

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY TO ESTABLISH A STANDARD
SERVICE OFFER IN THE FORM OF AN
ELECTRIC SECURITY PLAN.

CASE NO. 08-1094-EL-SSO

IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR APPROVAL OF REVISED
TARIFFS.

CASE NO. 08-1095-EL-ATA

IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR APPROVAL OF CERTAIN
ACCOUNTING AUTHORITY.

CASE NO. 08-1096-EL-AAM

IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR WAIVER OF CERTAIN
COMMISSION RULES.

CASE NO. 08-1097-EL-UNC

TENTH ENTRY ON REHEARING

Entered in the Journal on November 30, 2022

1. SUMMARY

{¶ 1} In this Tenth Entry on Rehearing, the Commission finds that the application for rehearing filed by Ohio Consumers' Counsel should be denied.

I. HISTORY OF THE PROCEEDING

{¶ 2} The Dayton Power and Light Company d/b/a/AES Ohio (AES Ohio or the Company) is a public utility as defined under R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility (EDU) shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer (MRO)

in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} R.C. 4928.143(C)(2)(b) provides that if a utility terminates an application for an ESP or if the Commission disapproves an application, the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent SSO is authorized.

{¶ 5} By Opinion and Order issued in this case on June 24, 2009, the Commission adopted the stipulation and recommendation of the parties (ESP I Stipulation) to establish AES Ohio's first ESP (ESP I). Included among the terms, conditions, and charges in ESP I was a rate stabilization charge (RSC). Thereafter, on December 19, 2012, the Commission extended ESP I, including the RSC, until a subsequent SSO could be authorized. Entry (Dec. 19, 2012) at 3-5.

{¶ 6} On September 4, 2013, the Commission modified and approved AES Ohio's application for a second ESP (ESP II). *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (*ESP II Case*), Opinion and Order (Sept. 4, 2013). On June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the decision of the Commission approving ESP II and disposing of all pending appeals. *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179. Thereafter, on August 26, 2016, in the *ESP II Case*, the Commission modified ESP II as directed by the Court and then granted AES Ohio's application to withdraw ESP II, thereby terminating it. *ESP II Case*, Finding and Order (Aug. 26, 2016). In light of AES Ohio's withdrawal of ESP II, the Commission, pursuant to R.C. 4928.143(C)(2)(b), granted AES Ohio's motion in this case to implement the provisions, terms and conditions of ESP I, its most recent SSO, until a subsequent SSO could be authorized. Finding and Order (Aug. 26, 2016); Third Entry on Rehearing (Dec. 14, 2016).

{¶ 7} The provisions, terms and conditions of ESP I remained in effect until the Commission modified and approved an amended stipulation establishing AES Ohio's third electric security plan (ESP III), effective November 1, 2017. *In re Dayton Power and Light Co.*, Case No. 16-395-EL-SSO, et al. (*ESP III Case*), Opinion and Order (Oct. 20, 2017) at ¶ 131. The Supreme Court of Ohio then dismissed as moot the appeals of the August 26, 2016 Finding and Order which reinstated ESP I, including the RSC. *In re Application of Dayton Power & Light Co.*, 154 Ohio St.3d 237, 2018-Ohio-4009, 113 N.E.3d 507, *reconsideration denied*, 154 Ohio St.3d 1446, 2018-Ohio-4962, 113 N.E.3d 554.

{¶ 8} Subsequently, Interstate Gas Supply (IGS) withdrew from the amended stipulation in the *ESP III Case*, necessitating an additional evidentiary hearing in that proceeding. *ESP III Case*, Entry (Nov. 15, 2018). Following the additional evidentiary hearing, the Commission issued a Supplemental Opinion and Order in the *ESP III Case*. In the Supplemental Opinion and Order, the Commission further modified and approved the amended stipulation filed in the *ESP III Case* by eliminating AES Ohio's distribution modernization rider (DMR) based upon the Supreme Court of Ohio's decision in *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 454, and *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 458. *ESP III Case*, Supplemental Opinion and Order (Nov. 21, 2019) at ¶ 1, 102-110, 134.

{¶ 9} On November 26, 2019, AES Ohio filed a notice of withdrawal of its application and amended application filed in the *ESP III Case*, pursuant to R.C. 4928.143(C)(2)(a). AES Ohio also filed on November 26, 2019, proposed tariffs in this proceeding to implement the provisions, terms and conditions of ESP I, its most recent ESP prior to ESP III. On December 4, 2019, comments were filed by Ohio Energy Group, Ohio Hospital Association, Industrial Energy Users-Ohio (IEU-Ohio) and the Retail Energy Supply Association (RESA). Joint comments were filed on December 4, 2019, by City of Dayton and Honda of America Mfg., Inc. (Dayton/Honda). Further, Ohio Consumers' Counsel (OCC), Ohio Manufacturers' Association (OMA) and The Kroger Co. (Kroger)

(collectively, Consumer Groups) filed a motion on December 4, 2019, seeking rejection of AES Ohio's proposed tariff filing.

{¶ 10} The Commission accepted the withdrawal of ESP III in the *ESP III Case* on December 18, 2019. *ESP III Case*, Finding and Order (Dec. 18, 2019). On December 18, 2019, in this proceeding, the Commission also approved AES Ohio's proposed tariffs, implementing the provisions terms and conditions of ESP I, subject to the modifications directed by the Commission. Second Finding and Order (Dec. 18, 2019).

{¶ 11} Subsequently, on January 17, 2019, applications for rehearing were filed by IEU-Ohio, IGS, OCC, and Dayton/Honda, and a joint application for rehearing was filed by OMA and Kroger. AES Ohio timely filed its memorandum contra on February 3, 2020. On February 4, 2020, RESA filed a motion for leave to file memorandum contra instant to the application for rehearing filed by IGS.

{¶ 12} On February 14, 2020, the Commission issued a Fourth Entry on Rehearing, in which it denied the application for rehearing filed by IGS and granted the remaining applications for rehearing for the purpose of further consideration in the matters raised in the applications for rehearing. Fourth Entry on Rehearing (Feb. 14, 2020).

{¶ 13} Meanwhile, in *In re Dayton Power and Light Co.*, Case Nos. 18-1875-EL-GRD et al., (*Quadrennial Review Case*), the signatory parties to the global stipulation submitted in that proceeding, including IEU-Ohio, IGS, Dayton, Honda, Ohio Manufacturers' Association Energy Group and Kroger, requested, on October 23, 2020, that the Commission defer ruling on the applications for rehearing filed in response to the Second Finding and Order in this proceeding. The signatory parties further represented that the applications for rehearing filed by IEU-Ohio, IGS and Dayton/Honda and the joint application for rehearing filed by OMA and Kroger will be withdrawn within seven days after the Commission issues a final appealable order which adopts, without modification, the global stipulation submitted in the *Quadrennial Review Case*.

{¶ 14} Subsequently, on June 16, 2021, the Commission issued the Fifth Entry on Rehearing in this case granting, in part, and denying, in part, OCC's application for rehearing. In the Fifth Entry on Rehearing, the Commission directed AES Ohio to file proposed tariffs making the RSC refundable "to the extent permitted by law." Fifth Entry on Rehearing at ¶¶ 61-64. On July 16, 2021, AES Ohio filed proposed tariffs, including the refund language, as directed by the Commission in the Fifth Entry on Rehearing. OCC and AES Ohio each filed an application for rehearing regarding the Fifth Entry on Rehearing on July 21, 2021. On July 30, 2021, OCC timely filed a memorandum contra the application for rehearing filed by AES Ohio; AES Ohio also timely filed a memorandum contra the application for rehearing filed by OCC.

{¶ 15} On August 11, 2021, the Commission denied the applications for rehearing filed by OCC and AES Ohio. Sixth Entry on Rehearing (Aug. 11, 2021). In addition, the Commission approved the proposed tariffs filed by AES Ohio on July 16, 2021, which included the refund language directed by the Commission, and the Commission authorized AES Ohio to file final tariffs consistent with the Sixth Entry on Rehearing. Sixth Entry on Rehearing at ¶¶ 48, 51-53. On August 27, 2021, OCC filed a notice of appeal to the Supreme Court of Ohio. AES Ohio filed a notice of cross-appeal on October 8, 2021.

{¶ 16} Meanwhile, on June 16, 2021, the Commission adopted the global stipulation in the *Quadrennial Review Case* without modification. *Quadrennial Review Case*, Opinion and Order (Jun. 16, 2021). After rehearing, the Commission issued a final appealable order in the *Quadrennial Review Case* on December 1, 2021. *Quadrennial Review Case*, Third Entry on Rehearing (Dec. 1, 2021). Subsequently, pursuant to the commitments made in the global stipulation in the *Quadrennial Review Case*, IEU-Ohio withdrew its pending application for rehearing in this case. Further, Dayton/Honda and OMA/Kroger withdrew their pending applications for rehearing in this case. Seventh Entry on Rehearing at ¶¶ 19-21.

{¶ 17} On April 13, 2022, the Supreme Court of Ohio dismissed, sua sponte, OCC's appeal and AES Ohio's cross-appeal. *04/13/2022 Case Announcements*, 2022-Ohio-1156.

{¶ 18} On June 15, 2022, the Commission issued a Seventh Entry on Rehearing in this case. In the Seventh Entry on Rehearing, the Commission found that the application for rehearing filed by IEU-Ohio should be deemed withdrawn and that the joint applications for rehearing filed by Dayton/Honda and OMA/Kroger should also be deemed withdrawn. Seventh Entry on Rehearing at ¶¶ 22, 27. The Commission also approved, inadvertently for a second time, the proposed tariffs, filed by AES Ohio on July 16, 2021. Seventh Entry on Rehearing at ¶¶ 23, 28. Further, the Commission granted OCC's uncontested request for a stay in this proceeding.

{¶ 19} On June 22, 2022, AES Ohio filed final tariffs, including the refund language, with an effective date of June 22, 2022.

{¶ 20} On July 15, 2022, OCC filed an application for rehearing regarding the Seventh Entry on Rehearing. AES Ohio filed a memorandum contra the application for rehearing on July 25, 2022.

{¶ 21} On August 10, 2022, in the Eighth Entry on Rehearing, the Commission granted, in part, and denied, in part, the application for rehearing filed by OCC on July 15, 2022. Specifically, on rehearing, the Commission vacated, as unnecessary and redundant, the repeated approval, in the Seventh Entry on Rehearing, of the proposed tariffs filed by AES Ohio on July 16, 2021. We noted that, following AES Ohio's timely submission of proposed tariffs on July 16, 2021, the Commission approved the proposed tariffs in the Sixth Entry on Rehearing on August 11, 2021. AES Ohio did not file final tariffs as directed by the Commission. However, on March 8, 2022, during the briefing of an appeal and cross-appeal of this case to the Supreme Court of Ohio, now dismissed, AES mistakenly represented to the Supreme Court that AES had filed a "proposed" tariff with the Commission on July 16, 2021, "but that tariff has not been approved and is not currently operative." *In re the Application of the Dayton Power and Light Company to Establish a Standard Service Offer*, S. Ct. Case No. 2021-1068, Fourth Merit Brief at 1. (Mar. 8, 2022). Based upon AES Ohio's mistaken representation to the Supreme Court, the Commission sought to cure this alleged deficiency

in the Seventh Entry on Rehearing by approving the proposed tariffs; however, as OCC correctly pointed out in its application for rehearing regarding the Seventh Entry on Rehearing, this action was unnecessary and redundant. In order to correct this error, the Commission granted rehearing and vacated the language in the Seventh Entry on Rehearing which contained the unnecessary and redundant approval of the proposed tariffs. Eighth Entry on Rehearing at ¶ 24. Further, the Commission directed AES Ohio to file new final tariffs specifying an effective date of August 11, 2021. Eighth Entry on Rehearing at ¶25. AES Ohio filed new final tariffs in compliance with the Eighth Entry on Rehearing on August 11, 2022.

{¶ 22} On September 9, 2022, OCC filed an application for rehearing regarding the Eighth Entry on Rehearing. AES Ohio filed a memorandum contra the application for rehearing on September 19, 2022.

{¶ 23} The Commission issued the Ninth Entry on Rehearing in this proceeding on October 5, 2022, denying the application for rehearing filed by OCC on September 9, 2022.

{¶ 24} 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.

{¶ 25} On November 4, 2022, OCC filed an application for rehearing regarding the Ninth Entry on Rehearing. AES Ohio filed a memorandum contra the application for rehearing on November 14, 2022.

II. DISCUSSION

A. *OCC's first assignment of error should be denied.*

{¶ 26} In its first assignment of error, OCC alleges that the Commission erred when it failed to order refunds for \$60 million paid by consumers under AES Ohio's unauthorized tariffs, after finding that the issue is "moot." OCC argues that, contrary to the Commission's

conclusion, the issue is capable of repetition while evading review and is, therefore, an exception to mootness.

{¶ 27} In its memorandum contra, AES Ohio argues that the Commission should deny the application for rehearing filed by OCC. Initially, AES Ohio argues that OCC seeks rehearing upon rehearing. AES Ohio claims that the Commission held in the Ninth Entry on Rehearing that the issues raised in OCC's September 9, 2022 application for rehearing were raised in OCC's July 15, 2022 application for rehearing and that the Commission held that R.C. 4903.10 does not allow parties to seek rehearing on the same issues that were raised in a prior application for rehearing. Ninth Entry on Rehearing at ¶ 27. AES Ohio posits that OCC most recent application for rehearing seeks the same relief and should be rejected.

{¶ 28} AES Ohio further claims that there is no prejudice to customers. AES Ohio argues that the Commission granted OCC the relief that OCC sought in its July 15, 2022 application for rehearing; specifically, the Commission required AES Ohio to change the effective date of the revised final tariffs to August 11, 2021 in order to be consistent with the Sixth Entry on Rehearing. AES Ohio notes that OCC does not claim that customers are in a different position now than they would have been had AES Ohio filed the revised final tariffs immediately after the Commission's Sixth Entry on Rehearing and argues that the Commission's directive that the tariffs be effective as of that date eliminates any prejudice to customers.

{¶ 29} AES Ohio also contends that a refund would not be lawful. AES Ohio notes that OCC asserted in its September 9, 2022 application for rehearing that AES Ohio violated R.C. 4905.54, 4905.22 and 4905.32. AES Ohio claims that OCC did not quote any of these statutes, did not identify any provision of these statutes that OCC alleges AES Ohio violated, and did not demonstrate that these statutes authorize refunds. AES Ohio denies that it violated any of the statutes and claims that the statutes do not authorize refunds.

{¶ 30} The Commission finds that rehearing on OCC's first assignment of error should be denied. It is well-established that R.C. 4903.10 does not allow persons who enter

an appearance in a case to have “two bites at the apple” or to file rehearing upon the denial of rehearing of the same issue. *Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, Second Entry on Rehearing (Sept. 13, 2006) (*Ormet*) at 3-4 (citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3); *See also In re Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (Jan. 30, 2013) at 4-5. In the first assignment of error in its application for rehearing, OCC seeks a third “bite at the apple” because OCC seeks rehearing of a *second* denial of rehearing on the same issue. Previously, OCC alleged in its July 15, 2022 application for rehearing that the Commission erred when it failed to find that AES Ohio’s collection of RSC charges of approximately \$60 million from consumers since August 11, 2021, was unauthorized and in violation of R.C. 4905.22 and a Commission order. In the Eighth Entry on Rehearing, the Commission denied rehearing on that assignment of error. *Id* at ¶ 26, 28-29. Subsequently, in its September 9, 2022 application for rehearing, OCC alleged in its third assignment of error that the Commission erred when the Commission found that AES Ohio lawfully collected the RSC between August 11, 2021, and the present under a tariff filed with the Commission under R.C. 4905.32. In the Ninth Entry on Rehearing, the Commission found that this assignment of error should be denied as moot. The Commission noted that, on August 11, 2022, AES Ohio filed revised tariffs for the RSC which included the refund language and an effective date of August 11, 2021; thus, we found that all RSC charges collected since August 11, 2021, have been collected under a tariff which included the refund language as directed by the Commission. The Commission also found that OCC could not demonstrate any prejudice because OCC is in the same position today as if AES Ohio had immediately filed revised final tariffs, including the refund language, on August 11, 2021, the date the Commission issued the Sixth Entry on Rehearing. Ninth Entry on Rehearing at ¶ 30, 32. Accordingly, the Commission finds that OCC’s first assignment of error is improper and should be denied.

{¶ 31} The Commission notes that, even if OCC’s first assignment of error were not improper, the Commission would deny rehearing on the first assignment of error. In support of this assignment of error, OCC claims that this issue is capable of repetition while evading review and thus falls within an exception for mootness. In its memorandum contra the application for rehearing, AES Ohio points out that the exception to the mootness doctrine only applies in “exceptional circumstances” and requires two factors to be present, citing *State ex rel. Calvary v. City of Upper Arlington*, 89 Ohio St.3d 229, 729 N.E.2d 1182 (2000):

This exception applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

89 Ohio St.3d at 231.

{¶ 32} With respect to the first factor, a party claiming the exception must demonstrate that the challenged action is “always so short as to evade review.” *Id.* OCC cannot meet this required factor. There is no statutory timeframe in which the Commission must act to approve proposed tariffs and no mandatory deadline under which the Commission must act or lose the authority to require a utility to file tariffs in final form once the tariffs have been approved by the Commission. This present case is instructive. AES Ohio did not file revised final tariffs in response to the Commission’s directive on August 21, 2021. Sixth Entry on Rehearing (Aug. 11, 2021). When this failure to file revised final tariffs was brought to the Commission’s attention by OCC in its application for rehearing filed on July 15, 2022, the Commission, on August 10, 2022, directed AES Ohio to remedy the error by filing the revised final tariffs with an effective date of August 21, 2021. Thus, OCC had at least eleven months to challenge AES Ohio’s failure to file revised final tariffs and could have filed a motion or other pleading alerting the Commission to the failure to file revised final tariffs at any time in that eleven-month period. We are not persuaded that,

under these circumstances, an open-ended period of at least eleven months is “always so short as to evade review.”

{¶ 33} With respect to the second factor, OCC has not demonstrated that there is a reasonable expectation that OCC will be subject to the same action again. OCC correctly notes that the Commission’s docket contains many cases that will require new tariffs, tariff updates or more. Utilities routinely file cases proposing new or revised tariffs. The Commission routinely approves, or modifies and approves, these proposed new or revised tariffs. Utilities then routinely file final tariffs consistent with the Commission approval of the proposed new or revised tariffs. Many of these tariffs contain important consumer protections, particularly the tariffs which implement the minimum service standards promulgated by the Commission. Many of these proposed tariffs include rate reductions due to the reconciliation of various riders. However, despite all of the various tariff cases filed with the Commission, OCC has not identified a single other instance of a utility failing to file a final revised tariff after Commission approval of the proposed revised tariff. AES Ohio erred by not timely filing the final revised tariff in this proceeding, but there is no reasonable expectation that OCC will be subject to the same action again.

B. OCC’s third assignment of error should be denied.

{¶ 34} OCC alleges in its third assignment of error that the Commission erred in stating that the plain language of R.C. 4903.10 and the case law does not limit its authority to address issues on rehearing. In support of this assignment of error, OCC contends that the Commission cannot lawfully broaden the scope of rehearing to matters that were not raised in applications for rehearing before it. OCC claims that the plain language of the statute prohibits it and that Supreme Court precedent prohibits it.

{¶ 35} The Commission finds that rehearing on this assignment of error should be denied as improper. R.C. 4903.10 does not allow persons who enter appearances to have “two bites at the apple” or to file rehearing upon the denial of rehearing of the same issue. *Ormet*, Second Entry on Rehearing (Sept. 13, 2006) at 3, citing *In re The East Ohio Gas Co.* and

Columbia Gas Co., Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3; see also *In re Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929- EL-UNC, Entry on Rehearing (Jan. 30, 2013) at 4-5.

{¶ 36} As with the first assignment of error, OCC seeks a “third” bite at the apple. OCC alleged in the second assignment of error of its July 15, 2022 application for rehearing that the Commission erred by misusing the statutory process to change its ruling on a matter not specified in the applications for rehearing that were under review, violating R.C. 4903.10. The Commission denied rehearing on this assignment of error in the Eighth Entry on Rehearing, finding that the assignment of error was moot and that the plain language of R.C. 4903.10 does not limit “to matters raised on rehearing” the Commission’s authority to modify the original order. Eighth Entry on Rehearing at ¶ 21, 31-32 (citing *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 15, 460 N.E.2d 1108, 10 O.B.R. 166 (1984) (“Following a rehearing, the commission need only be *of the opinion* that the original order should be changed for it to modify the same.” (Emphasis sic.)) Subsequently, OCC alleged in the fifth assignment of error in its September 9, 2022 application for rehearing that, in the Eighth Entry Rehearing, the Commission erred when it unreasonably and unlawfully construed R.C. 4903.10 to allow rehearing on matters not specified in applications for rehearing under Commission review. The Commission denied rehearing on this assignment of error in the Ninth Entry on Rehearing. Ninth Entry on Rehearing at ¶ 23, 35-39. In its November 4, 2022 application for rehearing, OCC seeks rehearing on an issue for which the Commission has denied rehearing twice in this proceeding; accordingly, we find that this assignment of error is improper and should be denied.

{¶ 37} Moreover, the Commission finds that, even if this assignment of error was not improper, the assignment of error would be denied. OCC argues that R.C. 4903.10 is unambiguous and, therefore, must be applied as written and not be interpreted. We agree that R.C. 4903.10 is unambiguous and that the plain language must be applied as written. However, the plain language of the statute does not limit the Commission’s authority to modify the original order “to matters raised on rehearing.” The plain language of R.C.

4903.10 states that “[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.” R.C. 4903.10 (emphasis added). OCC simply ignores this language in R.C. 4903.10.

{¶ 38} OCC further argues in support of this assignment of error that the Supreme Court of Ohio’s decision in *Doc Goodrich & Sons, Inc. v. Pub. Util. Comm.*, 53 Ohio St.2d 70, 372 N.E.2d 354 (1978) (*Doc Goodrich*) ties the Commission’s rehearing duties to a review of the issues which were raised on rehearing. OCC relies upon the language of the syllabus, which states:

When the Public Utilities Commission has granted a rehearing under R.C. 4903.10, it may analyze the evidentiary record to determine whether, on a proper view of the law, there was any evidence to support its ultimate findings on the issues being reheard; and it may assign the task of analyzing the record to its examiner pursuant to R.C. 4901.18.

Doc Goodrich, syllabus ¶1.

OCC posits that the Commission misconstrued *Doc Goodrich* in the Ninth Entry on Rehearing by relying upon language in the Court’s decision, which OCC dismisses as mere dicta, rather than upon the syllabus of the decision; OCC contends that the syllabus controls over dicta.

{¶ 39} We believe that the actual language of the Court’s decision in *Doc Goodrich* deserves more respect than OCC’s summary dismissal as mere dicta. In *Doc Goodrich*, the Court held that “[s]ince the order of January 15, 1976, did not enlarge the issues on rehearing, the court need not consider whether the commission can lawfully broaden the scope of a rehearing once the time for granting a rehearing under R.C. 4903.10 has expired.” *Doc Goodrich*, 53 Ohio St.2d at 72. We are not persuaded that this language, which defines the scope of the issues decided by the Court, is mere dicta. Further, we are not persuaded

that the language relied upon by the Commission is in conflict in any way with the syllabus by the Court. The simple fact is that, in *Doc Goodrich*, the Court rejected the claim by appellant that the Commission had illegally expanded the scope of the rehearing, holding that “[t]his claim is without merit. The order which granted the rehearing specified the issues to be considered. *This order did not expand the scope of the issues previously considered.*” *Id.* (emphasis added). Bearing in mind that the Court had explicitly ruled in *Doc Goodrich* that the Commission had not enlarged scope of the issues on rehearing, there is no reason to conclude that the syllabus is inconsistent with the finding by the Court that “the court need not consider whether the commission can lawfully broaden the scope of a rehearing once the time for granting a rehearing under R.C. 4903.10 has expired.” *Id.*

C. OCC’s second assignment of error should be denied.

{¶ 40} In its second assignment of error, OCC claims that the Commission erred, violating R.C. 4903.09, when it unlawfully and unreasonably claimed, without evidence and sound reasoning, that it approved AES Ohio’s tariffs under authority independent of the rehearing statute.

{¶ 41} Initially, the Commission finds that this assignment of error should be denied because we previously determined that the issue was moot, and OCC never sought rehearing on that ruling. As noted above, in its application filed on September 9, 2022, OCC claimed that the Commission erred, in the Eighth Entry on Rehearing, when it unreasonably and unlawfully construed R.C. 4903.10 to allow rehearing on matters not specified in applications for rehearing under Commission review. In the Ninth Entry on Rehearing, we found that rehearing on this assignment of error should be denied. OCC even acknowledges that the Commission, in the Eighth Entry on Rehearing, had denied as moot OCC’s second assignment of error in its July 15, 2022 application for rehearing, in which OCC claimed that Commission erred by misusing the statutory rehearing process to change its ruling on a matter not specified in the applications for rehearing that were under review. Further, in the Ninth Entry on Rehearing, the Commission found that OCC’s arguments continued to be moot because, in the Eighth Entry on Rehearing, the Commission had granted OCC’s

application for rehearing and vacated the provisions of the Seventh Entry on Rehearing which OCC objected to in its July 15, 2022 application for rehearing. OCC never challenged the Commission's determination in either the Eighth Entry on Rehearing or the Ninth Entry on Rehearing that OCC's assignments of error were moot.

{¶ 42} Instead of filing for rehearing on the Commission's ruling that the assignments of error were moot, OCC challenges the Commission's observation, in a footnote, that the Commission did not concede to OCC's characterization of the Commission's action. Specifically, in the footnote, we stated that:

In determining that OCC's assignment of error was moot, the Commission did not concede that OCC's characterization of the Seventh Entry on Rehearing was correct. Although the order was plainly styled "Seventh Entry on Rehearing," the order consisted of three distinct parts: (1) acceptance of the withdrawal of applications for rehearing; (2) the now-vacated approval of the proposed tariffs; and (3) granting a stay requested by OCC. Only the first part of the order was done pursuant to the Commission's authority under R.C. 4903.10. Under the second part, the Commission proceeded with its authority to approve proposed tariffs, independent of the rehearing statute. Further, in the Sixth Entry on Rehearing, the Commission did the exact same thing. The Commission denied the applications for rehearing filed by OCC and AES Ohio, and the Commission approved AES Ohio's proposed tariffs which included the refund language. Sixth Entry on Rehearing at ¶48, 51-53.

Ninth Entry on Rehearing at ¶ 36, fn. 1.

{¶ 43} AES Ohio claims in its memoranda contra the September 9, 2022 application for rehearing that OCC's arguments are contradictory. AES Ohio argues that, under OCC's theory that a document styled as an entry on rehearing must only address applications for rehearing, the Commission's original approval of the proposed revised tariffs in the Sixth Entry on Rehearing would be invalid. *See* Sixth Entry on Rehearing at ¶ 48. AES Ohio

clarifies that the Company does not assert that the approval of the proposed revised tariffs in the Sixth Entry on Rehearing was invalid; instead, AES Ohio simply claims that OCC's arguments are contradictory and flawed.

{¶ 44} The Commission finds that rehearing on this assignment of error should be denied. OCC's arguments promote form over substance. As we acknowledged in the Ninth Entry on Rehearing, the Seventh Entry on Rehearing was plainly styled an "Entry on Rehearing." However, we reject the contention that the Commission was required to act *exclusively* under R.C. 4903.10, our statutory authority for rehearing, simply because the order was styled an "Entry on Rehearing." As we noted above, the Seventh Entry on Rehearing consisted of three distinct parts, and, in each part, the Commission acted under different statutory authority. OCC has never questioned the Commission's statutory authority to either approve tariffs or issue a stay. Moreover, we note that, although we do not often need to rule on other issues in a proceeding in an entry on rehearing, it is not without precedent in complex cases involving multiple entries on rehearing. See *In re Application of Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.*, Case No. 10-176-EL-ATA, Second Entry on Rehearing (Apr. 15, 2010) at 2, 4 (Commission directed the utilities to file revised file tariffs within seven days of issuance of the Second Entry on Rehearing); *In re Dayton Power and Light Co.*, 16-395-EL-SSO, Third Entry on Rehearing (Sept. 19, 2018) at ¶ 83-92, 97 (Commission denied motion to re-open proceedings). Finally, it is well-established that the Commission is vested with the broad discretion to manage its dockets to avoid undue delay and the duplication of effort, including the discretion to decide, how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort. *In re Application of Columbus S. Power Co.*, Case Nos. 11-346-EL-SSO et al., Opinion and Order (Aug. 8, 2012) at 24 (citing *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982)).

{¶ 45} Further, we agree with AES Ohio that OCC's arguments are undermined because the arguments are internally inconsistent. OCC contends that the Commission cannot act under statutory authority independent of the rehearing statute, R.C. 4903.10, in an entry styled as an "entry on rehearing." However, the Commission's *valid approval* of the proposed revised tariffs in the Sixth Entry on Rehearing, which was plainly styled as the "Sixth Entry on Rehearing," is central to OCC's arguments in its applications for rehearing filed on July 15, 2022, September 9, 2022 and November 4, 2022. In addition, in the Seventh Entry on Rehearing, the Commission approved the stay, requested by OCC on May 13, 2022, on further proceedings related to its notice of termination and withdrawal filed on September 21, 2021. OCC has taken no further action in the docket regarding its notice of termination and withdrawal, apparently in reliance upon the stay even though the stay was granted by the Commission in the Seventh Entry on Rehearing.

III. ORDER

{¶ 46} It is, therefore,

{¶ 47} ORDERED, That the application for rehearing filed by OCC on November 4, 2022, be denied. It is, further,

{¶ 48} ORDERED, That a copy of this Tenth Entry on Rehearing be served upon each party of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair
M. Beth Trombold
Daniel R. Conway
Dennis P. Deters

Recusal:

Lawrence K. Friedeman

GAP/hac

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**Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-
UNC**

Summary: Entry on Rehearing finding that the application for rehearing filed by Ohio Consumers' Counsel should be denied. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio