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 an Extension of the Distribution Modernization Rider	))))))	Case No. 19-361-EL-RDR

MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO APPLICATIONS FOR REHEARING OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

I. INTRODUCTION

The Public Utilities Commission of Ohio (the "Commission") should deny the Applications for Rehearing submitted by The Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Manufacturers' Association Energy Group ("OMAEG") and affirm its determination that "it is no longer necessary or appropriate" for Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") "to be required to file a new distribution rate case at the conclusion of the Companies' current ESP."[1]

The Companies' fourth Electric Security Plan ("ESP IV")[2] included a package of provisions related to distribution service, including but not limited to a base distribution rate freeze and the extension of Rider DCR. In addition, in its Fifth Entry on Rehearing, the Commission approved Rider DMR and the potential extension of Rider DMR, and also included a requirement to file a base distribution rate case at the end of ESP IV. Following its determination that Rider DMR is not an "incentive," the Supreme Court of Ohio directed the Commission to remove Rider

[1] *See* 11/21/2019 Entry ("Entry") at ¶ 17.
[2] *See* Case No. 14-1297-EL-SSO.

DMR from ESP IV. While implementing the court's directive to remove Rider DMR, as well as removing its potential two-year extension, the Commission was well within its authority to remove the rate case filing requirement, finding that "it is no longer necessary or appropriate."[3]

Indeed, the Commission is correct – the rate case filing requirement is no longer necessary given the Companies' recent filing of an application for approval of a decoupling mechanism for residential and commercial customers,[4] and the General Assembly's declaration through House Bill 6 ("HB 6") that customers benefit from a decoupling mechanism that is in effect until the electric distribution utility ("EDU") decides to apply for a base distribution rate case.[5]

In addition, the rate case filing requirement is no longer appropriate, given the shift in the package of distribution-related provisions in ESP IV caused by the removal of Rider DMR and its potential extension. The Commission could find, based on its findings in ESP IV, that removing the rate case filing requirement restores the balance of distribution-related provisions in ESP IV.

OCC and OMAEG lack standing to challenge removal of the rate case filing requirement on rehearing because neither is prejudiced by the Commission's decision. Further, OCC and OMAEG's arguments willfully ignore the Commission's explanation for its decision. Accordingly, their applications for rehearing should be denied.

II. ARGUMENT

A. OCC and OMAEG lack standing to challenge the Commission's decision to remove the rate case filing requirement.

OCC and OMAEG lack standing because they cannot show that they have been prejudiced by the Commission's decision to remove the obligation that the Companies file a base distribution rate case at the end of ESP IV. The Ohio Supreme Court has repeatedly held that "an allegedly

[3] Entry at ¶ 17.
[4] *See* Case No. 19-2080-EL-ATA.
[5] *See generally*, R.C. 4928.471(C).

aggrieved party must show that it suffered prejudice from a commission order to warrant reversal."[6] Here, neither OCC nor OMAEG has articulated any prejudice or harm allegedly suffered as a result of the Commission's decision to remove the requirement that the Companies file a base distribution rate case in 2024.

Moreover, pursuant to R.C. 4928.471, which went into effect on October 22, 2019, the decision to file a base distribution rate case now lies with an EDU. As both OCC and OMAEG acknowledge, R.C. 4928.471 permits an EDU to file an application to decouple base distribution rates for residential and commercial customers.[7] The Companies filed an application to implement a decoupling mechanism on November 21, 2019 in Case No. 19-2080-EL-ATA. Once approved by the Commission, under R.C. 4928.471(C), the decoupling mechanism will remain in effect until the next time the Companies decide to file a base distribution rate case. Thus, as now provided by statute, the decision to initiate such a case rests with the Companies.

Through HB 6, the General Assembly has declared that decoupling to 2018 base distribution rates for residential and commercial customers (the customer classes OCC and OMAEG represent) and maintaining the decoupled rates until the EDU decides to initiate a base distribution rate case is sound policy and a benefit to customers and the State of Ohio. Customers will benefit from having base distribution revenues decoupled to 2018 levels. As a result, the removal of a requirement for the Companies to file a base distribution rate case at the end of ESP IV causes no legally cognizable harm to residential or commercial customers. Since the requirement to file a base distribution rate case has been superseded for residential and commercial

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[6] *Buckeye Energy Brokers, Inc. v. Palmer Energy Co.*, 139 Ohio St.3d 284, 2014-Ohio-1532, 11 N.E.3d 1126, ¶ 22. *See also In re Ohio Power Co.*, 155 Ohio St.3d 320, 2018-Ohio-4697, 121 N.E.3d 315, ¶ 18 ("The party seeking reversal of the commission's order must demonstrate prejudice or harm from the order on appeal."); *Myers v. Pub. Util. Comm.*, 64 Ohio St.3d 299, 302, 595 N.E.2d 873 (1992) (this Court "will not reverse an order of the commission absent a showing of prejudice by the party seeking reversal.").

[7] OCC AFR at 7; OMAEG AFR at 11.

customers by the decoupling authority granted the Companies under R.C. 4928.471, OCC and OMAEG cannot demonstrate harm and their applications for rehearing should be dismissed for lack of standing to challenge the Commission's decision.

B. The Commission's explanation for its removal of the rate case filing requirement satisfied R.C. 4903.09 and Ohio Supreme Court precedent.

OCC, in its first assignment of error, and OMAEG argue that the Commission did not provide sufficient explanation for its decision, in violation of R.C. 4903.09.[8] However, that statute only requires the Commission to provide sufficient details for a reviewing court "to determine, upon appeal, how the commission reached its decision" and "enough evidence and discussion in order to enable the PUCO's reasoning to be readily discerned."[9] In other words, the Commission has to provide the court "with an adequate record to understand the commission's rationale underlying its decision on appeal."[10] The Commission did so here.

There can be no question that the Commission compiled a voluminous record in the ESP IV proceeding,[11] and the present case is inextricably tied to, and is an extension of, ESP IV. OCC and OMAEG cannot argue to the contrary where they both purport to rely on record evidence from ESP IV in their applications for rehearing in this case.[12] In fact, OCC relies on self-serving testimony from its ESP IV witnesses Effron and Kahal to argue that customers will be prejudiced if the Companies do not file a base distribution rate case.[13] However, these arguments are misguided and irrelevant as the referenced testimonies were discredited during the litigation of ESP IV and were not adopted by the Commission.

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[8] OCC AFR at 3-7; OMAEG AFR at 10-11.
[9] *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 4 Ohio St. 3d 107, 110 (1983).
[10] *Elyria Foundry Co. v. Pub. Util. Comm.*, 118 Ohio St. 3d 269, 2008-Ohio-2230, 888 N.E.2d 1055, ¶ 36.
[11] *See* Case No, 14-1297-EL-SSO.
[12] *See* OCC AFR at 2, 4, 6; OMAEG AFR at 5-9.
[13] OCC AFR at 6.

Further, OCC and OMAEG have no choice but to acknowledge that the Commission, in its Fifth Entry on Rehearing, also made extensive findings of fact in accordance with R.C. 4903.09 regarding the many distribution-related provisions of ESP IV, including Rider DCR and the base distribution rate freeze, as well as the Commission's approval of Rider DMR and the potential Rider DMR extension, before also requiring the Companies to file a base distribution rate case by 2024.[14] Although the Supreme Court of Ohio found that Rider DMR is not an "incentive" under R.C. 4928.143(B)(2)(h),[15] it nevertheless was part of the package of ESP IV provisions related to the Companies' distribution service. Therefore, based on the findings the Commission made in its Fifth and Eighth Entries on Rehearing in ESP IV, it was proper for the Commission to find in this case that elimination of Rider DMR and the Rider DMR extension disrupted the balance of distribution-related provisions and that the imbalance could be remedied by also eliminating the rate case filing requirement.

OCC and OMAEG profess ignorance of the "changed circumstances" of ESP IV referenced in the Entry and of the reason why requiring the Companies to file a distribution rate case is "no longer necessary and appropriate." However, the Commission's Entry succinctly explains that the changed circumstances are "termination of revenues recovered through Rider DMR, as well as the elimination of any possibility for an extension of Rider DMR."[16] The Commission articulated the reasons for its decision with sufficient citations to its prior findings to enable a reviewing court to understand the Commission's rationale. R.C. 4903.09 requires nothing more.

[14] *See, e.g.*, OCC AFR at 4, 5; OMAEG AFR at 5-7.
[15] *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶¶ 14-19 ("*In re Ohio Edison*").
[16] Entry at ¶ 17.

In its second assignment of error, OCC asserts that the Commission's alleged failure to explain its decision violates Ohio Supreme Court precedent.[17] However, the very case OCC cites in its application for rehearing,[18] in portions omitted by OCC, simply requires the Commission to provide an explanation that need not be elaborate and may consist of a "few simple sentences."[19] Here, the Commission satisfied Ohio Supreme Court precedent when it identified changed circumstances that made the requirement to file a distribution rate case no longer necessary or appropriate and articulated those circumstances in its Entry.

In addition to the changed circumstances identified by the Commission in its Entry, which provide a reasonable justification for its decision, other circumstances further bolster removal of the rate case filing requirement. On the same day that the Commission journalized the Entry, the Companies filed their application to implement a decoupling mechanism.[20] The Companies' decoupling application is not only consistent with the policies advanced by the General Assembly in HB 6, but also, as explained above, benefits the public interest by affording protections for residential and commercial customers under R.C. 4928.471 for the foreseeable future. Moreover, all customers are protected by the Companies' annual significantly excessive earnings test ("SEET"), which prevents the Companies, in the aggregate, from having significantly excessive earnings.[21]

[17] OCC AFR at 8-9.
[18] *Id*. at 8.
[19] *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 16, quoting *Consumers' Counsel*, 16 Ohio St.3d 21, 21-22, 475 N.E.2d 786 (1985).
[20] Case No. 19-2080-EL-ATA.
[21] R.C. 4928.143(F).

C. The Commission's removal of the requirement to file a distribution rate case did not alter the package of ESP IV settlement terms.

In its third assignment of error, OCC asserts that the Commission-approved ESP IV settlement agreement included the requirement to file a distribution rate case, and that removal of the requirement alters the settlement package that the Commission evaluated.[22] Importantly, neither OCC nor OMAEG was a party to the settlement.[23] And, contrary to OCC's assertions, the requirement to file a base rate case was not part of the ESP IV stipulation.[24] Thus, also contrary to OCC's assertions, no Signatory Party executed the settlement (which was filed on December 1, 2015) in reliance upon the requirement of a base rate case filing (which was included in the Fifth Entry on Rehearing issued ten months later on October 12, 2016). No Signatory Party to the settlement is contesting the Commission's rebalancing of ESP IV's distribution-related provisions.

ESP IV was thoroughly and extensively litigated. When the Commission imposed the base rate case filing requirement in its Fifth Entry on Rehearing, it did so premised upon and in consideration of *all* of the provisions in ESP IV.[25] Those provisions have now been altered as explained above – first by the Ohio Supreme Court, and then by OCC's and OMAEG's motion to dismiss in this case. These changes to the package of distribution-related provisions of ESP IV justify the Commission's determination to remove the rate case filing requirement.

D. The Commission has afforded adequate due process.

In its fourth assignment of error, OCC contends that the Commission's removal of the rate case filing requirement without notice and an evidentiary hearing violated OCC's due process rights. Due process, however, is defined by statute in Commission proceedings, and no due

[22] *Id*. at 10-12.
[23] *See* Third Supplemental Stipulation and Recommendation, 12/1/2015, in Case No. 14-1297-EL-SSO.
[24] *Id*.
[25] *See* Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing, 10/12/2016 at ¶ 251.

process exists beyond that afforded by statute.[26] Neither OCC nor OMAEG have cited any statute that mandates additional process under the circumstances presented here.

Further, there was ample due process afforded all parties in the ESP IV proceeding, which, in relevant part, authorized this DMR extension proceeding. No hearings were held in this DMR extension proceeding because OCC, OMAEG, and others moved to dismiss the Companies' Application without the benefit of any further due process for the Companies. Thus, OCC and OMAEG have no reasonable grounds to complain of a lack of due process.

III. CONCLUSION

For the foregoing reasons, the Commission should deny the Applications for Rehearing filed by OCC and OMAEG.

[26] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 20 ("We have repeatedly held that there is no constitutional right to notice and hearing in rate-related matters if no statutory right to a hearing exists.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Applications for Rehearing of The Office of the Ohio Consumers' Counsel and The Ohio Manufacturers' Association Energy Group was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 2nd day of January, 2020. The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/Christine E. Watchorn
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Summary: Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Applications for Rehearing of The Office of the Ohio Consumers' Counsel and The Ohio Manufacturers' Association Energy Group electronically filed by Ms. Christine E. Watchorn on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company