

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY TO ESTABLISH A STANDARD
SERVICE OFFER IN THE FORM OF AN
ELECTRIC SECURITY PLAN.**

CASE NO. 08-1094-EL-SSO

**IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR APPROVAL OF REVISED
TARIFFS.**

CASE NO. 08-1095-EL-ATA

**IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR APPROVAL OF CERTAIN
ACCOUNTING AUTHORITY.**

CASE NO. 08-1096-EL-AAM

**IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR WAIVER OF CERTAIN
COMMISSION RULES.**

CASE NO. 08-1097-EL-UNC

NINTH ENTRY ON REHEARING

Entered in the Journal on October 5, 2022

I. SUMMARY

{¶ 1} In this Ninth Entry on Rehearing, the Commission finds that the application for rehearing filed by Ohio Consumers' Counsel should be denied.

II. HISTORY OF THE PROCEEDING

{¶ 2} The Dayton Power and Light Company d/b/a AES Ohio (AES Ohio) is a public utility as defined under R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a

firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} R.C. 4928.143(C)(2)(b) provides that if a utility terminates an application for an ESP or if the Commission disapproves an application, the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent SSO is authorized.

{¶ 5} By Opinion and Order issued in this case on June 24, 2009, the Commission adopted the stipulation and recommendation of the parties (ESP I Stipulation) to establish AES Ohio's first ESP (ESP I). Included among the terms, conditions, and charges in ESP I was a rate stabilization charge (RSC). Thereafter, on December 19, 2012, the Commission extended ESP I, including the RSC, until a subsequent SSO could be authorized. Entry (Dec. 19, 2012) at 3-5.

{¶ 6} On September 4, 2013, the Commission modified and approved AES Ohio's application for a second ESP (ESP II). *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (*ESP II Case*), Opinion and Order (Sept. 4, 2013). On June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the decision of the Commission approving ESP II and disposing of all pending appeals. *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179. Thereafter, on August 26, 2016, in the *ESP II Case*, the Commission modified ESP II as directed by the Court and then granted AES Ohio's application to withdraw ESP II, thereby terminating it. *ESP II Case*, Finding and Order (Aug. 26, 2016). In light of AES Ohio's withdrawal of ESP II, the Commission, pursuant to R.C. 4928.143(C)(2)(b), granted AES Ohio's motion in this case to implement the provisions, terms and conditions of ESP I, its most recent SSO, until a subsequent SSO could be authorized. Finding and Order (Aug. 26, 2016); Third Entry on Rehearing (Dec. 14, 2016).

{¶ 7} The provisions, terms and conditions of ESP I remained in effect until the Commission modified and approved an amended stipulation establishing AES Ohio's third electric security plan (ESP III), effective November 1, 2017. *In re Dayton Power and Light Co.*, Case No. 16-395-EL-SSO, et al. (*ESP III Case*), Opinion and Order (Oct. 20, 2017) at ¶ 131. The Supreme Court of Ohio then dismissed as moot the appeals of the August 26, 2016 Finding and Order which reinstated ESP I, including the RSC. *In re Application of Dayton Power & Light Co.*, 154 Ohio St.3d 237, 2018-Ohio-4009, 113 N.E.3d 507, *reconsideration denied*, 154 Ohio St.3d 1446, 2018-Ohio-4962, 113 N.E.3d 554.

{¶ 8} Subsequently, Interstate Gas Supply (IGS) withdrew from the amended stipulation in the *ESP III Case*, necessitating an additional evidentiary hearing in that proceeding. *ESP III Case*, Entry (Nov. 15, 2018). Following the additional evidentiary hearing, the Commission issued a Supplemental Opinion and Order in the *ESP III Case*. In the Supplemental Opinion and Order, the Commission further modified and approved the amended stipulation filed in the *ESP III Case* by eliminating AES Ohio's distribution modernization rider (DMR) based upon the Supreme Court of Ohio's decision in *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 454, and *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 458. *ESP III Case*, Supplemental Opinion and Order (Nov. 21, 2019) at ¶ 1, 102-110, 134.

{¶ 9} On November 26, 2019, AES Ohio filed a notice of withdrawal of its application and amended application filed in the *ESP III Case*, pursuant to R.C. 4928.143(C)(2)(a). AES Ohio also filed on November 26, 2019, proposed tariffs in this proceeding to implement the provisions, terms and conditions of ESP I, its most recent ESP prior to ESP III. On December 4, 2019, comments were filed by Ohio Energy Group, Ohio Hospital Association, Industrial Energy Users-Ohio (IEU-Ohio) and the Retail Energy Supply Association (RESA). Joint comments were filed on December 4, 2019, by City of Dayton and Honda of America Mfg., Inc. (Dayton/Honda). Further, Ohio Consumers'

Counsel (OCC), Ohio Manufacturers' Association (OMA) and The Kroger Co. (Kroger) filed a motion on December 4, 2019, seeking rejection of AES Ohio's proposed tariff filing.

{¶ 10} The Commission accepted the withdrawal of ESP III in the *ESP III Case* on December 18, 2019. *ESP III Case*, Finding and Order (Dec. 18, 2019). On December 18, 2019, in this proceeding, the Commission also approved AES Ohio's proposed tariffs, implementing the provisions terms and conditions of ESP I, subject to the modifications directed by the Commission. Second Finding and Order (Dec. 18, 2019).

{¶ 11} Subsequently, on January 17, 2019, applications for rehearing were filed by IEU-Ohio, IGS, OCC, and Dayton/Honda, and a joint application for rehearing was filed by OMA and Kroger. AES Ohio timely filed its memorandum contra on February 3, 2020. On February 4, 2020, RESA filed a motion for leave to file memorandum contra instant to the application for rehearing filed by IGS.

{¶ 12} On February 14, 2020, the Commission issued a Fourth Entry on Rehearing, in which it denied the application for rehearing filed by IGS and granted the remaining applications for rehearing for the purpose of further consideration in the matters raised in the applications for rehearing. Fourth Entry on Rehearing (Feb. 14, 2020).

{¶ 13} Meanwhile, in *In re Dayton Power and Light Co.*, Case Nos. 18-1875-EL-GRD et al., (*Quadrennial Review Case*), the signatory parties to the global stipulation submitted in that proceeding—including IEU-Ohio, IGS, Dayton, Honda, Ohio Manufacturers' Association Energy Group and Kroger—requested, on October 23, 2020, that the Commission defer ruling on the applications for rehearing filed in response to the Second Finding and Order in this proceeding. The signatory parties further represented that the applications for rehearing filed by IEU-Ohio, IGS and Dayton/Honda and the joint application for rehearing filed by OMA and Kroger will be withdrawn within 7 days after the Commission issues a final appealable order which adopts, without modification, the global stipulation submitted in the *Quadrennial Review Case*.

{¶ 14} Subsequently, on June 16, 2021, the Commission issued the Fifth Entry on Rehearing in this case granting, in part, and denying, in part, OCC's application for rehearing. Fifth Entry on Rehearing (June 16, 2021). In the Fifth Entry on Rehearing, the Commission directed AES Ohio to file proposed tariffs making the RSC refundable "to the extent permitted by law." Fifth Entry on Rehearing at ¶ 61-64. On July 16, 2021, AES Ohio filed proposed tariffs, including the refund language, as directed by the Commission in the Fifth Entry on Rehearing. OCC and AES Ohio each filed an application for rehearing regarding the Fifth Entry on Rehearing on July 21, 2021. On July 30, 2021, OCC timely filed a memorandum contra the application for rehearing filed by AES Ohio; AES Ohio also timely filed a memorandum contra the application for rehearing filed by OCC.

{¶ 15} On August 11, 2021, the Commission denied the applications for rehearing filed by OCC and AES Ohio. Sixth Entry on Rehearing (Aug. 11, 2021). In addition, the Commission approved the proposed tariffs filed by AES Ohio on July 16, 2021, which included the refund language directed by the Commission, and the Commission authorized AES Ohio to file final tariffs consistent with the Sixth Entry on Rehearing. Sixth Entry on Rehearing at ¶ 48, 51-53. On August 27, 2021, OCC filed a notice of appeal to the Supreme Court of Ohio. AES Ohio filed a notice of cross-appeal on October 8, 2021.

{¶ 16} Meanwhile, on June 16, 2021, the Commission adopted the global stipulation in the *Quadrennial Review Case* without modification. *Quadrennial Review Case*, Opinion and Order (Jun. 16, 2021). After rehearing, the Commission issued a final appealable order in the *Quadrennial Review Case* on December 1, 2021. *Quadrennial Review Case*, Third Entry on Rehearing (Dec. 1, 2021). Subsequently, pursuant to the commitments made in the global stipulation in the *Quadrennial Review Case*, IEU-Ohio withdrew its pending application for rehearing in this case. Further, Dayton/Honda and OMA/Kroger withdrew their pending applications for rehearing in this case. Seventh Entry on Rehearing at ¶ 19-21.

{¶ 17} On April 13, 2022, the Supreme Court of Ohio dismissed, sua sponte, OCC's appeal and AES Ohio's cross-appeal. *In re Dayton Power & Light Co.*, 166 Ohio St.3d 1471,

2022-Ohio-1156, 185 N.E.3d 1106, *reconsideration denied*, 167 Ohio St.3d 1409, 2022-Ohio-2047, 188 N.E.3d 1104.

{¶ 18} On June 15, 2022, the Commission issued a Seventh Entry on Rehearing in this case. In the Seventh Entry on Rehearing, the Commission found that the application for rehearing filed by IEU-Ohio should be deemed withdrawn and that the joint applications for rehearing filed by Dayton/Honda and OMA/Kroger should also be deemed withdrawn. Seventh Entry on Rehearing at ¶ 22, 27. The Commission also approved, inadvertently for a second time, the proposed tariffs, filed by AES Ohio on July 16, 2021. Seventh Entry on Rehearing at ¶ 23, 28. Further, the Commission granted OCC's uncontested request for a stay in this proceeding.

{¶ 19} On June 22, 2022, AES Ohio filed final tariffs, including the refund language, with an effective date of June 22, 2022.

{¶ 20} On July 15, 2022, OCC filed an application for rehearing regarding the Seventh Entry on Rehearing. AES Ohio filed a memorandum contra the application for rehearing on July 25, 2022.

{¶ 21} On August 10, 2022, the Commission granted, in part, and denied, in part, the application for rehearing filed by OCC on July 15, 2022. Specifically, on rehearing, the Commission vacated, as unnecessary and redundant, the repeated approval, in the Seventh Entry on Rehearing, of the proposed tariffs filed by AES Ohio on July 16, 2021. We noted that, following AES Ohio's timely submission of proposed tariffs on July 16, 2021, the Commission approved the proposed tariffs in the Sixth Entry on Rehearing on August 11, 2021. AES Ohio did not file final tariffs as directed by the Commission. However, on March 8, 2022, during the briefing of an appeal and cross-appeal of this case to the Supreme Court of Ohio, now dismissed, AES Ohio incorrectly represented to the Supreme Court that AES Ohio had filed a "proposed" tariff with the Commission on July 16, 2021, "but that tariff has not been approved and is not currently operative." *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer*, S.Ct. Case No. 2021-1068,

Fourth Merit Brief at 1 (Mar. 8, 2022). Based upon AES Ohio's mistaken representation to the Supreme Court, the Commission sought to cure this alleged deficiency in the Seventh Entry on Rehearing by approving the proposed tariffs; however, as OCC correctly pointed out in its application for rehearing regarding the Seventh Entry on Rehearing, this action was unnecessary and redundant. In order to correct this error, the Commission granted rehearing and vacated the language in the Seventh Entry on Rehearing which contained the unnecessary and redundant approval of the proposed tariffs. Eighth Entry on Rehearing at ¶ 24. Further, the Commission directed AES Ohio to file new final tariffs specifying an effective date of August 11, 2021. Eighth Entry on Rehearing at ¶25. AES Ohio filed new final tariffs in compliance with the Eighth Entry on Rehearing on August 11, 2022.

{¶ 22} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 23} On September 9, 2022, OCC filed an application for rehearing regarding the Eighth Entry on Rehearing. AES Ohio filed a memorandum contra the application for rehearing on September 19, 2022.

III. DISCUSSION

A. OCC's first and second assignments of error should be denied.

{¶ 24} In its first assignment of error, which consists of three allegations, OCC claims that the Commission erred when it failed to order refunds to consumers for \$60 million paid under AES Ohio's unauthorized tariffs, after finding no prejudice to OCC or AES Ohio's consumers. OCC claims that, contrary to the Commission's unsupported conclusion, consumers suffered prejudice when they were denied a \$60 million refund for unauthorized charges. OCC also alleges that the Commission unreasonably and unlawfully ruled that OCC must show prejudice before consumer refunds may be ordered. According to OCC, this ruling violated R.C. 4903.09 because the Commission failed to provide a reasoned

explanation of the basis of its decision that (1) consumers were not prejudiced and (2) that prejudice must be shown before consumer refunds may be ordered. OCC further argues that, as a creature of statute, the Commission cannot lawfully write into the law a requirement of prejudice before ordering refunds where a utility has violated a Commission order and R.C. 4905.22 and 4905.32.

{¶ 25} Moreover, OCC claims in its second assignment of error, which contains two separate allegations, that the Commission erred when it unreasonably failed to order refunds for \$60 million paid under AES Ohio's tariffs that were not authorized by the Commission by finding no evidence of bad faith or deliberate failure by AES Ohio or its counsel. OCC alleges that the Commission's finding of no bad faith was unlawful, unreasonable and contrary to the record in this case in violation of R.C. 4903.09. OCC further claims that, as a creature of statute, the Commission has no authority to write into the law a requirement of bad faith before ordering customer refunds where a utility has violated a Commission order and R.C. 4905.22 and 4905.32.

{¶ 26} In its memorandum contra, AES Ohio argues that the Commission should deny the application for rehearing filed by OCC. AES Ohio posits that OCC seeks rehearing upon rehearing in violation of R.C. 4903.10, claiming that the Commission has already rejected OCC's demand for a refund in the Eighth Entry on Rehearing and that OCC's latest application for rehearing does not raise any issues that were not already raised in its July 15, 2022 application for rehearing. AES Ohio also argues that it did not, and would not, deliberately disobey a Commission order or knowingly make a false statement to the Supreme Court of Ohio. AES Ohio notes that OCC cannot show any prejudice resulting from its representation to the Court that the proposed tariff had not been approved because OCC's appeal was dismissed as premature. *In re Dayton Power & Light Co.*, 166 Ohio St.3d 1471, 2022-Ohio-1156, 185 N.E.3d 1106, *reconsideration denied*, 167 Ohio St.3d 1409, 2022-Ohio-2047, 188 N.E.3d 1104.

{¶ 27} The Commission finds that rehearing on these assignments of error should be denied. The Commission finds that OCC's first claim in the multi-part first assignment of error is improper as OCC seeks rehearing of a denial of rehearing on the same issue. It is well-established that R.C. 4903.10 does not allow persons who enter appearances to have "two bites at the apple" or to file rehearing upon the denial of rehearing of the same issue. *Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, Second Entry on Rehearing (Sept. 13, 2006) (*Ormet*) at 3, citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3; See also *In re Ohio Power Co. and Columbus Southern Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (Jan. 30, 2013) at 4-5. Previously, in this case, OCC alleged in the fourth assignment of error in its application for rehearing filed on July 15, 2022, that the Commission erred when it failed to find that AES Ohio's collection of RSC charges of approximately \$60 million from consumers since August 11, 2021, was unauthorized and in violation of R.C. 4905.22 and a Commission order. Eighth Entry on Rehearing at ¶ 26. The Commission denied rehearing on the fourth assignment of error. *Id.* at ¶ 28-29. Similarly, in the application for rehearing currently before the Commission, OCC alleges that the Commission unreasonably failed to order a refund of RSC charges collected since August 11, 2021. Accordingly, we find that OCC's first and second assignments of error in its September 9, 2022 application for rehearing are improper and should be denied on that basis.

{¶ 28} Even if OCC's application for rehearing were not improper, the Commission would deny rehearing on the first and second assignments of error. OCC claims that the Commission ruled that OCC must show prejudice before consumer refunds may be ordered and that the Commission cannot lawfully write into the law a requirement of prejudice before ordering refunds where a utility has violated a Commission order and R.C. 4905.22 and 4905.32. OCC also claims that the Commission violated R.C. 4903.09 because the Commission failed to provide a reasoned explanation of the basis of its decision that consumers were not prejudiced and that prejudice must be shown before consumer refunds

may be ordered. However, OCC misconstrues the Commission's conclusion in the Eighth Entry on Rehearing that an order requiring AES Ohio to refund a portion of the RSC collected since August 11, 2021, would be "unnecessary and inappropriate." The Commission did not rule, *as a matter of law*, that OCC must show prejudice before a refund could be ordered; the Commission determined that, *based upon the facts and circumstances of this case*, that a refund was "unnecessary and inappropriate." These facts and circumstances included the fact that there was no evidence of bad faith or deliberate failure to perform a duty on the part of AES Ohio or its counsel. Eighth Entry on Rehearing at ¶ 28. The facts and circumstances also included the absence of prejudice to OCC because the Commission had directed AES Ohio to file revised final tariffs for the RSC with an effective date of August 11, 2021. *Id.* AES Ohio, in fact, filed revised final tariffs, including the refund language, on August 11, 2022, with the effective date directed by the Commission. Thus, OCC is in the same position today as if AES Ohio had immediately filed revised final tariffs on August 11, 2021, the date the Commission issued the Sixth Entry on Rehearing; no further explanation of the absence of prejudice to OCC is necessary.

{¶ 29} Moreover, OCC characterizes AES Ohio's behavior as "the very definition of bad faith and deliberate inaction." However, OCC substitutes innuendo for evidence and rhetoric for facts. As AES Ohio points out, AES Ohio timely filed proposed tariffs, including the refund language, on July 16, 2021, as directed by the Commission in the Fifth Entry on Rehearing. There is no question that AES Ohio erred when it failed to timely file final tariffs including the refund language in response to the Commission's directive in the Sixth Entry on Rehearing or that AES Ohio mistakenly represented to the Supreme Court of Ohio that the "tariff has not been approved and is not currently operative." *In the Matter of the Application of the Dayton Power and Light Co. to Establish a Standard Service Offer*, S.Ct. Case No. 2021-1068, Fourth Merit Brief at 1 (Mar. 8, 2022). AES Ohio does not dispute these facts. However, these two facts alone are not *sufficient* to demonstrate "bad faith" or "deliberate inaction." OCC cites no other evidence in the record that AES Ohio was acting in bad faith; moreover, the very public nature of both errors, documented for all time in the

Commission's docketing system and in the Supreme Court's online docket, made it inevitable that the errors would be discovered in due course. In fact, AES Ohio's incorrect representation to the Court was easily refuted by OCC by pointing to the language in the Sixth Entry on Rehearing approving the proposed tariffs.

B. OCC's third assignment of error should be denied as moot.

{¶ 30} In its third assignment of error, OCC claims that the Commission erred when the Commission found that AES Ohio lawfully collected the RSC between August 11, 2021, and the present under a tariff filed with the Commission under R.C. 4905.32. OCC alleges that the Commission's ruling is unlawful and unreasonable, being without record support, and against the manifest weight of the evidence, violating R.C. 4903.09. OCC further alleges that AES Ohio violated 4905.22 and R.C. 4905.32 when AES Ohio continued to charge customers under filed rates that were not in accordance with the Commission-approved rate schedule from the Commission August 11, 2021 Entry on Rehearing. OCC argues that the Commission mistakenly construes *Lucas Cty. Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997), in support of the finding that refunds would be retroactive ratemaking. Instead, OCC posits that, because the tariffs under which AES Ohio was collecting the RSC from consumers were not Commission-approved tariffs at the time such charges were collected, a refund to consumers would not be retroactive ratemaking.

{¶ 31} In its memorandum contra, AES Ohio responds that refund would not be lawful. AES Ohio avers that refunds are ordinarily barred in Ohio. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957), paragraph two of the syllabus. AES Ohio claims that, although OCC asserts that AES Ohio violated R.C. 4905.54, 4905.22 and 4905.32, OCC does not quote any of those statutes, does not identify any provision in those statutes that AES Ohio allegedly violated and does not demonstrate that those statutes authorize refunds. AES Ohio argues that none of the statutes are applicable to the facts of this case and that none of the statutes authorize the Commission to order utilities to issue refunds. AES Ohio concludes that, if the General Assembly had intended

to authorize the Commission to order utilities to issue refunds, it would have done so in express language, as it did in R.C. 4904.42 and R.C. 4928.143(F).

{¶ 32} The Commission finds that rehearing on this assignment of error should be denied as moot. On August 11, 2022, AES Ohio filed revised tariffs for the RSC which included the refund language and an effective date of August 11, 2021. Accordingly, all RSC charges collected since August 11, 2021 have been collected under a tariff which includes the refund language directed by the Commission. Moreover, OCC cannot demonstrate any prejudice under this assignment of error because, as stated above, OCC is in the same position today as if AES Ohio had immediately filed revised final tariffs, including the refund language, on August 11, 2021, the date the Commission issued the Sixth Entry on Rehearing.

C. OCC's fourth assignment of error should be denied.

{¶ 33} OCC alleges in its fourth assignment of error that the Commission erred when we found that OCC did not raise the underlying issue in a timely manner and thus arguably deprived the Commission of the opportunity to correct it earlier in the proceeding. OCC claims that the Commission's ruling is unlawful and unreasonable as lacking record support, violating R.C. 4903.09. OCC states that it informed the Commission in a timely manner that would have allowed the Commission to correct the error by ordering a full refund to consumers. OCC further alleges that the Commission wrongly relied on *Parma v. Pub. Util. Comm.*, 86 Ohio St.3d 144, 712 N.E.2d 724 (1999), as rationale for denying consumers refunds because *Parma* is distinguishable.

{¶ 34} The Commission finds that rehearing on this assignment of error should be denied. OCC misstates the Commission's determination in the Eighth Entry on Rehearing, where we clearly stated that "we reject OCC's first and fifth assignments of error for the reasons provided above [in paragraph 28]." Eighth Entry on Rehearing at ¶ 30. Thus, the basis for the rejection of the first and fifth assignments is entirely contained in paragraph 28 of the Eighth Entry on Rehearing. The Commission then goes on to state that the failure to

raise this issue at an earlier juncture created an additional difficulty for OCC's claims because OCC had several prior opportunities to raise, with the Commission, AES Ohio's failure to file revised final tariffs, including the refund language, for the RSC. *Id.* The Commission concluded that the failure to raise this issue at an earlier juncture precludes any claim for a forfeiture, *not a refund*, because it deprived the Commission of an opportunity to cure any error when it reasonably could have done so. *Id.* Thus, we do not concede that the Commission relied upon *Parma* as a rationale for not ordering refunds of the RSC collected since August 11, 2021.

D. OCC's fifth assignment of error should be denied.

{¶ 35} OCC alleges in its fifth assignment of error that the Commission erred when it unreasonably and unlawfully construed R.C. 4903.10 to allow rehearing on matters not specified in applications for rehearing under Commission review. OCC contends that the Commission erred by construing, and not applying, an unambiguous statute. Additionally, assuming *arguendo* the statute was ambiguous, the Commission erred in unreasonably construing the statute to such an extent as to make it unworkable and contrary to its just and reasonable intent, violating Ohio Rules of Construction Section 1.47(B).

{¶ 36} The Commission finds that rehearing on this assignment of error should be denied. OCC acknowledges that the Commission denied as moot OCC's second assignment of error in its July 15, 2022 application for rehearing, in which OCC claimed that the Commission erred by misusing the statutory rehearing process to change its ruling on a matter not specified in the applications for rehearing that were under review.¹ OCC's

¹ In determining that OCC's assignment of error was moot, the Commission did not concede that OCC's characterization of the Seventh Entry on Rehearing was correct. Although the order was plainly styled "Seventh Entry on Rehearing," the order consisted of three distinct parts: (1) acceptance of the withdrawal of applications for rehearing; (2) the now-vacated approval of the proposed tariffs; and (3) granting a stay requested by OCC. Only the first part of the order was done pursuant to the Commission's authority under R.C. 4903.10. Under the second part, the Commission proceeded with its authority to approve proposed tariffs, independent of the rehearing statute. Further, in the Sixth Entry on Rehearing, the Commission did the exact same thing. The Commission denied the applications for rehearing filed by OCC and AES Ohio, and the Commission approved AES Ohio's proposed tariffs which included the refund language. Sixth Entry on Rehearing at ¶ 48, 51-53.

arguments continue to be moot; in the Eighth Entry on Rehearing, the Commission granted OCC's application for rehearing and vacated the provisions of the Seventh Entry on Rehearing which OCC objected to in its July 15, 2022 application for rehearing. Further, this assignment of error is improper. R.C. 4903.10 does not allow persons who enter appearances to have "two bites at the apple" or to file rehearing upon the denial of rehearing of the same issue. *Ormet*, Second Entry on Rehearing (Sept. 13, 2006) at 3, citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3; *See also In re Ohio Power Co. and Columbus Southern Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (Jan. 30, 2013) at 4-5.

{¶ 37} Nonetheless, even if OCC's fifth assignment of error was not both moot and improper, the Commission would deny rehearing on this assignment of error. OCC interprets R.C. 4903.10 as limiting the Commission's authority on rehearing to addressing "the matters specified in such application." R.C. 4903.10. We are unpersuaded by OCC's cramped interpretation of R.C. 4903.10 as OCC's interpretation is supported by neither the plain language of the statute nor the cases OCC cites in support of its interpretation.

{¶ 38} Contrary to OCC's reading of R.C. 4903.10, the plain language of the statute does not limit the Commission's authority to modify the original order "to matters raised on rehearing." OCC elides the plain language of R.C. 4903.10, which states that "[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." (Emphasis added.) R.C. 4903.10 Further, OCC faults the Commission's reliance upon the Supreme Court of Ohio's ruling in *Columbus & Southern Ohio Elec. Co. v. Pub. Util. Comm.* Eighth Entry on Rehearing at ¶ 32, quoting *Columbus & Southern Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 15, 460 N.E.2d 1108, 10 O.B.R. 166 (1984) ("Following a rehearing, the commission need only be *of the opinion* that the original order should be changed for it to modify the same." (Emphasis sic.)). OCC contends that the Commission ignores part of the Court's ruling that a rehearing is limited, "first, to matters determined in the earlier proceedings, and second, among those,

to matters for which, in judgment of the commission, sufficient reason has been shown [through an application for rehearing]. The General Assembly did not intend for a rehearing to be a de novo hearing.” Application for Rehearing at 19-20. However, the operative words, “through an application for rehearing,” were added by OCC to the Court’s decision; and OCC omits the phrase “in the commission’s discretion” from its quotation of the decision. The sentence in question reads, in full:

A rehearing is limited, in the commission’s discretion, first, to matters determined in the earlier proceedings, and second, among those, to matters for which, in judgment of the commission, sufficient reason has been shown.

Columbus & Southern Ohio Elec. Co., 10 Ohio St.3d at 13.

{¶ 39} Moreover, OCC represents that the language in the Supreme Court of Ohio’s syllabus in *Doc Goodrich & Sons, Inc. v. Pub. Util. Comm.*, 53 Ohio St.2d 70, 372 N.E.2d 354 (1978) (*Doc Goodrich*) ties the Commission’s rehearing duties to a review of the issues which were raised on rehearing. OCC quotes the language of the syllabus: “[the Commission] may analyze the evidentiary record to determine whether, on a proper view of the law, there was any evidence to support its ultimate findings on the issues being reheard[.]” *Doc Goodrich*, paragraph one of the syllabus. However, OCC misrepresents the Supreme Court’s actual decision in *Doc Goodrich*. The Court expressly declined to rule on whether the Commission is limited on rehearing to the issues raised in the applications for rehearing, stating that:

Since the order of January 15, 1976, did not enlarge the issues on rehearing, the court need not consider whether the commission can lawfully broaden the scope of a rehearing once the time for granting a rehearing under R.C. 4903.10 has expired.”

Doc Goodrich, 53 Ohio St.2 at 72. Likewise, OCC misrepresents the Commission’s decision *In re Complaint of Ohio Cable Telecommunications Assoc. et al*, Case No. 96-1309-EL-CSS, Entry on Rehearing (Dec. 4, 1997) at 3. OCC claims that in this case, the Commission

acknowledged that its authority to address an issue on rehearing must be “within the scope of issues raised in the initial applications for rehearing.” *Id.*, citing *Doc Goodrich*. However, like *Doc Goodrich*, the Commission found that the ruling at issue was within the scope of issues raised in the initial applications for rehearing. *Id.* at 3. Thus, the Commission did not need to address the question of the Commission’s authority on rehearing is limited to the scope of the matters raised in an application for rehearing.

IV. ORDER

{¶ 40} It is, therefore,

{¶ 41} ORDERED, That the application for rehearing filed by OCC be denied. It is, further,

{¶ 42} ORDERED, That a copy of this Ninth Entry on Rehearing be served upon each party of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair
M. Beth Trombold
Daniel R. Conway
Dennis P. Deters

Recusal:

Lawrence K. Friedeman

GAP/dmh

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**Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-
UNC**

Summary: Entry finding that the application for rehearing filed by Ohio Consumers' Counsel should be denied electronically filed by Heather A. Chilcote on behalf of Public Utilities Commission of Ohio