

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the)
Ohio Department of Development to) Case No. 23-779-EL-UNC
Adjust Ohio Power Company's 2023)
Universal Service Fund Rider Rate.)

**APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The PUCO's Finding and Order¹ granting the application of the Ohio Department of Development ("ODOD") to increase the 2023 Universal Service Fund ("USF") Rider rate for the Ohio Power Company ("AEP") fails consumers and is unlawful. The Finding and Order denies residential consumers a voice by preventing their state legal representative, the Ohio Consumers' Counsel ("OCC"), from participating in this proceeding to raise their USF Rider rates. The Finding and Order also fails to enforce the terms of the Settlement in Case No. 22-556-EL-USF ("2022 USF Adjustment Case"), that requires ODOD to convene a USF Rider Working Group Meeting.

Accordingly, under R.C. 4903.10, OCC applies for rehearing of the September 6, 2023 Finding and Order, which was unlawful in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by denying OCC's intervention in this proceeding, in violation of R.C. 4903.221(B) and Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 384, 2006-Ohio-5853, which requires intervention in PUCO proceedings to be "liberally allowed."

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by failing to enforce the terms of the Settlement it approved in Case No. 22-556-EL-USF, as binding Supreme Court of Ohio precedent requires, by not ordering (without explanation) that ODOD convene a USF Rider Working Group Meeting.

¹ Finding and Order (September 6, 2023).

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In Ohio, residential utility consumers have a voice, which is OCC. The PUCO's September 6, 2023 Finding and Order denied consumers that voice by preventing OCC from intervening in this proceeding.² It also denied consumers' voice on USF Rider rate hikes by failing to order³ the USF Working Group to meet and consider ways to "control the costs that are ultimately recovered through the USF Rider."⁴ The Settlement in Case No. 22-556-EL-USF,⁵ adopted by the PUCO,⁶ required these meetings. Yet, the Working Group has not convened since 2019. Nonetheless, without explaining its change of position, the PUCO now fails to enforce its prior decision by refusing to order Working Group meetings.

The PUCO's Finding and Order is unlawful. Accordingly, OCC objects to the Finding and Order. The PUCO should grant OCC's Application for Rehearing as further explained below and reverse, abrogate or modify its Finding and Order.

² Finding and Order (September 6, 2023) at 8.

³ *Id.* at 7.

⁴ Case No. 03-2049-EL-UNC, Stipulation and Recommendation (November 14, 2003) at 7.

⁵ Case No. 22-556-EL-USF, Stipulation and Recommendation (November 23, 2022) at 8.

⁶ Case No. 22-556-EL-USF, Opinion and Order (December 14, 2022).

II. MATTER FOR CONSIDERATION

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by denying OCC’s intervention in this proceeding, in violation of R.C. 4903.221(B) and *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, which requires intervention in PUCO proceedings to be “liberally allowed.”

The PUCO should have granted OCC’s motion to intervene.⁷ OCC has authority under law, pursuant to R.C. Chapter 4911, to represent the interests of the about 1.5 million residential utility consumers of AEP. OCC satisfies the standards for intervention. The PUCO misapplied the intervention standard by denying OCC’s intervention in this case.

The only reason the PUCO provides for denying OCC’s intervention is finding it “not *necessary* for the Commission to consider fully the comments and arguments presented in this case.”⁸ But, that is not the standard for intervention in cases before the PUCO. R.C. 4903.221 does not require the PUCO to determine whether a party’s intervention is “necessary.” Instead, R.C. 4903.221 provides, in part, that any person “who may be adversely affected” by a PUCO proceeding is entitled to intervene in that proceeding.

The interests of Ohio’s residential consumers may be “adversely affected” in this case. The PUCO is reviewing whether proposed additional charges to consumers under the USF Rider are just and reasonable. All consumers, including residential consumers, pay to support the low-income consumer programs through the USF Rider. ODOD seeks

⁷ Motion to Intervene and Memorandum in Support of Office of the Ohio Consumers’ Counsel (“OCC Motion to Intervene”) (August 2, 2023).

⁸ Finding and Order at 8 (emphasis added).

to impose on consumers new charges under AEP's USF Rider totaling \$5,267,013.⁹ Residential consumers may be "adversely affected" in this proceeding if the PUCO approves rate increases under the USF Rider. Per R.C. 4903.221, that is all that is required for OCC to intervene.

Further, the Supreme Court of Ohio has held that "intervention ought to be *liberally allowed* so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO."¹⁰ In the "absence of some evidence in the record calling those claims into doubt or showing that intervention would unduly prolong or delay the proceedings, intervention should [be] granted."¹¹

There is no evidence in the record that contradicts or calls into question that that OCC has a "real and substantial interest" in this proceeding. The PUCO is setting the rates to be charged to AEP consumers under the USF Rider. And no party contests that OCC has authority under R.C. Chapter 4911 to represent the interests of the 1.5 million residential consumers of AEP.

Further, there is no evidence in the record to demonstrate that OCC's intervention would "unduly prolong or delay" this proceeding. OCC filed comments and reply comments in accordance with the PUCO's procedural schedule. OCC even moved to *shorten* the discovery response time in this proceeding from twenty days to seven days, allowing it to conduct discovery within the time the procedural schedule provided.¹² As a result, this case was fully briefed within just *24 days* of ODOD's initial application.

⁹ Application at 4.

¹⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 388 (2006) (emphasis added).

¹¹ *Id.*

¹² Motion to Shorten the Discovery Response Time and Request for Expedited Ruling by Office of the Ohio Consumers' Counsel.

OCC's intervention did not prolong or delay this proceeding *at all*, let alone for an "undue" time.

The PUCO should follow the Supreme Court of Ohio's instructions on OCC's intervention rights. Per the Supreme Court of Ohio's instructions, OCC's intervention in this matter "should be *liberally allowed*."

The Finding and Order is unlawful. The PUCO should modify its Finding and Order to grant OCC's motion to intervene.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by failing to enforce the terms of the Settlement it approved in Case No. 22-556-EL-USF, as binding Supreme Court of Ohio precedent requires, by not ordering (without explanation) that ODOD convene a USF Rider Working Group Meeting.

The PUCO should have granted OCC's request to order ODOD to convene a Working Group meeting. The settlement in Case No. 03-2049-EL-UNC required ODOD to establish the Working Group to "control the costs that are ultimately recovered through the USF Rider."¹³ The PUCO tasked the Working Group with "developing, reviewing, and recommending...cost-control measures."¹⁴ These issues are within the scope of this proceeding, in which ODOD is asking residential consumers to pay an additional more than \$5 million under the USF Rider.

The settlement in Case No. 22-556-EL-USF required continuation of the Working Group.¹⁵ Yet, no Working Group meeting has occurred since at least 2019. OCC advised the PUCO of this fact. The PUCO denied OCC's request to order meetings to resume,

¹³ Case No. 03-2049-EL-UNC, Stipulation and Recommendation (November 14, 2003) at 7.

¹⁴ *Id.*

¹⁵ Case No. 22-556-EL-USF, Stipulation and Recommendation (November 23, 2022) at 8.

stating that because “ODOD has committed to convening a meeting of the Working Group, we find OCC’s related concern has been addressed...”¹⁶ It has not been.

When a settlement is approved by the PUCO it is entitled to the force of law.¹⁷ Indeed, the PUCO itself has recognized the importance of enforcing the terms of settlements.¹⁸ Instead of doing so here by ordering Working Group meetings, the PUCO accepts ODOD’s permissive claim that it “will convene the Working Group independently of this proceeding.”¹⁹ OCC appreciates this statement, but it is non-binding and does not itself satisfy the duty ODOD has long neglected to convene Working Group meetings. The Settlement in Case No. 22-556-EL-USF gave this duty this force of law, yet ODOD has not satisfied it. And the PUCO’s failure to order ODOD to honor the settlement to which it agreed contravenes Ohio Supreme Court precedent²⁰ requiring the Commission to enforce binding settlements.

By denying OCC’s request to order a Working Group meeting, the PUCO also violates binding Ohio Supreme Court of Ohio precedent requiring it to abide by its own decisions unless it provides justification for changing positions. The Ohio Supreme Court has instructed the PUCO “to respect its own precedents in its decisions to assure the

¹⁶ Finding and Order (September 6, 2023) at 7.

¹⁷ See *Ohio Consumers’ Counsel v. Pub. Util. Comm’n of Ohio*, 114 Ohio St.3d 340, 2007-Ohio-4276 (2007); *AK Steel Corp. v. Pub. Util. Comm’n of Ohio*, 95 Ohio St.3d 81, 82-83, 765 N.E.2d 862 (2002); O.A.C. 4901-1-30(D). See also *Akron v. Pub. Util. Comm’n of Ohio*, 55 Ohio St.2d 155, 157, 9 O.O.3d 122, 378 N.E.2d 480 (1978).

¹⁸ See Case No. 95-302-EL-FOR, et al. (Opinion and Order) (December 19, 1996) at 21-22.

¹⁹ Reply Comments of the Ohio Department of Development at 3.

²⁰ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n of Ohio*, 114 Ohio St.3d 340, 2007-Ohio-4276 (2007); *AK Steel Corp. v. Pub. Util. Comm’n of Ohio*, 95 Ohio St.3d 81, 82-83, 765 N.E.2d 862 (2002); O.A.C. 4901-1-30(D). See also *Akron v. Pub. Util. Comm’n of Ohio*, 55 Ohio St.2d 155, 157, 9 O.O.3d 122, 378 N.E.2d 480 (1978).

predictability, which is essential in all areas of law, including administrative law.”²¹

While the PUCO can revisit a particular decision, the PUCO is “bound by certain institutional constraints to justify that change before such order may be changed or modified.”²² If the PUCO sees fit to depart from a prior order, it “must explain why” and “the new course also must be substantively reasonable and lawful.”²³

The Settlement in Case No. 22-556-EL-USF *required* that ODOD continue the Working Group. It has not done so. Now, the PUCO takes the position that ODOD’s word is enough. The PUCO provides no reason for this change in position. This violates binding Supreme Court of Ohio precedent requiring the PUCO to explain why departure from its Opinion and Order in Case No. 22-556-EL-USF is “substantively reasonable and lawful.”

The PUCO is required to enforce Settlements it adopts or explain why its deviation from prior decisions is substantively reasonable and lawful. With no explanation, the PUCO failed to order ODOD to continue the Working Group, which the Settlement in Case No. 22-556-EL-USF required. The PUCO should modify its September 6, 2023 decision to include such an order.

III. CONCLUSION

“[T]he purpose of the PUCO * * * is to protect the customers of public utilities.” To protect consumers, the PUCO should reject or modify its Finding and Order OCC’s

²¹ *Cleveland Electric Illuminating Co. v. Pub Util. Comm.*, 42 Ohio St.2d 403, 431 (1975), superseded on other grounds (by statute), as recognized in *Babbitt v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89 (1979).

²² *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51 (1984).

²³ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52.

motion to intervene should be granted. It should also order ODOD to convene a Working Group meeting, consistent with the terms of settlement that it approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 6th day of October 2023.

/s/ Connor D. Semple
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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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