proposal requiring unregulated services to be accounted for on affiliates' books at fully allocated costs.¹² But again, this assignment of error is simply a repackaging of the same arguments OCC raised in its comments, which the Commission fully considered and rejected.

In rejecting this proposal, the Commission again considered and cited the comments of OCC and other parties. Specifically, the Commission noted AEP's concern that this proposal may prejudice the outcome of pending proceedings, and Duke's arguments that OCC's proposal was redundant of existing provisions in O.A.C. Chapter 4901:1-37 addressing the same concerns and that it improperly exceeded the scope of the enabling statute by seeking to regulate competitive affiliates.¹³

As with its first two assignments of error, OCC again incorrectly relies on *In re Comm. Rev. of Capacity Charges of Ohio Power Co.* to support its claim that the Commission's rejection of its proposal was unlawful. Again, this case, and the statute it cites, are inapposite. Moreover, the Commission fully considered OCC's proposal and included in its Finding and Order ample discussion with citations to the parties' comments explaining its decision. The Commission should reject OCC's third assignment of error.

¹² OCC AFR at 6.

¹³ Finding and Order at 7.

D. It was reasonable and lawful for the Commission to reject OCC's proposal to require regulated utilities' affiliates to purchase from the identical utility tariff as their competitors do when providing unregulated services.

OCC's fourth assignment of error should be rejected on similar grounds as its first three. OCC contends that the Commission erred in failing to adopt OCC's proposal to require regulated utilities' affiliates to purchase from the identical utility tariff as their competitors do when providing unregulated service. Like its other three assignments of error, OCC's fourth assignment of error simply repackages the same arguments OCC raised in its comments, which the Commission fully considered and rejected. The Commission should also reject OCC's fourth assignment of error.

In rejecting this proposal, the Commission again considered and cited the comments of OCC and other parties. Specifically, the Commission noted AEP's concern that this proposal may prejudice the outcome of pending proceedings, and Duke's arguments that OCC's proposal was redundant of existing provisions in O.A.C. Chapter 4901:1-37 addressing the same concerns and that it improperly exceeded the scope of the enabling statute by seeking to regulate competitive affiliates.¹⁴

OCC again incorrectly relies on R.C. 4903.09 to support its claim that the Commission's rejection of its proposal was unlawful.¹⁵ Again, the Commission is not bound by this statute in rulemaking proceedings.¹⁶ The Commission fully considered OCC's proposal and included in its Finding and Order ample discussion with citations to the parties' comments explaining its decision. The Commission should reject OCC's fourth assignment of error.

¹⁴ Finding and Order at 7.

¹⁵ OCC AFR at 9.

¹⁶ See *infra* n.6.

III. CONCLUSION

For the foregoing reasons, the Commission should deny the Application for Rehearing by The Office of the Ohio Consumers' Counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company's Memorandum Contra The Office of the Ohio Consumer's Counsel's Application for Rehearing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 27th day of July, 2020. The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/Christine E. Watchorn

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Toledo Edison Company*

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Summary: Memorandum Contra The Office of the Ohio Consumers' Counsel's Application for Rehearing electronically filed by Ms. Christine E. Watchorn on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company