

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of Ohio)
Adm. Code Chapter 4901-1 Rules) Case No. 18-275-AU-ORD
Regarding Practice and Procedure Before)
the Commission.)

**APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The PUCO's October 18, 2023 Finding and Order fails consumers by continuing to allow its Staff to discuss cases with PUCO decision makers outside the presence of other parties. For all other parties, including OCC, there are restrictions on such communications (known as the "ex parte" communications). OCC recommended that the PUCO modify its rules to prohibit PUCO Staff from ex parte communication with the Examiners or Commissioners that decide the cases.¹

The PUCO found that its Staff has a "unique role and responsibilities" and thus should not be restricted from discussing cases with the decision makers.² Not only is the PUCO's decision unjust and unreasonable, it failed to comply with Ohio law that requires the PUCO to address arguments that parties raise.³

Accordingly, under R.C. 4903.10, OCC applies for rehearing of the Finding and Order, which was unlawful in the following respects:

¹ OCC and NOAC Reply Comments at 2-3, 9-10; OCC and NOAC Initial Comments at 11.

² Finding and Order at ¶44.

³ R.C. 4903.09.

ASSIGNMENT OF ERROR NO. 1: The PUCO erred in continuing an unfair process that allows unequal treatment of parties by permitting ex parte communications between PUCO Staff and decision makers, which prevents other parties from knowing the basis of the decision in violation of R.C. 4903.09 and Ohio Supreme Court precedent.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred because it failed to adequately explain the basis of its decision and to address OCC's arguments in any substantive manner in violation of R.C. 4903.09 and Ohio Supreme Court precedent.

The reasons for granting this Application for Rehearing are more fully set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Under the PUCO's current ex parte rules, parties may not communicate with PUCO Commissioners and attorney examiners assigned to a case regarding that case's merits unless other parties are advised of such communications or given the opportunity to be present.⁴ The PUCO Staff is not considered a party for purposes of the ex parte rules.⁵

This means that the PUCO Staff can advocate positions different from or in opposition to other parties, yet other parties cannot respond to (or even know) what Staff has advocated to PUCO decision makers. Rather than basing its decisions on evidence of record, the PUCO can make decisions based on its off-the-record discussions with Staff. That is unfair. And it is contrary to R.C. 4903.09, which requires PUCO decisions to be transparent and based on record evidence.

To ensure fairness and transparent decision-making in PUCO proceedings, the PUCO should grant OCC's Application for Rehearing consistent with the recommendations below.

⁴ O.A.C. 4901-1-09.

⁵ O.A.C. 4901-1-10(C).

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The PUCO erred in continuing an unfair process that allows unequal treatment of parties by permitting ex parte communications between PUCO Staff and decision makers, which prevents other parties from knowing the basis of the decision in violation of R.C. 4903.09 and Ohio Supreme Court precedent.

Under R.C. 4903.09, the PUCO must set forth findings based on the record in the proceeding.⁶ However, O.A.C. 4901-1-10(C) allows the PUCO to bypass this requirement, because the PUCO Staff is not a party when it comes to the ex parte communication rules. The Ohio Supreme Court dealt with the inherent unfairness of this rule in *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 706 N.E.2d 1255, when it found that the PUCO violated R.C. 4903.09 by relying on information from the PUCO Staff that was not contained within the record.⁷

In *Tongren*, OCC challenged the PUCO's order as being unsupported by the record. The Court ruled that the PUCO had to provide in sufficient detail, the facts in the record upon which the order was based, as well as the reasoning followed in reaching its conclusion.⁸ The PUCO implicitly relied on ex parte communications with Staff after Staff's discussions with the utility for its "findings."⁹ The Court stated, "It is clear from *** the Finding and Order that the commission accepted its staff's recommendations and adopted as its own various of its staff's findings. However, there is nothing in the record

⁶ *In re Suvon, L.L.C.*, 166 Ohio St.3d 519, 526, 2021-Ohio-3630.

⁷ *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 at 89.

⁸ *Id.*

⁹ *Id.*

below to evince the bases for the commission's acceptance of such recommendations and adoption of such findings.”¹⁰

If the PUCO Staff in *Tongren* had been subject to the PUCO's ex parte rules, it is highly doubtful that this issue would have been before the Court. The fact is, to this day, the PUCO still relies on off-the-record ex parte communications with Staff in some of its rulings.¹¹ Modifying O.A.C. 4901-1-10(C) to make PUCO Staff parties for purposes of the PUCO's ex parte rules would eliminate the unfair and unequal treatment of other parties and facilitate an open and transparent process leading to PUCO decisions based on record evidence and findings therefrom as required by R.C. 4903.09

The PUCO Staff should be made parties for purposes of the PUCO's ex parte rules. For these reasons, the PUCO's Finding and Order is unreasonable and unlawful. Rehearing should be granted to modify the rule consistent with OCC's recommendation.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred because it failed to adequately explain the basis of its decision and to address OCC's arguments in any substantive manner in violation of R.C. 4903.09 and Ohio Supreme Court precedent.

The PUCO ignored OCC's recommendations. Consequently, the Finding and Order is unlawful.

Applying R.C. 4903.09, the Supreme Court of Ohio has found unlawful PUCO decisions in which the PUCO failed to address a party's arguments. In *In re Fuel Adjustment Clauses for Columbus S. Power Co. and Ohio Power Co.*, the Court found: “AEP is correct that the commission failed to address its arguments in any substantive

¹⁰ *Id.*

¹¹ See *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set Rider DS*, Case No. 23-126-EL-RDR, Finding and Order at ¶ 12 (October 4, 2023).

manner. Accordingly, we remand the cause to correct this error.”¹² This decision was based on the Court’s finding that, under R.C. 4903.09, the PUCO “must explain its decisions” and cannot make “summary rulings.”¹³

The PUCO Finding and Order violates R.C. 4903.09 as applied in binding Supreme Court precedent. OCC recommended the PUCO modify O.A.C. 4901-1-10(C) to recognize Staff as a party for purposes of the prohibitions in O.A.C. 4901-1-09 on certain ex parte communications.¹⁴ The PUCO did not address OCC’s arguments in any substantive manner. Instead, the PUCO stated only that “Because of Staff’s unique role and responsibilities, the recommendations to prohibit Staff from ex parte communications with the ALJ or Commissioners...are, therefore, denied.”¹⁵ This is the type of “summary ruling,” which R.C. 4903.09 prohibits,¹⁶ because the PUCO did not substantiate its claim that PUCO Staff’s role is unique from that of other parties, especially concerning ex parte communications.

The only “unique role and responsibilities” that the PUCO identified are those functionally shared by other parties. The PUCO noted that Staff is required, in many cases, to file a report of investigation, which may be subject to motions to strike, and to testify if subpoenaed.¹⁷ But, these functions are not unique to Staff.

¹² *In re Comm. Rev. of the Capacity Charges of Ohio Power Co.*, 147 Ohio St.3d 59, 2016-Ohio-1607, 60 N.E.3d 1221, ¶ 51; *see also In re Suvon, L.L.C.*, 166 Ohio St.3d 519, 524-28 (2021).

¹³ *Id.*

¹⁴ OCC and NOAC Reply Comments at 2-3, 9-10; OCC and NOAC Initial Comments at 11.

¹⁵ Finding and Order at ¶44.

¹⁶ *See In re Suvon, L.L.C.*, 166 Ohio St.3d 519, 526, 2021-Ohio-3630.

¹⁷ Finding and Order at ¶44.

A report of investigation states Staff's position and encourages the PUCO to adopt it. Other parties encourage the PUCO to adopt their positions, too, by filing briefs and comments. Like Staff's investigation reports, briefs and comments are subject to motions to strike. And other parties may be required to respond to subpoenas by proffering witnesses to testify at hearing, just as Staff must. The aspects of Staff's role the PUCO identified as unique are effectively shared by other parties. So, the Finding and Order fails to substantiate its only reason (that Staff has a unique role and responsibility) for denying OCC's recommendation that PUCO Staff be prohibited from certain ex parte communications. This makes the Finding and Order a "summary ruling," impermissible per R.C. 4903.09.

The Finding and Order also does not address why any purported uniqueness of Staff's role justifies its exemption from limits on ex parte communication. The purpose of limiting ex parte communication is to "prevent a party from gaining an unfair advantage over an opposing party through...communications with the decision maker."¹⁸ This unfair advantage occurs when a litigant can persuade a decision maker using additional or different arguments than those filed publicly, without giving other parties an opportunity to respond with counterarguments or evidence. Again, the PUCO Staff's role in PUCO proceedings is to take a position and advocate that the PUCO adopt it.

It would be unfair for the PUCO Staff (and Staff alone) to advance its positions using off-record arguments to which no party can reply. None of this is changed by the (so-called) uniqueness the Finding and Order attributed to PUCO Staff's role. For failing

¹⁸ *In re E. Ohio Gas Co.*, 2023-Ohio-3289, ¶ 36.

to discuss why PUCO Staff's role justifies ex parte communication between Staff and decision makers, the Opinion & Order is a "summary ruling" that R.C. 4903.09 prohibits.

R.C. 4903.09 and binding Supreme Court of Ohio precedent requires the PUCO to address OCC's arguments. The PUCO did not. Instead, the PUCO ignored OCC's positions and thereby ignored this important issue for Ohio consumers. The PUCO's Finding and Order is unreasonable and unlawful. Rehearing should be granted.

III. CONCLUSION

To ensure fair and transparent decision-making in PUCO proceedings, the PUCO should grant rehearing and reject or modify the Finding and Order in this case. The PUCO should accept OCC's recommendations that PUCO Staff be considered a party for the purposes of ex parte communications.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 17th day of November 2023.

/s/ Angela D. O'Brien
Angela D. O'Brien
Deputy Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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