

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.	) ) )	Case No. 17-0032-EL-AIR
In the Matter of the application of Duke Energy Ohio, Inc., for Tariff Approval.	) )	Case No. 17-0033-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	) )	Case No. 17-0034-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Modify Rider PSR.	) ) )	Case No. 17-0872-EL-RDR
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Amend Rider PSR.	) ) )	Case No. 17-0873-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	) ) )	Case No. 17-0874-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	) ) ) ) ) ) ) ) )	Case No. 17-1263-EL-SSO
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Amend Its Certified Supplier Tariff, P.U.C.O. No. 20.	) ) ) )	Case No. 17-1264-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Vegetation Management Costs.	) ) )	Case No. 17-1265-EL-AAM

In the Matter of the Application of Duke)	
Energy Ohio, Inc. to Establish Minimum)	
Reliability Performance Standards	)	Case No. 16-1602-EL-ESS
Pursuant to Chapter 4901:1-10, Ohio)	
Administrative Code.)	

**MEMORANDUM CONTRA MOTION OF DUKE ENERGY OHIO, INC., TO
STRIKE IMPROPERLY FILED APPLICATION FOR REHEARING AND
REQUEST FOR EXPEDITED TREATMENT
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Duke Energy Ohio, Inc., (“Duke”) is trying to deny consumers a full, fair hearing of the issues in this case. Contrary to the well-established practice before the Public Utilities Commission of Ohio (“PUCO”) and clear statutory authority, Duke asserts that the Office of the Ohio Consumers' Counsel’s (“OCC”) Second Application for Rehearing should be stricken. This is because, according to Duke, the PUCO’s Entry on Rehearing¹ “simply denied rehearing”² and did not make any changes to the original Opinion and Order.³ To protect consumers by allowing them to have a full, fair hearing of the issues in this case, and to effectuate clear statutory authority, the PUCO should deny Duke’s Motion.

¹ See Second Entry on Rehearing (July 17, 2019).

² See, e.g., Motion of Duke Energy Ohio, Inc., to Strike Improperly Filed Application for Rehearing and Request for Expedited Treatment (“Motion”) at 4.

³ See Opinion and Order (December 19, 2018).

II. RECOMMENDATIONS

The PUCO approved a settlement in this case in its December 19, 2019 Opinion and Order.⁴ After parties (including OCC) filed applications for rehearing, the PUCO granted rehearing for further consideration of the issues.⁵ In its Second Entry on Rehearing, the PUCO denied the applications for rehearing.⁶ It did so based on additional and different rationale than set forth in its Opinion and Order.⁷ Accordingly, OCC filed its Second Application for Rehearing on the additional authority the PUCO found to support its December Opinion and Order. Contrary to Duke’s Motion, OCC’s Second Application which addressed the additional and different rationale was properly filed. It should not be stricken. The PUCO should consider OCC’s properly filed application for rehearing and abrogate its order, as OCC requested.

R.C. 4903.10 permits an application for rehearing to be filed “[a]fter *any* order has been made by” the PUCO.⁸ The very case cited by Duke in its Motion confirms this. In that case, the Ohio Supreme Court explained that “[a]s we have held, R.C. 4903.10 permits an application for rehearing after *any* order.”⁹ With certain exceptions,¹⁰ if OCC

⁴ *See id.*

⁵ *See* Entry on Rehearing (February 6, 2019).

⁶ *See* Second Entry on Rehearing.

⁷ *See* OCC’s Second Application for Rehearing (August 16, 2019).

⁸ R.C. 4903.10 (*italics added*).

⁹ *In re Columbus S. Power Co.*, 2011-Ohio-958, ¶12 (2011) (*italics in original; internal quotations and citation omitted*).

¹⁰ For example, challenges to the PUCO’s subject matter jurisdiction. *See, e.g., Longshoremen’s Ass’n v. Davis*, 476 U.S. 380, 387-88 (1986) (state subject matter jurisdiction preempted where federal law vests exclusive jurisdiction over matter in another body); *Shawnee Twp. V. Allen County Budget Comm’n*, 58 Ohio St.3d 14, 15 (1991); *H.R. Options v. Zaino*, 100 Ohio St.3d 373, 374 (2004); *see also Publ’g Group, Ltd. V. Cooper*, 2011 Ohio 2872, para. 7 (Franklin 2011) (“the parties cannot waive subject-matter jurisdiction and may challenge it at any time.”); *State v. Blair*, 2010 Ohio 6310, para. 13 (Hamilton 2010) (“A judgment imposed by a court without subject-matter jurisdiction is void. A party cannot waive subject-

(or any other party) does not raise an issue in an application for rehearing, it loses its right to appeal the issue.¹¹

Here, the Second Entry on Rehearing included new and different reasons for its decision in denying OCC's application for rehearing—reasons that were not included in the original order. As it relates to OCC's Second Application for Rehearing, in the Second Entry on Rehearing the PUCO cited *In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, as precedent supporting denying OCC's application for rehearing.¹² This was the first time the PUCO relied upon the Ohio Power decision as support for its findings in this case. OCC believes that the PUCO's reliance on this case is misplaced, as explained in its Second Application for Rehearing.

If OCC were not allowed to file an application for rehearing—as Duke asserts—then OCC would not be able to appeal the PUCO's reliance on *Ohio Power* in the Second Entry on Rehearing. This is because under R.C. 4903.10, “[n]o party shall in any court urge or rely on the ground for reversal, vacation, or modification not so set forth in the application” for rehearing.¹³ The Ohio Supreme Court's rules further confirm this interpretation by requiring any party, in its notice of appeal, to “identify where in the application for rehearing that was filed pursuant to R.C. 4903.10 the issues to be raised on appeal were preserved.”¹⁴ The PUCO should not deny OCC its statutory right to

matter jurisdiction and may raise the issue at any time.”); *City of Cleveland v. Simpkins*, 192 Ohio App.3d 808, 813 (Cuyahoga 2011) (noting that a party “cannot waive subject matter jurisdiction.”).

¹¹ See R.C. 4903.10 and .11.

¹² Second Entry on Rehearing at 6.

¹³ See also S. Ct. Prac. R. 10.02(A)(2)(b) (requiring all appeals to “identify where in the application for rehearing that was filed pursuant to R.C. 4903.10.

¹⁴ S. Ct. Prac. R. 10.02(A)(2)(b).

appeal by striking an application for rehearing that is required by law to precede such an appeal.

Further, the provisions of R.C. 4903.10 on which Duke relies in its Motion are inapplicable here. It says that the “[c]ritically important” provision of the statute states that “[a]n order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order”¹⁵ By its plain language,¹⁶ this provision of the statute discusses what happens *after* rehearing is *granted* and the original order is abrogated or modified.¹⁷ Here, as Duke well knows,¹⁸ the applications for rehearing before the PUCO were *denied*.

Consumers deserve to have a full, fair hearing on the issues they raise, and OCC must have the ability to appeal the PUCO’s Second Entry on Rehearing. R.C. 4903.10’s plain language facilitates that. Duke’s Motion would deny it. Duke’s Motion should be denied.

III. CONCLUSION

To protect consumers and to effectuate clear statutory language, the PUCO should deny Duke’s Motion.

¹⁵ See Motion at 3.

¹⁶ Statutes should be interpreted based on their plain language. See, e.g., R.C. 1.42; *State ex rel. Choices for South-Western City Schools v. Anthony Jr.*, 28 Ohio St.3d 438, 439 (1986).

¹⁷ See R.C. 4903.10(B).

¹⁸ See Motion at 3.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum Contra has been served upon the below-named persons via electronic transmission this 27th day of August 2019.

/s/ William J. Michael

William J. Michael

Assistant Consumers' Counsel

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Summary: Memorandum Memorandum Contra Motion of Duke Energy Ohio, Inc., to Strike Improperly Filed Application for Rehearing and Request for Expedited Treatment by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.