

**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) Case No. 21-0101-EL-ATA
Edison Company for Approval of Tariff)
Amendments.)
)**

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM CONTRA
APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS’
COUNSEL**

I. INTRODUCTION

The Office of the Ohio Consumers’ Counsel’s (“OCC”) application for rehearing relies on a fundamental misreading and misapplication of R.C. 4909.16. OCC claims the Commission erred by failing to invoke that statute to order refunds of amounts collected by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s (the “Companies”) Conservation Support Rider (“Rider CSR”) before the rider was set to zero in accordance with the Commission’s February 2 Finding and Order. But contrary to OCC’s arguments, R.C. 4909.16 is inapplicable here. Rather, R.C. 4909.16 allows the Commission to take *temporary* measures to *prevent* a future injury in extraordinary circumstances. In other words, R.C. 4909.16 functions prospectively, not retroactively. Further, there is no emergency here of the kind contemplated by the statute—customers are not faced with any imminent threat of harm. So there is no basis for invoking the extraordinary provisions of R.C. 4909.16.

For these reasons and those further explained below, the Commission should reject OCC’s rehearing application.

II. ARGUMENT

OCC raises a single assignment of error in which it asserts that the Commission acted unreasonably and unlawfully by not ordering Rider CSR to be set to “a negative charge” in order to effectuate refunds of amounts previously collected under the rider.¹ In support, OCC relies solely upon R.C. 4909.16, claiming that the Commission should have exercised its power under that statute to order refunds in connection with a supposed “emergency” arising from the allegations surrounding House Bill 6.² OCC’s reliance on R.C. 4909.16 is, however, misplaced for several reasons—chiefly, the statute does not permit the retroactive relief OCC seeks.

R.C. 4909.16 is straightforward. The statute allows the Commission to “temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates” if the Commission deems it “necessary to prevent injury” to the interests of the public “in case of any emergency to be judged by the commission.” By its plain language, R.C. 4909.16 provides only for *temporary* prospective relief necessary to prevent a *future* injury in *emergency* circumstances. OCC ignores each of these limitations on the statute’s reach.

First, and most fundamentally, R.C. 4909.16 is prospective, not retroactive. The statute’s aim is to “prevent” injury to the public. But the supposed “injury” identified by OCC and the relief it seeks are entirely backward-looking. Indeed, OCC makes the point itself, arguing that it seeks the return of money “to customers who *paid* it.”³ And even when framing the payment of duly approved rates as an “injury,” OCC does not contest—and must of course concede—that there is no threat of any future injury because Rider CSR has already been set to zero. At bottom, OCC’s strained reliance on R.C. 4909.16 is an attempt to circumvent the settled rule against retroactive

¹ OCC’s Appl. for Reh’g at 2.

² Mem. in Supp. at 4–5.

³ *Id.* at 5 (emphasis added).

ratemaking. But R.C. 4909.16 is inapplicable here. In short, there is no legal basis for granting the relief sought by OCC.

Second, R.C. 4909.16 allows for temporary relief from existing rates and what OCC asks of the Commission is a permanent change to a past rate. The Ohio Supreme Court has acknowledged that the “very language of R.C. 4909.16” makes clear that “[e]mergency rates are temporary.”⁴ And the statute logically only allows for such temporary relief from “any existing rates.” The refunds requested by OCC would effectively amount to an irrevocable change to charges collected pursuant to now-defunct tariffs. Thus, beyond being impermissibly retroactive, the relief sought by OCC falls outside of R.C. 4909.16’s other limitations as well.

Third, the “emergency” circumstances within the statute’s purview contemplate a present emergency posing a threat of imminent harm. The cases OCC cites illustrate this point. In *In re East Ohio Gas Co.*, after a record-setting cold winter season, Dominion East Ohio asked the Commission to establish a payment-matching program for residential customers who were unable to pay their high energy bills.⁵ The Commission granted the request, recognizing that “[c]learly, these customers were facing a difficult financial situation, which justified the Commission taking emergency action.”⁶ The concurring opinion explains there were “literally tens of thousands of Dominion East Ohio customers who got behind in their bills last winter” and “[m]ost of those customers ended up losing their gas service.”⁷ In other words, absent Commission action in light of the extraordinarily cold weather, thousands of Ohioans likely would have lost gas service during the winter months.

⁴ *Seneca Hills Servs. Co. v. Pub. Utilities Comm’n*, 384 N.E.2d 277, 279 (Ohio 1978).

⁵ *In re East Ohio Gas Company d/b/a Dominion East Ohio*, Case No. 01-2592-GA-UNC, Entry on Reh’g, ¶¶ 1, 11 (Nov. 29, 2001).

⁶ *Id.* at ¶ 11.

⁷ See *In Re East Ohio Gas*, Entry on Reh’g (R. Fergus, concurring).

Likewise, the Commission issued its COVID-19 Emergency Order under R.C. 4909.16 when Ohio was under a literal state of emergency. Large portions of the State economy were shutting down, raising significant concerns about whether residential and commercial customers could pay their utility bills to keep service running. The Commission acted swiftly, entering an emergency order under R.C. 4909.16 that directed all public utilities to review their service disconnection policies and to promptly seek approval to suspend requirements that may impose a service continuity hardship on customers.⁸

Neither of those cases are remotely similar to the situation here. Customers are not faced with any ongoing emergency or some imminent harm absent rate relief. Once again, there is no prospective risk of a customer injury by virtue of paying rates, and OCC's claimed emergency relates entirely to conduct alleged to have occurred many months and years ago. R.C. 4909.16 is expressly directed at providing relief to prevent future harm threatened by a present or imminent emergency. None of those circumstances exist here, and the statute is simply inapplicable.

Finally, R.C. 4909.16 grants the Commission discretionary power. The Commission "may" choose to take action as provided for by the statute when the Commission "deems it necessary." Even putting aside that R.C. 4909.16 has no possible application here, the Commission did not act unreasonably or unlawfully by choosing not to exercise its discretion under the statute. And, in any event, the only question before the Commission in the Companies' Application was the request to set Rider CSR to zero. R.C. 4909.16 was not and is not implicated by that request, and the question of whether the statute applies is not properly before the Commission on rehearing.

⁸ *In the Matter of the Proper Procedures and Process for the Commission's Operations and Proceedings During the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC, Entry, ¶ 1 (Mar. 12, 2020).

III. CONCLUSION

For all these reasons, the Commission should reject OCC's rehearing application.

Dated: March 15, 2021

Respectfully submitted,

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On behalf of the Companies

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on March 15, 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

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Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel's Application for Rehearing electronically filed by Ryan A Doringo on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company