

**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. )

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

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The charges that consumers pay for their utility service should be determined as part of a fair, just, and reasonable process. Unfortunately for consumers, the Third Entry on Rehearing thwarts a fair, just, and reasonable process, thereby harming consumers.

The Public Utilities Commission of Ohio (“PUCO”) should grant this, the Office of the Ohio Consumers’ Counsel’s (“OCC”) Third Application for Rehearing (“Application”), because the PUCO’s Third Entry on Rehearing<sup>1</sup> is unreasonable and unlawful. It is unreasonable and unlawful for three reasons:

- |                               |   |
|-------------------------------|---|
| <u>Assignment of Error 1:</u> | The PUCO unlawfully and unreasonably ruled that a party can only challenge an entry on rehearing that modifies an earlier order, which is contrary to the plain language of R.C. 4903.10.   |
| <u>Assignment of Error 2:</u> | The PUCO unreasonably found that the Third Entry on Rehearing did not modify an earlier order.  |
| <u>Assignment of Error 3:</u> | In violation of R.C. 4903.09, the PUCO unlawfully and unreasonably did not address OCC’s argument that it was denied due process when, as a result of PUCO delay, OCC’s appeal of the ruling in Case No. 14-841-EL-SSO was dismissed as moot. |

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<sup>1</sup> Case No. 17-32-EL-AIR *et al.*, Third Entry on Rehearing (Sept. 11, 2019).

As explained in more detail in the memorandum of support below, the PUCO should grant rehearing and abrogate its Third Entry on Rehearing, consistent with this Third Application for Rehearing.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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The PUCO’s Third Entry on Rehearing is unlawful and unreasonable in at least three ways. On further rehearing, the PUCO should (i) find that OCC’s Second Application for Rehearing was procedurally proper and lawfully filed under R.C. 4903.10, and (ii) find that OCC was denied due process when its appeal of Duke’s third electric security plan (“ESP”) was mooted by the PUCO’s delay in ruling on OCC’s application for rehearing in that case.

**I. STANDARD OF REVIEW**

Applications for rehearing are governed by R.C. 4903.10, which reads: “After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding.” The PUCO’s Third Entry on Rehearing is an order made by the PUCO. OCC filed a motion to intervene in this proceeding, which was granted. OCC also filed testimony regarding the application, the Settlement, and participated in the evidentiary hearing on the Settlement.

R.C. 4903.10 requires that an application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” In addition, Ohio Adm. Code 4901-1-35(A) states:

“An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating the Third Entry on Rehearing is met here. The PUCO should grant and hold rehearing on the matters specified in this Application, and subsequently abrogate or modify its Third Entry on Rehearing. The PUCO’s ruling was unreasonable or unlawful as described below.

## **II. ERRORS**

**Assignment of Error 1: The PUCO unlawfully and unreasonably ruled that a party can only challenge an entry on rehearing that modifies an earlier order, which contradicts the plain language of R.C. 4903.10.**

In its Third Entry on Rehearing, the PUCO unlawfully and unreasonably ruled that an application for rehearing is only permitted to challenge entries on rehearing that modify earlier orders.<sup>2</sup> This is not the law.

R.C. 4903.10 is the law. And R.C. 4903.10 states: “After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters

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<sup>2</sup> Third Entry on Rehearing ¶ 17 (quotation omitted).

determined in the proceeding.” It does not say: “any order that modifies a prior order”—it says “any order.” It is a fundamental rule of statutory interpretation in Ohio that the PUCO lacks authority to add language to a statute.<sup>3</sup> But that is exactly what it has done here. OCC has a statutory right to file an application on rehearing in response to *any order*. The PUCO cannot add an additional requirement that an entry for rehearing can only be challenged if it modifies a prior order.

In that regard, the PUCO’s citation to *In re Columbus Southern Power Co.* is erroneous.<sup>4</sup> In the Third Entry on Rehearing, the PUCO, purporting to rely on *Columbus Southern*, stated: “As stated by the Supreme Court of Ohio, subsequent applications for rehearing are only permitted to ‘challenge entries on rehearing that modify earlier orders.’”<sup>5</sup> But the PUCO misstates *Columbus Southern*. The Supreme Court of Ohio (“Court”) did not use the word “only.” What the Court actually wrote was: “Parties thus receive a new 30-day period to challenge entries on rehearing that modify earlier orders.”<sup>6</sup> The Court did not state that a party may *only* challenge an entry on rehearing that modifies an earlier order; it simply said that a party may challenge such an entry on rehearing, which is true. Indeed, immediately after this statement, the Court reaffirmed the plain language of R.C. 4903.10: “As we have held, R.C. 4903.10 ‘permits an application for rehearing after *any order*.’”<sup>7</sup> The Court did not rule that parties are prohibited from filing an application for rehearing unless the entry in question modifies a

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<sup>3</sup> *Indus. Energy Users-Ohio v. Ohio Power Co.*, 140 Ohio St.3d 509, 515 (2014) (“In construing a statute, a court may not add or delete words.”).

<sup>4</sup> 2011-Ohio-958, 128 Ohio St.3d 402.

<sup>5</sup> Third Entry on Rehearing ¶ 17.

<sup>6</sup> *Columbus S.*, 128 Ohio St.3d at 404.

<sup>7</sup> *Id.* (quoting *Senior Citizens Coalition v. PUCO*, 40 Ohio St.3d 329, 333 (1988)).



prior order. Nor could it, because the Court, like the PUCO, must follow the plain language of the statute.<sup>8</sup>

The law guarantees parties like OCC the right to file an application for rehearing with respect to “any order.” The PUCO should reverse its ruling in the Third Entry on Rehearing that “subsequent applications for rehearing are only permitted to challenge entries on rehearing that modify earlier orders.”<sup>9</sup>

**Assignment of Error 2: The PUCO unreasonably found that the Third Entry on Rehearing did not modify an earlier order.**

Even under the PUCO’s unlawful standard that “subsequent applications for rehearing are only permitted to challenge entries on rehearing that modify earlier orders,” OCC’s Second Application for Rehearing was proper. The Second Entry on Rehearing *did* modify a prior order in this case (the December 19, 2019 Opinion and Order) by changing the rationale for the PUCO’s approval of the Price Stabilization Rider (“OVEC Rider”).

In the original Opinion and Order, the PUCO ruled that the OVEC Rider would not result in untimely transition costs in violation of R.C. 4928.38.<sup>10</sup> Instead, the PUCO relied on its ruling in Duke’s third electric security plan (“ESP”) case that the OVEC Rider was a rate stability charge related to limitations on customer shopping under R.C. 4928.143(B)(2)(d).<sup>11</sup> Notably, the PUCO did not rely on *In re Application of Ohio Power Co.*, 2018-Ohio-4698, to support its ruling. Instead, it simply “took note” of the *Ohio*

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<sup>8</sup> *Indus. Energy Users-Ohio v. Ohio Power Co.*, 140 Ohio St.3d 509, 515 (2014) (“In construing a statute, a court may not add or delete words.”).

<sup>9</sup> Third Entry on Rehearing ¶ 17.

<sup>10</sup> Opinion & Order ¶ 265.

<sup>11</sup> *Id.*

*Power* ruling and commented on it in dicta *after* reaching its conclusion regarding OCC's argument about unlawful transition costs.<sup>12</sup> In the Second Entry on Rehearing, in contrast, the PUCO explicitly relied on *Ohio Power* as authority for its ruling that the OVEC Rider would not result in unlawful transition charges.<sup>13</sup>

Though this may seem like a minor distinction, the distinction is in fact material and critical. Because the PUCO only discussed the *Ohio Power* case in dicta in the original Opinion and Order, there was arguably no basis for OCC or any other party to seek rehearing with respect to the PUCO's interpretation of the *Ohio Power* case based on the Opinion and Order. But in the Second Entry on Rehearing, the PUCO's interpretation of the *Ohio Power* case became part of the ruling itself, thus giving rise to OCC's need to address that interpretation on rehearing.

Under R.C. 4903.10, for OCC to appeal the PUCO's rulings in this case, it must include the grounds for reversal, vacation, or modification in an application for rehearing. The first opportunity for OCC to address the PUCO's explicit reliance on *Ohio Power* was in its Second Application for Rehearing. Thus, OCC's Second Application for Rehearing was procedurally proper.

**Assignment of Error 3: In violation of R.C. 4903.09, the PUCO unlawfully and unreasonably did not address OCC's argument that it was denied due process when, as a result of PUCO delay, OCC's appeal of the ruling in Case No. 14-841-EL-SSO was dismissed as moot.**

In its Second Application for Rehearing, OCC argued that it was denied due process when, as a result of PUCO delay, OCC's appeal of the OVEC Rider in Duke's

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<sup>12</sup> *Id.* ¶¶ 265-66.

<sup>13</sup> Second Entry on Rehearing ¶ 13 (discussing the *Ohio Power* decision and then concluding: "Accordingly, we affirm that Rider PSR is a valid provision of an ESP." (emphasis added)).

third ESP case was dismissed as moot.<sup>14</sup> That is, OCC has a statutory right to appeal PUCO orders, and the PUCO, by delaying ruling on OCC's application for rehearing in the third ESP case, denied OCC the right to appeal.

In its Third Entry on Rehearing, the PUCO ignored this argument altogether. Instead, the PUCO simply recounted OCC's participation in the cases *before the PUCO*.<sup>15</sup> It does not address at all OCC's argument that it was denied due process by being denied an opportunity to raise this issue *before the Ohio Supreme Court*. The PUCO is required under R.C. 4903.09 to address this argument specifically. Its failure to do so violates R.C. 4903.09.<sup>16</sup>

### **III. CONCLUSION**

To protect customers from unnecessary and unlawful charges, the PUCO should grant rehearing and abrogate its Third Entry on Rehearing. This would ensure Duke's charges to consumers and the electric distribution service provided are lawful, fair, just, reasonable and reliable.

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<sup>14</sup> Second Application for Rehearing by the Office of the Ohio Consumers' Counsel at 9 (Aug. 16, 2019).

<sup>15</sup> Third Entry on Rehearing ¶ 19.

<sup>16</sup> *In re Commission Review of the Capacity Charges of Ohio Power Co.*, 147 Ohio St.3d 59, 70-71 (2016) (PUCO violated R.C. 4903.09 by failing to respond to a party's arguments).

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Third Application for Rehearing has been served upon the below-named persons via electronic transmission this 11th day of October 2019.

*/s/ William J. Michael*

William J. Michael

Assistant Consumers' Counsel

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

### **SERVICE LIST**

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Summary: App for Rehearing Third Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.