

**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. 17-32-EL-AIR
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Case No. 17-33-EL-ATA
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 17-34-EL-AAM
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR.	)	Case No. 17-872-EL-RDR
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Rider PSR.	)	Case No. 17-873-EL-ATA
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 17-874-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 Pursuant to Chapter 4901:1-10, Ohio Administrative Code.	)	Case No. 16-1602-EL-ESS
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**DUKE ENERGY OHIO'S  
MEMORANDUM CONTRA THIRD APPLICATION FOR REHEARING**

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**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel (OCC) has filed another improper application for rehearing, again seeking to invalidate Rider PSR, which the Public Utilities Commission of Ohio (Commission) approved for Duke Energy Ohio, Inc. (Duke Energy Ohio or Company), in a 2014 proceeding.

Rider PSR was initially approved by the Commission in the Company's third Electric Security Plan (ESP III) as a valid limitation on shopping.<sup>1</sup> Although approved for inclusion in the Company's tariff, the Commission set Rider PSR to zero and required that the Company apply, at a subsequent time, to populate the rider. In the above-captioned, consolidated cases, the Commission approved and adopted a stipulation providing for the continuation of Rider PSR as well as the establishment of a rate.

OCC's initial application for rehearing in the present proceedings was denied. In that denial, the Commission made no changes to its Opinion and Order. Nevertheless, OCC filed a second application for rehearing, which the Commission denied as improperly filed, confirming that applications for rehearing of decisions denying rehearing are themselves not subject to rehearing. Again, OCC has filed a rehearing application (Third AFR), seeking to overturn the Commission's most recent denial. This Third AFR should similarly be denied.

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<sup>1</sup> *In the Matter of the Application of Duke Energy Ohio 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. 14-841-EL-SSO.

## II. PROCEDURAL ERROR BY OCC

The filing by OCC of a Third AFR is procedurally improper, just as was the filing of its second application for rehearing.

OCC's Third AFR should be denied or stricken as an improperly filed pleading, for the same reasons explained by the Commission in the Third Entry on Rehearing.

## III. OCC'S ASSIGNMENTS OF ERROR

### A. First Assignment of Error

OCC claims that the Commission erred in concluding that a party may not apply for rehearing of an entry denying rehearing. OCC is wrong.

As the Company has previously argued and the Commission has concluded, parties are allowed the opportunity to file applications for rehearing of Commission decisions under R.C. 4903.10. That opportunity is not unlimited. Rather, 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 . . . .”<sup>2</sup> The statute, by these words, makes it clear that an entry on rehearing that makes changes to the original opinion and order shall be treated just like an opinion and order, thus making it subject to a further application for rehearing. On the other hand, an entry on rehearing that makes no changes to the order—simply denying the application for rehearing—would not, under this statutory language, be treated in the same manner as an opinion and order. Thus, such an order on rehearing would not be subject to a further application for rehearing. If OCC wants to continue to challenge the Commission's order, it can only do so in the Ohio Supreme Court.

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<sup>2</sup> R.C. 4903.10 (emphasis added).

OCC points out, in its Third AFR, that R.C. 4903.10 allows a party to apply for rehearing of “matters determined in the proceeding.” But OCC goes on to claim, wrongly, that the statute “does **not** say: ‘any order that modifies a prior order’—it says ‘any order.’”<sup>3</sup> What OCC fails to account for is the language, quoted above, providing that an order abrogating or modifying the original order has the same effect as an original order; it does **not** say that an order affirming the original order has the effect of an original order.

The Ohio Supreme Court has confirmed the analysis proposed by the Company and followed by the Commission. OCC opines that the Commission’s (and the Company’s) reading of the Court’s ruling was flawed. OCC says the Court did not conclude that a party is **only** allowed to seek rehearing of entries that modify earlier orders, focusing on the lack of the word “only.”<sup>4</sup> Unfortunately, OCC fails to account for the Court’s use of the word “thus,” in the following analysis:

Pursuant to R.C. 4903.10, a party "may apply for a rehearing in respect to any matters determined in the proceeding." Applications for rehearing must be filed within 30 days after the entry of the initial order. *Id.* The statute, however, provides that "[a]n order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order." *Id.* Parties **thus** receive a new 30-day period to challenge entries on rehearing that modify earlier orders.

In other words, parties in a proceeding get a new 30-day opportunity to seek rehearing because of the quoted statutory language providing that an order that abrogates or modifies the original order has the effect of the original order. No, the Court did not use the word “only,” but it did use the word “thus.”

OCC’s first assignment of error should be denied.

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<sup>3</sup> OCC Third AFR, pg. 4 (emphasis added).

<sup>4</sup> OCC’s Third AFR, pg. 4.

**B. Second Assignment of Error**

For its second ground for rehearing, OCC claims that the Commission's Second Entry on Rehearing **did** modify the original Opinion and Order. Again, OCC is wrong.

OCC bases its argument on its distorted reading of the Commission's Opinion and Order. OCC states that, in the Opinion and Order, the Commission based its Rider PSR ruling only on its prior ruling in a separate proceeding and did not rely on recent Court precedent. "[I]t simply 'took note' of the *Ohio Power* ruling and commented on it in dicta *after* reaching its conclusion regarding OCC's argument about unlawful transition costs."<sup>5</sup>

A quick perusal of the Opinion and Order demonstrates the absurdity of this reading. After recounting the arguments of various parties, the Commission provided its analysis of the validity of those arguments. The Commission had two reasons for its decision, which reasons were explained in separate paragraphs, with a lead-in sentence indicating to the reader that it was, at that point, transitioning from a recitation of parties' positions to a discussion of its decision. The fact that the Commission talked about one rationale before the other does not mean that the first is the decision and the second is mere *dictum*.

OCC's second assignment of error should be denied.

**C. Third Assignment of Error**

In its final assignment of error, OCC attempts to grossly enlarge the scope of R.C. 4903.09, claiming that the Commission violated that statutory provision by failing to address one of OCC's arguments.

The terms of R.C. 4903.09 require the Commission to include, in its opinions, "the reasons prompting the decisions arrived at . . . ." This language has been interpreted by the Commission

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<sup>5</sup> OCC's Third AFR, pp. 5-6 (emphasis *sic*).

and the Court numerous times and nowhere has either entity said that every single argument made by a party is required to be discussed. Rather, the Court reads this section to require the Commission's order to "show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the (commission) in reaching its conclusion."<sup>6</sup> And the Commission has addressed this precise question, concluding that "it is not necessary, under the requirements of R.C. 4903.09, that each and every argument presented by an opposing intervenor be directly addressed by the Commission."<sup>7</sup>

Even if the statute did require the Commission to address every issue raised by every party (which it does not), there would still be no ground for rehearing on this basis. The second assignment of error in OCC's second application for rehearing read: "The PUCO's evaluation of rider PSR, including in its Second Entry [on Rehearing], is unlawful and unreasonable because it denied OCC its right to a hearing under R.C. 4928.141(B) and violated OCC's due process rights by preventing OCC from having its day in court."<sup>8</sup> According to the Third AFR, the essence of that claim in the Second Application for Rehearing was that, by delaying its final ruling on the Company's third electric security plan, OCC's was denied the right to appeal. The Commission did discuss that assignment of error, although perhaps not as OCC hoped it would.

But the crux of the matter—entirely ignored by OCC—is that the entire Second Application for Rehearing had already been determined to be improper. Therefore, the Commission had no obligation to address any of the arguments therein.

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<sup>6</sup> *In re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement*, 2019-Ohio-4698, ¶51.

<sup>7</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Management Program for its Residential and Commercial Customers*, Case No. 16-1309-GA-UNC, ¶87 (April 10, 2019).

<sup>8</sup> OCC's Second Application for Rehearing, pp. 2-3.

Furthermore, it must be asked how OCC can raise, as errors in the present proceedings, actions taken in different Commission cases.

Section 4903.09 does not require the Commission to address every single argument in its discussion. The third assignment of error must be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 21<sup>st</sup> day of October 2019, to the parties listed below.

/s/ Jeanne W. Kingery

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Summary: Memorandum Duke Energy Ohio's Memorandum Contra Third Application for Rehearing electronically filed by Carys Cochern on behalf of Duke Energy