

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Ohio Power Siting)
Board’s Review of Ohio Adm.Code Chapters) Case No. 21-902-GE-BRO
4906-1, 4906-2, 4906-3, 4906-4, 4906-5,)
4906-6, and 4906-7.)

**DUKE ENERGY OHIO’S
MEMORANDUM CONTRA APPLICATIONS FOR REHEARING**

Pursuant to Ohio Revised Code (R.C.) 4903.10 and Ohio Administrative Code (O.A.C.) 4901-1-35, Duke Energy Ohio, Inc. (Duke Energy Ohio), respectfully submits this Memorandum Contra Applications for Rehearing that were filed with the Ohio Power Siting Board (Board) on August 21, 2023, in the above-captioned proceeding.

The Office of the Ohio Consumers’ Counsel (OCC) argued, during the comment phase of this proceeding, that the Board should take it upon itself to consider need, cost effectiveness, and the utilization of competitive solicitation in its consideration of applications relating to PJM supplemental projects.¹ On rehearing, OCC complains that its arguments were not discussed by the Board in its Finding and Order. OCC cites R.C. 4903.09 and “binding Ohio Supreme Court precedent” for assignment of error. OCC is wrong, with regard to both its application for rehearing and its underlying comments.

Ohio law, in R.C. 4903.09, requires that the Commission (and Board) issue “written opinions setting forth the reasons prompting the decisions arrived at” in “all contested cases.”

¹ OCC Application for Rehearing, p. 1. See also Application for Rehearing by National Grid Renewables Development, LLC, Assignment of Error Number Three.

OCC argues vehemently regarding the need, in written opinions, for all arguments to be addressed. It fails entirely, however, to consider the limitation of this requirement to “contested cases.”

The seminal case on whether a rule-making process is a “contested case” was decided by the Ohio Supreme Court almost 70 years ago, in *Craun Transportation, Inc. v. Public Utilities Commission of Ohio*.² In that case, the Court considered whether the Commission violated the law by adopting a rule without preparing a written opinion setting forth the reasons for the rules and a summary of the facts on which its decision was based.³ The Court found that the Commission was not subject to that requirement as the rule-making proceeding “was not an adversary one as contemplated by the term, ‘contested cases.’ No justiciable question was before the commission.”⁴

Craun was relied upon by the Court in 1992, in *Ohio Edison Co. v. Public Utils. Comm.*, for its conclusion that the nature of a proceeding—quasi-judicial or quasi-legislative—was determinative of the appropriate standards and processes to be applied.⁵ There, the Court found that the adoption of a nuclear performance standard to be applied in future electric fuel component proceedings was a quasi-legislative act. That made it not subject to an appeal to the Court as of right.⁶

The Commission has applied *Craun* to the exact argument raised by OCC, concluding the R.C. 4903.09 is not applicable in a rule-making proceeding:

We also note that, as a quasi-legislative proceeding, a rulemaking such as this one is not subject to R.C. 4903.09, requiring reliance on the record garnered at hearing in a proceeding. *Craun Transp., Inc. v. Pub. Util. Comm.*, 162 Ohio St. 9, 10, 120 N.E.2d 436 (1954) (determining that the Commission "in the promulgation and adoption of the rules in question was not subject to the procedural requirements of Section 614-46a, General Code," predecessor of R.C. 4903.09); *In re the*

² *Craun Transportation, Inc. v. Public Utilities Commission of Ohio*, 53 Ohio Op. 451, 162 Ohio St. 9 (1954).

³ The law under consideration in *Craun* was General Code Section 614-46a. This was the predecessor of R.C. 4903.09.

⁴ *Craun*, 162 Ohio St. at 10.

⁵ *Ohio Edison Co. v. Public Utils. Comm.*, 63 Ohio St.3d 555, 589 N.E.2d 1292 (1992).

⁶ *Id.*, 63 Ohio St.3d at 566.

*Commission's Review of Chapter 4901:1-19 of the Ohio Administrative Code, Case No. 17-1945-GA-ORD, Second Entry on Rehearing (Feb. 27, 2019) at P 10.*⁷

The Board should reach the same conclusion.

It should also be noted that the underlying arguments made by OCC were of no merit. OCC was asking the Board to reach beyond its statutory authority to consider financial matters. The Board has only the authority granted to it by the Ohio General Assembly. R.C. 4906.10 spells out the matters to be determined by the Board in the course of issuing or denying a certificate. The financial issues addressed by OCC are not listed.

OCC's application for rehearing should be denied.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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⁷ *In the Matter of the Commission's Review of its Rules for Electrical Safety and Service Standards Contained in Chapter 4901:1-10 of the Ohio Administrative Code, ¶ 10.*

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio’s e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served via electronic mail on the 31st day of August, 2023, upon the persons listed below.

/s/ Jeanne W. Kingery
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Summary: Memorandum Duke Energy Ohio's Memorandum Contra Applications
For Rehearing electronically filed by Mrs. Tammy M. Meyer on behalf of Duke
Energy Ohio Inc. and D'Ascenzo, Rocco and Kingery, Jeanne and Akhbari, Elyse
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