

**BEFORE THE
OHIO POWER SITING BOARD**

In the Matter of the Ohio Power Siting	:	
Board’s Review of Ohio Adm.Code	:	Case No. 21-0902-GE-BRO
Chapters 4906-1, 4906-2, 4906-3, 4906-4,	:	
4906-5, 4906-6, and 4906-7	:	
	:	

**AES OHIO’S MEMORANDUM IN OPPOSITION
TO APPLICATION FOR REHEARING**

Pursuant to Ohio Adm.Code 4906-1-32(B), The Dayton Power and Light Company d/b/a AES Ohio opposes the August 21, 2023 Application for Rehearing by the Office of the Ohio Consumers’ Counsel in this rule-review proceeding. In its Application for Rehearing, OCC argues that the Board’s July 20, 2023 Opinion and Order violated R.C. 4903.09 because it did not specifically address certain comments filed by OCC in this proceeding. OCC is wrong on both the law and the facts.

Although R.C. 4903.09, as incorporated by R.C. 4906.12, requires the Board to issue “findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact” in “all contested cases,” that statute does not apply to this case as a rule-review proceeding. *E.g.*, *In the Matter of the Commission’s Review of Chapter 4901:1-37 of the Ohio Administrative Code*, Case No. 18-1190-EL-ORD (Aug. 12, 2020 Entry on Rehearing), ¶ 19 (finding that “a rulemaking is not a contested case” for purposes of R.C. 4903.09); *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*, Case No. 17-1842-EL-ORD, Entry on Rehearing (Jan. 27, 2021), ¶ 10 (explaining 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 in a proceeding”) (citing *Craun Transp., Inc. v. Pub. Util. Comm.*, 162 Ohio St. 9, 10 (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,” the predecessor of R.C. 4903.09)); *In the Matter of the 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), ¶ 10; *In re Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Exchange Companies*, Case No. 00-1532-TP-COI, Entry on Rehearing (Apr. 25, 2002), at 6-7 (rejecting OCC’s reliance on the provisions of R.C. 4903.09 in the context of a rulemaking, recognizing that in such cases, “[n]o party carries a burden of proof and it is generally the case that no justiciable issue arises until application or enforcement of the rule against a party”). OCC’s reliance on two non-rulemaking cases is, thus, inapt.¹

Moreover, OCC’s bald accusation (p. 3) that the Board “ignored” its arguments to modify Ohio Adm.Code 4906-2-04(C)² “to mandate its review of supplemental transmission projects include consideration of the need and cost effectiveness of the projects” and “to require utilities to demonstrate that they utilize competitive solicitation for all transmission utility supplemental projects as a means of containing costs being charged to customers” is demonstrably false.

Indeed, as the Board stated in its Opinion and Order (¶ 15):

Ohio Adm.Code Chapter 4906-2 concerns procedure in cases before the Board. Staff’s proposed revisions were minimal and there were limited comments submitted concerning this chapter. **Among the comments submitted, OCC seeks amendments to Ohio Adm.Code 4906-2-04(C)**, which currently requires, in sum, applicants to express costs and benefits of a proposed project in documented, quantitative terms. **OCC seeks a required**

¹ *In re Fuel Adjustment Clauses for Columbus S. Power Co. and Ohio Power Co.*, 147 Ohio St.3d 59, 2016-Ohio-1607, 60 N.E.3d 1221; *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, 166 Ohio St.3d 519, 2021-Ohio-3630.

² See Aug. 5, 2022 Consumer Protection Comments by Office of the Ohio Consumers’ Counsel, pp. 4-5.

explanation of prudence and a description of how construction of a project will be competitively procured. The Board declines to adopt these recommendations. R.C. 4906.10(A) already requires applicants to demonstrate the basis of need for a project. Further, projects are subject to review by the regional transmission organization and at the federal level.

(Emphasis added).

Moreover, OCC has not explained what statutory authority the Board would have to conduct the review that OCC now seeks or how such review would be consistent with the jurisdiction granted by Congress to the FERC over the transmission of electric energy in interstate commerce, for the resale of electric energy in interstate commerce, and the facilities for such sales or transmission. 16 U.S.C. § 824. See *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 375 (1988) (holding that where FERC has allocated costs, state proceedings may not be used as a forum for a collateral attack on the reasonableness of those costs). Accord: *In the Matter of the Ohio Power Siting Board's Report to the General Assembly Regarding the Power Transmission System*, Case No. 21-796-EL-UNC, Entry (Nov. 18, 2021) (adopting the Ohio Power Siting Board Report to the General Assembly Regarding the Power Transmission System), at p. 3 of the Report.

The Application for Rehearing by OCC should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was e-filed with the Ohio Power Siting Board on August 31, 2023. The docketing division's e-filing system will electronically serve notice of the filing of this document.

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Summary: Memorandum AES Ohio's Memorandum in Opposition to Application for Rehearing electronically filed by Mr. Christopher C. Hollon on behalf of The Dayton Power and Light Company d/b/a AES Ohio.