

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**DUKE ENERGY OHIO, INC.'S MEMORANDUM
CONTRA THE APPLICATION FOR REHEARING FILED BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The statutory representative of residential customers in Ohio has sought rehearing in this proceeding, in spite of a well-reasoned, thoughtful, and clear order issued by the Public Utilities Commission of Ohio (Commission).

Namely, the Office of the Ohio Consumers' Counsel (OCC) asks that the Commission reverse its October 18, 2023 Finding and Order (Order) as it relates to Staff's ability to discuss cases with Commission "decision makers outside the presence of other parties."¹ OCC argues in favor of rehearing on two grounds: first, OCC argues that the Commission erred in continuing its longstanding practice of allowing communications between Staff and members of the Commission both inside and outside the presence of other parties to a proceeding, and second, OCC argues that the Commission should grant rehearing because it did not explain why it decided against upending this longstanding practice.

Both of these arguments fail to demonstrate why rehearing should be granted in this instance.

¹ OCC Application for Rehearing at 2.

II. LAW AND ARGUMENT

Pursuant to R.C. 111.15(B) and R.C. 106.03(A), all state agencies must conduct a review of their rules every five years to determine whether to continue without change or amend those rules. In keeping with this practice, on February 13, 2018, the Commission initiated the underlying docket “to review Ohio Adm.Code Chapter 4901-1, Administrative Provisions and Procedures; Ohio Adm.Code Chapter 4901:1-1, Utility Tariffs and Underground Utility Protection Service Registration; Ohio Adm.Code Chapter 4901-3, Open Commission Meetings; and Ohio Adm.Code Chapter 4901-9, Complaint Proceedings.”² On December 4, 2019, the Commission issued an Entry which contained the proposed changes to the rules identified above, as well as establishing a procedural schedule to receive comments upon the same by January 13, 2020, with replies due February 10, 2020. A large number of parties participated in the comment and reply comment process, including Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company), and many other electric and gas distribution utilities, as well as other interested groups.³

On October 18, 2023, the Commission issued its Finding and Order, reviewing all of the comments filed in the underlying docket, as well as the proposed rule changes, and determining

² Order at 2.

³ Timely comments were filed by a large and varied group of parties, including the Ohio Farm Bureau Federation (OFBF), Ohio Telecom Association (OTA), Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy), Ohio Power Company (AEP Ohio), Industrial Energy Users-Ohio (IEU-Ohio), The East Ohio Gas Company d/b/a Dominion Energy Ohio (Dominion), Environmental Law & Policy Center (ELPC), Interstate Gas Supply, Inc. (IGS), Columbia Gas of Ohio, Inc. (Columbia), Duke Energy Ohio, Inc. (Duke), Ohio Consumers’ Counsel (OCC), Northwest Ohio Aggregation Coalition (NOAC), Northeast Ohio Public Energy Council (NOPEC), Edgemont Neighborhood Coalition (ENC), and Four A Energy Consulting Services, LLC (Four A). Reply comments were filed on February 10, 2020, by OTA; Ohio Energy Group (OEG); IEU-Ohio; AEP Ohio; FirstEnergy; Ohio Manufacturers’ Association Energy Group (OMAEG); The Dayton Power and Light Company (AES Ohio); IGS; collectively by OCC and NOAC; collectively by Columbia, Dominion, Duke, and Vectren Energy Delivery of Ohio, Inc. (Gas Companies); and collectively by Coalition on Homelessness and Housing in Ohio, Tri-County Community Action Organization, The Ohio Poverty Law Center, The Legal Aid Society of Cleveland, Pro Seniors, Inc., and Southeastern Ohio Legal Services (Consumer Groups).

which changes were to be adopted, and which would not. This is the Order from which OCC now seeks rehearing.

In its First Assignment of Error, OCC rehashes the arguments it made during the initial and reply comment periods in this case. In its initial comments, OCC recommended that the Commission add language to O.A.C. 4901-1-9 to extend the *ex parte* communication rule to “anyone else reasonably expected to be involved in the decisional process of the proceeding.”⁴ Likewise, OCC now argues that “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.”⁵ In arguing in favor of rehearing, OCC cites *Tongren*, however OCC’s attempts to compare the underlying case to the record set forth in *Tongren* are not rooted in fact, not helpful to the Commission’s decision on rehearing, and distinguishable. The Supreme Court’s decision in *Tongren* makes clear the manner in which the record was lacking in that case, stating “[t]he record in the first case consists of the companies' joint application for approval of the merger; comments filed by OCC and another interested party; the companies' responses to those comments; and correspondence from the companies to the commission's staff . . . [t]he commission's staff filed no comments, testimony, or report.”⁶ *Tongren* was not about *ex parte* communications, but record deficiency. No one is arguing in this rule review docket that *ex parte* communications can or should trump Staff Reports, comments, or other docket entries by Commission Staff. Moreover, OCC’s statement that “[i]f 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,” is pure conjecture on its part, unhelpful to the Commission’s consideration of rehearing, and not rooted in reality.

⁴ Comments on the PUCO’s Rules of Practice by The Office of the Ohio Consumers’ Counsel and The Northwest Ohio Aggregation Coalition (“Consumer Groups 18-275 Comments”) at pp. 4-6 (January 13, 2020).

⁵ OCC Application for Rehearing at 2.

⁶ *Tongren v. Public Utilities Commission of Ohio*, 85 Ohio St. 3d 87, 90.

OCC goes on to further muddy the waters, by citing in a footnote to a recent distribution storm rider (Rider DSR) audit proceeding for Duke Energy Ohio in which OCC is also seeking rehearing based, at least partially, again on its interpretation of *Tongren*.⁷ In its Application for Rehearing in the underlying case OCC claims that “to this day, the PUCO still relies on off-the-record *ex parte* communications with Staff in some of its rulings.”⁸ For this statement, OCC cites to Duke Energy Ohio’s Rider DSR proceeding. This statement by OCC, that in Rider DSR the Commission relied upon *ex parte* communications in issuing its Order, is not based in fact, not in the least.

At risk of belaboring OCC’s misleading argument further, clarification is required. In Rider DSR, Staff issued a Staff Report with certain findings related to its review of Duke Energy Ohio’s Rider DSR for calendar year 2022. Staff had certain disallowance determinations in its Staff Report that the Company sought to clarify with the submission of additional information in its Initial Comments to the Staff Report, as well as in communications to Staff. In response, in Rider DSR Staff issued an *updated and revised Staff Report recommendation*, which cited to its discussions with the Company as well as its review of the Company’s Initial and Reply Comments in that case, and exhibits thereto. Neither the Commission Order in Rider DSR nor Staff’s updated Staff Report which the Commission relied upon in coming to its decision in that case cited to any *ex parte* communications between the Commission and its Staff, the very subject matter upon which OCC now seeks rehearing in the present case. In Duke Energy Ohio’s Rider DSR, Staff put its updated recommendations onto the docket for the Commission and all parties’ review, which is the near antithesis of an *ex parte* communication. Moreover, the Commission, in its Rider DSR

⁷ See *In the Matter of the Review of Duke Energy Ohio, Inc.’s Distribution Storm Rider*, Case No. 23-126-EL-RDR, OCC’s Application for Rehearing at 4 (November 3, 2023).

⁸ OCC Application for Rehearing at 3.

decision, did not cite to or rely upon private communications with or from Staff. The Commission cited Staff’s docket entry on this subject—its updated Staff Report and Recommendation. Even the paragraph from the Rider DSR decision which OCC claims supports its position in its current Application for Rehearing (its only support for this concept, nonetheless) does not indicate that an *ex parte* communication between Staff and the Commission took place at all. That paragraph simply states: “the Commission finds that Duke’s application for recovery . . . should be approved, subject to Staff’s recommendations. As explained by Duke and Staff, storms eligible for recovery can all typically be found on the Company’s Rule 10 Report, but occasionally eligible storms may be excluded from that particular listing. The Commission is persuaded, after Staff’s confirmation, that such a situation took place here.”⁹ The confirmation in question is not some *ex parte* communication with Staff, but Staff’s own *docketed* confirmation in the form of an updated Staff Report—the near opposite of an *ex parte* communication. OCC’s citation to Rider DSR does not support the assertion it seeks to make in the current case, not even close. Its First Assignment of Error is without merit.

OCC argues in its Second Assignment of Error that the Commission did not adequately explain the basis of its decision to maintain its longstanding practice as it relates to *ex parte* communications. OCC takes issue with the Commission’s description of Staff’s position in Commission proceedings as one of a “unique role and responsibility[y]”¹⁰ and argues that the Commission failed to address OCC’s arguments contained in its various comments. This argument is likewise without merit.

⁹ Rider DSR, Finding and Order at ¶ 12.

¹⁰ OCC Application for Rehearing at 3.

In its Order, the Commission explained its reasoning for upholding the role and responsibilities that Staff of the Commission has in the various proceedings before it. OCC may disagree with the Commission's findings, but the Commission did adequately and thoroughly explain its reasoning when ruling as such. The Commission reviewed the arguments made by the many (many) commenting parties in this case and indicated that it "agrees with the stakeholders who responded to OCC and NOAC's proposals."¹¹ Not only that, the Commission went on to clarify exactly why OCC's proposals were not necessary or reliable: "The phrase "anyone else reasonably expected to be involved in the decisional process" does not provide sufficient clarity and would likely cause confusion for stakeholders. Additionally . . . *ex parte* communications are communications between a decision maker and a party. Although Staff may provide analysis in the form of reports, Staff is not a decision maker in Commission proceedings. Thus, we decline to expand the rule as proposed."¹² Given the thorough review of arguments, and exact reasoning on why it declined to adopt OCC's position, the Commission provided its reasoning, support, and justification for dismissing OCC's rule review comments. This is not the type of reasoning that should be subject to rehearing for lack of support. OCC's arguments to the contrary in its Second Assignment of Error are likewise without merit.

For the above reasons, and as further demonstrated below, the Application for Rehearing should be denied.

III. CONCLUSION

For the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission deny rehearing in the underlying matter.

¹¹ Order at 15.

¹² *Id.*

Respectfully submitted,
DUKE ENERGY OHIO, INC.

/s/ Elyse H. Akhbari

Rocco O. D'Ascenzo (0077651)

Deputy General Counsel

Jeanne W. Kingery (0012172)

Associate General Counsel

Larisa M. Vaysman (0090290)

Senior Counsel

Elyse H. Akhbari (0090701) (Counsel of Record)

Senior Counsel

Duke Energy Business Services LLC

139 E. Fourth Street, 1303-Main

Cincinnati, Ohio 45201-0960

(513) 287-4320 (telephone)

Rocco.D'Ascenzo@duke-energy.com

Jeanne.Kingery@duke-energy.com

Larisa.Vaysman@duke-energy.com

Elyse.Akhbari@duke-energy.com

Willing to accept service via e-mail

Attorneys for Duke Energy Ohio, Inc.

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John.jones@ohioattorneygeneral.gov
cendsley@ofbf.org
lcurtis@ofbf.org
Jeanne.kingery@duke-energy.com
Fdarr2019@gmail.com
edanford@firstenergycorp.com
cmblend@aep.com
rglover@mcneeslaw.com
whitt@whitt-sturtevant.com
fykes@whitt-sturtevant.com
nvijaykar@elpc.org
michael.nugent@igs.com
trhayslaw@gmail.com
kboehm@bkllawfirm.com
ctavenor@theOEC.org
glpetrucci@vorys.com

sseiple@nisource.com
josephclark@nicsource.com
rocco.dascenzo@duke-energy.com
christopher.hollon@aes.com
larisa.vaysman@duke-energy.com
stnourse@aep.com
mpritchard@mcneeslaw.com
andrew.j.campbell@dominionenergy.com
kennedy@whitt-sturtevant.com
rkelter@elpc.org
bethany.allen@igs.com
joe.oliker@igs.com
mkurtz@bkllawfirm.com
jkylercohn@bkllawfirm.com
christopher.hollon@aes.com

Attorney Examiners:

Patricia.schabo@puco.ohio.gov
Jacqueline.St.John@puco.ohio.gov

/s/ Elyse H. Akhbari
Elyse H. Akhbari

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Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra The Application For Rehearing Filed by The Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tammy M. Meyer on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco and Akhbari, Elyse Hanson and Kingery, Jeanne and Vaysman, Larisa.