

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Review of Chapter 4901:1-37 of the)	Case No. 18-1190-EL-ORD
Ohio Administrative Code.)	

**JOINT MEMORANDUM OF DUKE ENERGY OHIO, INC., THE DAYTON POWER
AND LIGHT COMPANY, AND THE OHIO POWER COMPANY
CONTRA THE APPLICATION FOR REHEARING
FILED BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The Public Utilities Commission of Ohio ("Commission") issued a Finding and Order in this proceeding on June 17, 2020 ("Order"), adopting certain amendments to Ohio Adm. Code ("O.A.C.") Chapter 4901:1-37, and rejecting other proposed amendments. The Office of the Ohio Consumers' Counsel ("OCC") filed an application for rehearing on July 17, 2020, arguing that the Commission erred in four respects. OCC's assignments of error are baseless, and its application for rehearing should be denied.

II. ARGUMENT

A. OCC's First Assignment of Error is Without Merit and Should Be Denied.

OCC's first assignment of error posits that the Commission's Order was both unlawful and unreasonable. According to OCC, the Order was unlawful because it was contrary to precedent decided by the Supreme Court of Ohio and it was unreasonable because it failed to require unregulated affiliates of utilities to operate as structurally separate entities. Both claims are incorrect.

With regard to the first claim, OCC quoted the argument it made to the Commission and then indicated that OCC had provided more than adequate justification for its proposal,

“[c]ontrary to what the [Commission] said in its Order”¹ But a close reading of the Commission’s Order shows that it said no such thing about the structural separation issue. Rather, the Commission referenced the fact that OCC was seeking a requirement for structural separation and went on to discuss in detail OCC’s actual proposed rule change—one that would add a definition of “unregulated service.” And it was in reference to that definitional issue that the Commission stated that “OCC has not provided an adequate reason to make such a rule change.”²

To support its claim that the Commission’s Order was contrary to precedent, the only citation that OCC provided was to a case in which the Court reversed and remanded a decision that failed to address a critical argument in a substantive way.³ Thus, it appears that OCC’s argument on this point may actually be that the Commission did not adequately address OCC’s suggestion that unregulated affiliates of utilities should have to operate as structurally separate entities. It must be recognized that OCC merely discussed structural separation in general, theoretical terms. OCC did not propose any actual rule change on this topic. It is not reasonable to expect a lengthy analysis by the Commission when the commenting party made no specific suggestion.

Finally, from a substantive standpoint, OCC is seeking a change in law, not a simple rule change. As the law is currently written, a utility can be functionally separate from a nonregulated affiliate, in accordance with a corporate separation plan approved by the

¹ Case No. 18-1190-EL-ORD, Application for Rehearing Regarding PUCO Order Reviewing Rules Governing Utility Affiliates by The Office of the Ohio Consumers’ Counsel (“OCC Application for Rehearing”) at p. 4 (July 17, 2020).

² Case No. 18-1190-EL-ORD, Finding and Order (“Finding and Order”) at ¶ 18 (June 17, 2020).

³ OCC Application for Rehearing, p. 4 (footnote 6).

Commission.⁴ OCC is attempting to have the Commission change the law that the General Assembly enacted.

OCC's second claim is also unsupportable. Its suggestion, as the assignment of error is worded, is that the Order is unreasonable because it failed to require affiliates to be structurally separate. However, OCC's explanation of why it believes the Order to be unreasonable only addresses the definitional change that is covered by its second assignment of error. All that can be gleaned from the words of this assignment of error is that OCC believes it is unreasonable for the Commission to disagree with OCC.

The first assignment of error should be denied.

B. OCC's Second Assignment of Error is Without Merit and Should Be Denied.

In Comments and Reply Comments, OCC and the electric distribution utilities took opposite stances on defining the role of utilities in offering retail electric services under O.A.C. 4901:1-1-37.⁵ The Commission ruled similarly and decided that no parties had "provided an adequate reason to make such a rule change" and that the Commission did "not believe that such an issue should be decided in a rulemaking proceeding at this time."⁶ OCC filed an Application for Rehearing plainly disagreeing with the Commission's decision. OCC claims that it is contrary to Supreme Court precedent, without any specific explanation of the cited case other than hinting that the Commission failed to adequately explain its reasoning. To the contrary, however, the Commission provided a detailed recitation of all arguments, including those of OCC, but ultimately decided that such changes are not appropriate under a rulemaking case at

⁴ See R.C. 4928.17.

⁵ Finding and Order at ¶¶ 12-18, 42-47.

⁶ *Id.* at ¶¶ 18, 47.

this time.⁷ After all, OCC was seeking the addition of a very broad definition of “unregulated service” that would undoubtedly conflict with Ohio law.

As set forth in the electric distribution utilities’ Reply Comments, OCC’s requested definition of “unregulated services” would have run directly contrary and/or conflicted with certain sections of the Revised Code as well as pending cases.⁸ OCC’s proposal would be contrary to the firmly established concept that “[r]ules adopted by administrative agencies are valid and enforceable unless unreasonable or in conflict with the statutory enactment covering the same subject matter,” because an “administrative rule cannot add or subtract from the legislative enactment.”⁹ For this reason alone, it was appropriate for the Commission not to adopt OCC’s requested definition of “unregulated service.”

Nevertheless, OCC is of the opinion that this rulemaking case is the appropriate forum to adopt the weighty definition that OCC requested and cites to prior rulemaking cases where the Commission has provided clarity on definitional terms.¹⁰ But those cases involved clarifications of previously existing definitional terms to reflect alignment – amending “major event” under O.A.C. 4901:1-10-01(T) to include transmission outages in alignment with the IEEE standards,¹¹

⁷ See *infra*, Section II.C.

⁸ Case No. 18-1190-EL-ORD, Reply Comments of The Dayton Power and Light Company at pp. 1-3 (July 26, 2019); Case No. 18-1190-EL-ORD, Reply Comments of Duke Energy Ohio, Inc., at pp. 1-3 (July 26 2019); Case No. 18-1190-EL-ORD, Comments of Ohio Power Company at pp. 1-3 (July 26, 2019).

⁹ *AMOCO v. Petroleum Underground Storage Tank Release Compensation Bd.* (2000), 89 Ohio St.3d 477, 484 (internal citations omitted).

¹⁰ OCC Application for Rehearing at p. 4 (citing *In Re Commission's Rev. of Certain Rules in Chapter 4901:1-16, Ohio Adm. Code*, Case No. 2006-540-GA-ORD, Entry (April 10, 2006); *In the Matter of the Commissions Rev. of Its Rules for Electrical Safety & Serv. Standards Contained in Chapter 4901:1-10 of the Ohio Adm. Code.*, Case No. 17-1842-EL-ORD, Finding and Order (February 26, 2020)).

¹¹ *In Re the Commission’s Review of its Rules for Electrical Safety and Service Standards Contained in Chapter 4901:1-10 of the Ohio Administrative Code*, Case No. 17-1842-EL-ORD, Finding and Order at ¶15 (February 26, 2020).

and amending “gathering lines” under O.A.C. 4901-1-16 to reflect changes in federal law that were cross-referenced in the definition.¹² OCC seeks to add a whole new definition – one that is broadly encompassing and has the likelihood of upending the entire regulatory scheme in Ohio.

While the Commission does have the ability to deem additional services as competitive,¹³ such decisions should not be made lightly. Afterall, the state has set forth a policy of “[e]nsur[ing] the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs.”¹⁴ And such service offerings – including any by utilities and/or their affiliates – must comply with the law enacted by the General Assembly and the rules adopted by the Commission. Thus, customers should be able to choose from a myriad of innovative products to be offered by the entity of their choosing including a regulated option from their local electric distribution utility if they so choose. But given the quickly evolving energy landscape, determinations of what could be and should be competitive versus non-competitive is likely to be very factually-intensive depending on what innovative solution is offered and how it is proposed to be offered. For these reasons, it was not unreasonable and unlawful to defer such decisions for future cases with fact-specific filings and findings.

C. OCC’s Third and Fourth Assignments of Error are Without Merit and Should Be Denied.

In its third and fourth assignments of error, OCC claims a violation of R.C. 4903.09 for failure to adequately explain the Commission’s rejection of OCC proposals to insert language in divisions (A)(6) and (D)(10)(e) of O.A.C. 4901:1-37-04 (Rule 4). Specifically, OCC

¹² *In Re the Commission’s Review of Certain Rules in Chapter 4901:1-16, Ohio Administrative Code, to Incorporate Recent Changes in Federal Regulations*, Case No. 06-540-GA-ORD, Entry at ¶¶ 4-5 (April 10, 2006).

¹³ *See*, R.C. 4928.04.

¹⁴ R.C. 4928.02(B).

recommended that the Commission add language in Rule 4 regarding fully allocated cost accounting for affiliate services and purchasing services under the identical utility tariff.¹⁵ The Order adequately addressed these proposals when rejecting them and the OCC fails to show legal error here.

The Supreme Court of Ohio has held that, as long as there is a basic rationale and record supporting the Order, no violation of R.C. 4903.09 exists.¹⁶ Thus, R.C. 4903.09 only requires the explanation to be clear enough that the Court can tell what the rationale was. Contrary to OCC's claim here, the Order easily satisfies this standard.

OCC complains because the Commission did not identify the pending matters or the current law. But Commission did cite to AEP Ohio's comments in opposition to OCC's proposal in this regard, wherein the Company cited numerous dockets where similar or overlapping issues were pending.¹⁷ OCC's rehearing request makes no attempt to refute the AEP Ohio arguments that the Commission relied on; OCC just makes a generic objection that does not hold water. Further, in response to OCC's argument, the Order also noted the point made by Duke Energy Ohio that the proposed language was, in part, redundant to existing rule language and unnecessary for that reason.¹⁸ In rejecting OCC's proposals, the Commission stated that it "does

¹⁵ OCC Application for Rehearing at pp. 6-7.

¹⁶ *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St. 3d 486, 493 (Ohio 2008 990 ¶ 30) (quoting *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337); *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St. 3d 87, 90, 1999 Ohio 206, 706 N.E.2d 1255; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St. 3d 163, 166, 1996 Ohio 296, 666 N.E.2d 1372.

¹⁷ Finding and Order at ¶ 22.

¹⁸ *Id.* at ¶ 23.

not support OCC's proposed rule change; the proposal may prejudice the outcome of pending matters and may be inconsistent with current law and policy.”¹⁹

It has always been a prerequisite to rehearing and appeal to demonstrate harm and raise a justiciable issue. The Supreme Court has consistently upheld those principles and only recently held as follows when rejecting a similar academic difference of opinion between OCC and the Commission:

‘It is well settled that this court will not reverse an order’ of the PUCO ‘unless the party seeking reversal shows that it has been harmed or prejudiced by the order.’ *In re Application of Ohio Power Co.*, 155 Ohio St.3d 320, 2018-Ohio-4697, 121 N.E.3d 315, at ¶ 9. * * * The costs and alleged inefficiencies associated with the OCC's strategy to litigate an issue prematurely are not harm or prejudice caused by or resulting from the order on appeal itself, and the OCC cites no authority to the contrary.²⁰

In sum, OCC merely advances a policy disagreement about what the Commission's rules should say but does not present a valid legal basis for error. The Commission is not legally required to address matters in rules unless the General Assembly directs them to do so. OCC suffers no harm by the Order and there are other proceedings for OCC to pursue OCC's arguments. OCC third and fourth assignments of error should be denied.

III. CONCLUSION

For the foregoing reasons, the Commission should deny OCC's Application for Rehearing on all grounds.

¹⁹ *Id.* at ¶ 24.

²⁰ *In re Ohio Power Company*, 2020-Ohio-143 (January 22, 2020) at ¶ 34.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's efilings system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Joint Memorandum of Duke Energy Ohio, Inc., The Dayton Power and Light Company, and The Ohio Power Company Contra the Application for Rehearing Filed by the Office Of the Ohio Consumers' Counsel* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 27th day of July, 2020 via electronic transmission.

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