BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company for Approval of its Energy Efficiency/Peak Demand Reduction Portfolio Plan.	))))	Case No. 16-574-EL-POR

MEMORANDUM CONTRA THE APPLICATION FOR REHEARING FILED BY THE ENVIRONMENTAL LAW & POLICY CENTER, NATURAL RESOURCES DEFENSE COUNCIL, OHIO ENVIRONMENTAL COUNCIL, AND ENVIRONMENTAL DEFENSE FUND
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

There should be a limit on what Ohioans pay to utilities for utility-run energy efficiency programs. And the PUCO wisely reached that conclusion. In this case, the PUCO approved a settlement[1] that protects customers from paying too much for energy efficiency by limiting the amount that AEP Ohio can charge them for annual program costs and profits (shared savings). The PUCO reasonably balanced the interests of customers and all intervening parties by approving, without modification, the unopposed Settlement. The PUCO should continue its course of limiting what Ohioans pay on their electric bills and reject the rehearing request of the environmental groups.

The Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Environmental Defense Fund signed the Settlement.[2]

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[1] Stipulation and Recommendation (Dec. 9, 2016) (the "Settlement").

[2] *See* Settlement at 16-17 (identifying Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Environmental Defense Fund (collectively, the "Environmental Groups") as signatory parties to the Settlement).

These Environmental Groups do not believe that the PUCO erred in approving the Settlement, nor do they ask the PUCO to modify the Settlement in any way.[3]

Instead, the Environmental Groups ask the PUCO to modify the language of the January 18, 2017 Opinion and Order solely to remove the following two sentences (the "Cost Cap Sentences"), the removal of which would not affect the PUCO's decision:

> The addition of an annual cost cap is a reasonable response to concerns which have been raised regarding potential increases in the costs of the EE/PDR programs, and the annual cost cap should incent AEP Ohio to manage the costs of the programs in the most efficient manner possible. In light of the importance of the annual cost cap, the Commission notes that we will be reluctant to approve stipulations in other EE/PDR program portfolio cases which do not include a similar cap on EE/PDR program costs.[4]

This request should be denied because the inclusion of these two sentences does not make the Opinion and Order unjust or unwarranted, as required by R.C. 4903.10(B). And the Environmental Groups' request should be denied because the PUCO's general statement makes sense for several million Ohioans who should have lower electric bills. The PUCO should deny the Environmental Groups' application for rehearing. The PUCO should not change the Opinion and Order.

I. STANDARD OF REVIEW

After an order is entered, intervenors in a PUCO proceeding have a statutory right to apply for rehearing "in respect to any matters determined in the proceeding."[5] An application for rehearing must "set forth specifically the ground or grounds on which the

[3] *See* Environmental Groups' Application for Rehearing at 1, 3, and 7 (Jan. 20, 2017).

[4] Opinion & Order ¶ 32.

[5] R.C. 4903.10.

applicant considers the order to be unreasonable or unlawful."[6] The party applying for rehearing must attach a separate memorandum of support.[7]

In considering an application for rehearing, Ohio Revised Code 4903.10 provides that the PUCO may grant and hold rehearing if there is "sufficient reason" to do so. After such rehearing, the PUCO may "abrogate or modify" the order in question if the PUCO "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted."[8]

The Environmental Groups have not established that there is sufficient reason for rehearing, nor have they established that any part of the Opinion and Order is unjust or unwarranted.

II. ARGUMENT

A. The Cost Cap Sentences are dicta and therefore cannot form the basis for rehearing under R.C. 4903.10 and PUCO precedent.

The Ohio Supreme Court defines dictum as "an incidental and collateral opinion uttered by a judge, and therefore (as not material to his decision or judgment) not binding."[9] A similar statement in a PUCO Order constitutes dictum as well.[10]

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[6] R.C. 4903.10(B). *See also* Ohio Adm. Code 4901-1-35(A).

[7] Ohio Adm. Code 4901-1-35(A).

[8] R.C. 4903.10(B).

[9] *State ex rel. Gordon v. Barthalow*, 150 Ohio St. 499, 505-06 (1948); *State v. Fuller*, 124 Ohio St. 3d 543, 544 (2010) (quoting *State ex rel. Gordon*) (Pfeifer, dissenting).

[10] *See, e.g., In re Review of SBC Ohio's TELRIC Costs for Unbundled Network Elements*, PUCO Case No. 02-1280-TP-UNC, Entry on Rehearing ¶ 53 (Dec. 21, 2004) (referring to statements made in the PUCO's Opinion and Order as dicta); *Youngstown Thermal, Ltd. P'Ship v. Ohio Edison Co.*, PUCO Case No. 93-1408-EL-CSS, Entry on Rehearing ¶ 19 (Oct. 18, 1995) (noting that the Opinion and Order contained dicta).

And because dictum is neither material to the decision nor binding, it cannot form the basis for rehearing under R.C. 4903.10. In *In re Application of the Ohio Bell Telephone Co.*,[11] the City of Cleveland applied for rehearing with respect to statements in a PUCO order regarding burdens of proof.[12] The PUCO swiftly denied the request for rehearing on the grounds that City of Cleveland complained about dicta in the Order: "the fact that this statement is dicta by definition means that rehearing does not lie."[13]

The Environmental Groups' case is no different. The Opinion and Order approved, without amendment, a settlement that the Environmental Groups signed. The PUCO found that the Settlement satisfied each of the three prongs in its three-prong test for settlements: (i) the Settlement was the product of serious bargaining among capable, knowledgeable parties,[14] (ii) the Settlement, as a package, benefits customers and the public interest,[15] and (iii) the Settlement package does not violate any important regulatory principle or practice.[16] The Environmental Groups do not challenge any of these findings.

Indeed, the Environmental Groups stressed, no fewer than four times in their seven-page application for rehearing, that they do not challenge the PUCO's approval of the Settlement and do not ask the PUCO to modify the Settlement in any way:

- "Environmental Intervenors emphasize that we do not challenge the Commission's approval of the December 9, 2016 Stipulation and

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[11] Case No. 84-1435-TP-AIR, Entry on Rehearing (Feb. 4, 1986), 1986 Ohio PUC LEXIS 1504.

[12] *Id.* ¶ 27.

[13] *Id. See also Youngstown Thermal*, Case No. 93-1408-EL-CSS, Entry on Rehearing ¶ 19 (Oct. 18, 1995) (denying rehearing where the issue in question was only mentioned in dictum and it "was not a factor in the Commission's decision").

[14] Opinion and Order ¶ 31.

[15] Opinion and Order ¶ 34.

[16] Opinion and Order ¶ 36.

Recommendation . . . as reasonable under the applicable three-prong test, and we continue to support the Stipulation as filed."[17]

- [W]e do not request that the Stipulation itself be modified in any way."[18]
- "The Environmental Intervenors continue to support the Stipulation as filed in this case, and we do not challenge the Commission's approval of the Stipulation package as reasonable under the applicable three-prong test. Likewise, we do not request that the Stipulation itself be modified in any way."[19]
- "Environmental Intervenors emphasize that we do not challenge the Commission's approval of the Stipulation, and do not request that the Stipulation itself by modified in any way."[20]

By the Environmental Groups' own admission, the Cost Cap Sentences do not alter the PUCO's finding that the Settlement satisfies the PUCO's three-prong test for settlements. Thus, by definition, the Cost Cap Sentences are dicta and they cannot render the Opinion and Order unlawful, unreasonable, unjust, or unwarranted.

B. The Environmental Groups suffer no prejudice as a result of the Cost Cap Sentences.

The Cost Cap Sentences do not bind the PUCO to any future decision in this or any other proceedings. This is evident from the plain language of the Opinion and Order, where the PUCO noted merely that it will be *reluctant* to approve stipulations that do not include an overall cap on the annual costs that customers pay for utility-administered energy efficiency programs and utility profits (shared savings).

Section IV.X. of the Settlement provides that a hearing will be held in 2017 to determine whether the cost cap should be eliminated in plan years 2019 and 2020. Nothing in the Opinion and Order modifies this section of the Settlement. The

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[17] Environmental Groups' Application for Rehearing at 1 (Jan. 20, 2017).

[18] *Id.*

[19] *Id.* at 3.

[20] *Id.* at 7.

Environmental Groups will have an opportunity to present their evidence and arguments to the PUCO in this and other PUCO proceedings. They will have an opportunity to try to convince the PUCO to overcome its reluctance to approve settlements without adequate customer cost constraints. They suffer no prejudice from the PUCO's general statements regarding the direction of its regulatory policies.[21]

C. The Environmental Groups' concern that the Opinion and Order will undermine future settlement negotiations is unfounded.

The Environmental Groups claim that the Opinion and Order will undermine future settlement negotiations in PUCO proceedings.[22] To support this claim, however, they misstate the Opinion and Order. According to the Environmental Groups, "[p]arties may be reluctant to reach agreements where the Commission may dramatically change the outcome without an opportunity for hearing."[23] But here, the PUCO did not "dramatically change" anything. It approved the Settlement in its entirety and without modification.

The Environmental Groups likewise claim that the PUCO "has seemingly given itself *carte blanche* to reach binding, substantive conclusions regarding the merits of individual provisions in a stipulation."[24] But again, the PUCO did not do this here. The PUCO did not reach any binding, substantive conclusions on the cost cap (other than to approve it for 2017 and 2018, something the Environmental Groups do not challenge).

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[21] *Youngstown Thermal, Ltd. P'Ship v. Ohio Edison Co.*, PUCO Case No. 93-1408-EL-CSS, Entry on Rehearing ¶ 19 (Oct. 18, 1995) (denying rehearing because the party that applied for rehearing "was not prejudiced by [the PUCO's] observations" in the Opinion and Order); *In re Application of Black Fork Wind Energy, LLC*, Case No. 10-2865, Entry on Rehearing ¶ 72 (Mar. 26, 2012) (denying application for rehearing where party could not demonstrate any prejudice from the PUCO's ruling).

[22] Environmental Groups' Application for Rehearing at 6.

[23] *Id.*

[24] *Id.* at 6-7.

The PUCO made general comments regarding the direction of its regulatory policy for controlling the amount that customers pay for utility-administered energy efficiency programs. These cannot reasonably be interpreted as "binding, substantive conclusions." There is no basis to conclude that the Opinion and Order will hinder parties' ability to negotiate settlements in future PUCO proceedings. And, in fact, the PUCO's general comments serve the public interest and several million Ohioans who should be paying less, not more, on their electric bills.

D. The PUCO should discourage applications for rehearing that do not request any substantive relief.

The Environmental Groups suggest that an important goal of regulatory proceedings is to avoid "putting undue time and resources into contested litigation."[25] Their application for rehearing, however, does not support this goal. If the PUCO were to grant the Environmental Groups' application for rehearing, it would encourage similar applications for rehearing in the future. Every time a party—even a party that supports the results of an Order in its entirety, as the Environmental Groups do here—felt that some small portion of an Order might be detrimental to its positions in future litigation, it might apply for rehearing and ask to strike individual paragraphs, sentences, or words from the Order. The PUCO should discourage this practice.

III. CONCLUSION

The PUCO should reject the Environmental Groups' application for rehearing and should not change its Opinion and Order.

[25] *Id.* at 6.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra Application for Rehearing was served on the persons stated below via electronic transmission this 30th day of January 2017.

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Summary: Memorandum Memorandum Contra the Application for Rehearing Filed by The Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Environmental Defense Fund by the Office Of The Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.