

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan)
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) **Case No. 14-1297-EL-SSO**
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OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM CONTRA THE APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL

I. INTRODUCTION

After receiving eleven applications for rehearing on its Fifth Entry on Rehearing (the “November 2016 Applications for Rehearing”) and hundreds of pages of related briefing, the Commission, in its Sixth Entry on Rehearing, granted those applications for further consideration.¹ In its Application for Rehearing on the Sixth Entry on Rehearing, the Office of the Ohio Consumers’ Counsel (“OCC”) raises the same tired and previously rejected arguments (albeit in highly abbreviated fashion) against the Distribution Modernization Rider (“Rider DMR”). Ironically, OCC argues that the Commission erred in *granting* OCC’s November 2016 Application for Rehearing. Further, OCC criticizes the Commission, a deliberative body, for acting in a deliberative fashion. These arguments are meritless. The Commission’s decision to take the Companies’ and intervenors’ November 2016 Applications for Rehearing under further

¹ Sixth Entry on Rehearing, ¶¶ 12-14.

consideration is consistent with Ohio Supreme Court precedent and the Ohio Revised Code. OCC's Application for Rehearing on the Sixth Entry on Rehearing should be denied.

II. ARGUMENT

A. OCC's First Assignment of Error is Meritless and Raises Nothing New.

1. OCC Wrongly Complains That the Commission Erred in Not Granting Rehearing, Despite the Commission's Decision to Grant Rehearing.

OCC argues that the Commission erred in "not granting and holding rehearing on the matters specified in OCC's" November 2016 application for rehearing.² To the contrary, the Commission did, in fact, grant OCC's November 2016 application for rehearing for further consideration.³ OCC's application for rehearing remains pending before the Commission, and OCC has not been denied any relief that it requested in its application for rehearing. As a result, OCC is asking for rehearing on the *grant* of its November 2016 application. Further, OCC's First Assignment of Error is not authorized by R.C. 4903.10 under which a "party... may apply for a rehearing in respect to any matters determined in the proceeding." The Sixth Entry on Rehearing did not determine any matters in this proceeding, let alone any matters adverse to OCC. Thus, OCC's First Assignment of Error is baseless.

2. OCC Raises the Very Same Arguments Regarding Rider DMR That the Commission Has Already Rejected.

Even if the Commission had acted adversely to OCC on its November 2016 Application for Rehearing, OCC's instant application falls short of the mark. Under the Ohio Revised Code, OCC was required to "set forth specifically the ground or grounds on which [it] considers the

² Office of Consumers' Counsel Memorandum in Support of Application for Rehearing ("OCC AFR"), p. 3.

³ Sixth Entry on Rehearing, ¶¶ 12-14.

[Sixth Entry on Rehearing] to be unreasonable or unlawful.”⁴ It has not done so here. Instead, OCC offers perfunctory arguments in support of its previously rejected opposition to Rider DMR.⁵ Indeed OCC reiterates the same arguments here in three paragraphs without any citation to the factual record or to legal authority.⁶ These arguments add nothing new here. It is well settled that the Commission will deny applications for rehearing that “simply reiterate[] arguments that were considered and rejected by the Commission.”⁷ The Commission should reject OCC’s arguments accordingly.

B. The Commission’s Decision to Give Further Consideration to Eleven Applications for Rehearing on Its Fifth Entry on Rehearing and Hundreds of Pages of Related Briefing Is Consistent with Ohio Law.

OCC’s Second Assignment of Error argues that the Commission has failed to rule on OCC’s November 2016 application for rehearing “without unreasonable delay,” preventing OCC from seeking timely review of the Commission’s Order before the Ohio Supreme Court.⁸ But OCC’s real grievance has nothing to do with the facts of this case or with the Commission’s

⁴ R.C. 4903.10.

⁵ OCC AFR, pp. 3-4.

⁶ *Id.*

⁷ *Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, 2011 Ohio PUC LEXIS 1276, Entry on Rehearing, at *6-7 (Nov. 29, 2011). *See also In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, 2011 Ohio PUC LEXIS 543, Entry on Rehearing, at *15-16 (May 4, 2011) (rejecting an application for rehearing that “raised nothing new”); *City of Reynoldsburg v. Columbus Southern Power Co.*, Case No. 08-846-EL-CSS, 2011 PUC LEXIS 680, Entry on Rehearing, at *19-20 (June 1, 2011) (holding that no grounds for rehearing existed where no new arguments had been raised); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, No. 08-1344-GA-EXM, 2011 Ohio PUC LEXIS 1184, Entry on Rehearing, at *9-10 (Nov. 1, 2011) (denying application for rehearing because applicant “raised nothing new on rehearing that was not thoroughly considered” in the Commission order at issue).

⁸ OCC AFR, pp. 4-8.

action here. OCC's complaint is with Ohio Supreme Court precedent that vests the Commission with discretion to grant applications for rehearing for further consideration.⁹ The facts of the present case provide ample support for the Commission's decision to do so here. On November 14, 2016, the Companies and intervenors submitted eleven applications for rehearing accompanied by hundreds of pages of related briefing challenging the Commission's Fifth Entry on Rehearing. Over the next two weeks, the Companies and intervenors submitted additional hundreds of pages of briefing responsive to the eleven applications for rehearing. On December 7, 2016, faced with this extensive briefing on a variety of complex issues, the Commission reasonably granted the parties' applications for rehearing for further consideration.¹⁰ This decision was consistent with *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*¹¹ and the Commission's responsibility as a deliberative body to give due consideration to the complex issues before it. OCC's claim of error is therefore without merit.

OCC nonetheless emphasizes that, because the Commission's Fifth Entry on Rehearing remains in force, the Companies will be able to collect Rider DMR charges without any chance of refund to consumers if OCC is successful on its challenge to Rider DMR.¹² Again, OCC's dispute is not with the Commission's action, but with well settled Ohio law. Unambiguous and long-standing Ohio Supreme Court precedent prohibits retroactive ratemaking, including a

⁹ See *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, 2004-Ohio-2894, ¶ 19, 102 Ohio St. 3d 301, 304, 809 N.E.2d 1146, 1149 ("The commission acted within 30 days of the filing of the applications when it granted the applications on February 11 for the limited purpose of allowing additional time to consider them. Nothing in R.C. 4903.10 or precedent specifically prohibited the commission from so proceeding.").

¹⁰ Sixth Entry on Rehearing, ¶¶ 12-14.

¹¹ See *supra* n.9.

¹² OCC AFR, pp. 6-7.

refund of funds collected under approved and filed rates charged during the appeal of a Commission order.¹³

The Commission did not err in granting the parties' applications for rehearing to take the matters raised under consideration in a deliberative fashion. Here, the Commission is faced with a variety of complex issues and extensive briefing that was completed *less than two months ago*. OCC has offered no evidence that the Commission will not give these disputes due consideration and resolve them in a timely fashion. OCC's Second Assignment of Error should be denied accordingly.

III. CONCLUSION

For the foregoing reasons, the Commission should deny OCC's Application for Rehearing.

¹³*In re Application of Columbus S. Power Co.*, 2014-Ohio-462, ¶ 49, 138 Ohio St. 3d 448, 460, 8 N.E.3d 863, 874 (collecting cases).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 17th day of January, 2017. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via email.

/s/ David A. Kutik

David A. Kutik

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Summary: Memorandum Contra the Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company