

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke     )  
Energy Ohio, Inc., to Adjust and Set     ) Case No. 23-126-EL-RDR  
Rider DSR.     )

In the Matter of the Application of Duke     )  
Energy Ohio, Inc., for Approval of Tariff     ) Case No. 23-281-EL-ATA  
Amendments.     )

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

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November 3, 2023

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On October 4, 2023, the PUCO entered an Order allowing Duke to collect from consumers storm related costs based on outside the record information. The PUCO relied on its Staff's revised recommendation to approve the storm costs, even though its Staff originally recommended disallowing the charges. (The PUCO Staff revised its recommendation after meeting with and receiving additional support from Duke, all without OCC's participation.) And the PUCO relied upon Duke's unauthorized surreply comments as well. The PUCO's reliance on such information was unlawful under R.C. 4903.09 and contrary to the Ohio Supreme Court's holding in *Tongren v. Pub. Util Comm.* (1999), 85 Ohio St.3d. 87, 706 N.E.2d 1255.

OCC applies for rehearing of the PUCO's Order issued on October 4, 2023. The PUCO's Order is unreasonable and unlawful in the following particulars:

**ASSIGNMENT OF ERROR NO. 1:** The PUCO erred, violating R.C. 4903.09, when it relied on outside the record information that the November 2022 storm qualified as a Major Event. Under R.C. 4903.09, the PUCO must set forth findings based on the record in the proceeding. The PUCO's reliance on non-record information is also contrary to the Ohio Supreme Court's holding in *Tongren v. Pub. Util Comm.* (1999), 85 Ohio St.3d. 87, 706 N.E.2d 1255.

**ASSIGNMENT OF ERROR NO. 2:** The PUCO erred, violating R.C. 4903.09, when it failed to set forth its reasoning for finding good cause to allow Duke's surreply comments. Consumers were harmed because the PUCO relied, in part, on Duke's surreply comments, to justify charging consumers for storm related expenses.

The reasons for granting this Application for Rehearing are more fully set forth in the attached Memorandum in Support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

OCC files this Application for Rehearing asking the PUCO to modify or reverse its Order of October 4, 2023. In its Order the PUCO allowed Duke to file surreply comments, which are generally not allowed, without explaining why there was good cause for the surreply comments. The PUCO relied in part on the surreply comments as justification for charging consumers for \$80,000 of storm related expenses that did not qualify for collection from consumers under the PUCO rules.<sup>1</sup> The PUCO also relied upon outside the record information obtained by its Staff, through discussions with Duke.<sup>2</sup> That information never saw the light of day in this case. The PUCO’s Order violates R.C. 4903.09.

**II. STANDARD OF REVIEW**

Applications for rehearing are governed by R.C. 4903.10 and O.A.C. 4901-1-35. The statute provides that, within thirty days after the PUCO issues an order, “any party

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<sup>1</sup> Order at ¶ 11.

<sup>2</sup> *Id.* at ¶ 12.

who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.”<sup>3</sup> Furthermore, the application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”<sup>4</sup>

In considering an application for rehearing, Ohio law provides that the PUCO “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”<sup>5</sup> Furthermore, if the PUCO grants a rehearing and determines 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 \* \* \*.”<sup>6</sup>

OCC meets the statutory requirements applicable to applicants for rehearing pursuant to R.C. 4903.10. Accordingly, OCC respectfully requests the PUCO grant rehearing on the matters specified below.

### **III. ARGUMENTS ON ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1: The PUCO erred, violating R.C. 4903.09, when it relied on outside the record information that the November 2022 storm qualified as a Major Event. Under R.C. 4903.09, the PUCO must set forth findings based on the record in the proceeding. The PUCO’s reliance on non-record information is also contrary to the Ohio Supreme Court’s holding in *Tongren v. Pub. Util Comm.* (1999), 85 Ohio St.3d. 87, 706 N.E.2d 1255.**

The PUCO ruled that Duke could collect \$80,000 of storm costs for the November 2022 storm based on a revised recommendation of its Staff, even though it did

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<sup>3</sup> R.C. 4903.10.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

not list the storm as a major storm on its reporting forms.<sup>7</sup> The PUCO's finding was in error and should be reversed.

Initially the PUCO Staff noted that Duke asked for storm costs associated with a storm that occurred on Nov. 5-6, 2022. The Staff then noted that the Company did not include this storm in its Rule 10 report. On that basis, the PUCO Staff concluded that the costs are not eligible for cost recovery from consumers. The Staff recommended a disallowance.<sup>8</sup>

But on September 26, 2023, the PUCO Staff reversed itself. It recommended allowing collection from consumers of the costs associated with the November storm.<sup>9</sup> Notably, the PUCO Staff did not explain how the November storm qualified as a Major Event as defined by O.A.C. 4901:1-10-01(T) in its Revised Recommendation. Instead, the PUCO Staff noted that Duke reported the November storm as a transmission outage and revealed that "Staff met with and received additional support from Duke. Staff confirms that the November storm qualifies as a Major Event and agrees with Duke that the November storm should be allowed for recovery."<sup>10</sup> What was missing from the Staff's report was what "additional support from Duke" it obtained that allowed it to confirm that the storm qualified as a major event. In other words, the PUCO Staff did not divulge what information it obtained from Duke that caused it to reverse itself.

The PUCO then relied upon the Staff's recommendation, and approved the November storm costs for collection from consumers. In pertinent part, the PUCO order

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<sup>7</sup> Order at ¶ 14.

<sup>8</sup> PUCO Staff Recommendation (September 9, 2023).

<sup>9</sup> PUCO Staff Revised Recommendation (September 26, 2023).

<sup>10</sup> *Id.*

makes it clear that it was relying on its Staff assessment that the storm qualified as a major event, justifying its cost collection from consumers:

Staff maintains it typically relies on Duke's Rule 10 Report to confirm major event outages. However, Staff explains that, in rare cases, storms eligible for recovery may not appear on the Rule 10 Report. *Here, after additional review and after receiving additional support from the Company, Staff was able to confirm that the November 2022 event qualifies as a "Major Event Outage" and should be eligible for recovery.* As amended, Staff states the revenue requirement should be \$13,901,874.

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Upon review, the Commission finds that Duke's application for recovery does not appear to be unjust or unreasonable and should be approved, subject to Staff's recommendations. As explained by Duke and Staff, storms eligible for recovery can all typically be found on the Company's Rule 10 Report, but occasionally eligible storms may be excluded from that particular listing. *The Commission is persuaded, after Staff's confirmation, that such a situation took place here.* Therefore, we affirm a revenue requirement of \$13,901,874.<sup>11</sup> (Emphasis added.)

The Ohio Supreme Court was presented with an almost identical situation in *Tongren v. Pub. Util Comm.* (1999), 85 Ohio St.3d. 87, 706 N.E.2d 1255. In that case the Court found that the PUCO violated R.C. 4903.09 when it relied upon information that the PUCO Staff was privy to but was not contained within the record.

In *Tongren*, OCC challenged the PUCO's order as being unsupported by the record. The Court agreed. *Tongren* presents facts that are not distinguishable from the facts present in this very case. The same conclusion should be reached here: the PUCO

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<sup>11</sup> Order at ¶ 12 (emphasis added).



violated R.C. 4903.09 when it relied on its Staff's recommendation that was based on information outside the record.

The Court in *Tongren* advised that strict compliance with the terms of R.C. 4903.09 was not required.<sup>12</sup> However, the Court ruled that the PUCO had to provide in sufficient detail, the facts in the record upon which the order was based, as well as the reasoning followed in reaching its conclusion.<sup>13</sup> The Court found that the PUCO failed to meet the requirements of § 4903.09 by not providing an adequate record and reversed and remanded the cases to the PUCO.<sup>14</sup>

In *Tongren*, the Court found that no hearing was held and no written testimony was filed on behalf of the utilities or any other interested party.<sup>15</sup> The Court also found that the PUCO Staff filed no comments, testimony, or report.<sup>16</sup> Additionally, the Court noted that the PUCO's "findings" were based on a staff recommendation resulting from discussions between the PUCO Staff and the utility.<sup>17</sup> The Court went on to say, "It is clear from \*\*\* the Finding and Order that the commission accepted its staff's recommendations and adopted as its own various of its staff's findings. However, there is nothing in the record below to evince the bases for the commission's acceptance of such recommendations and adoption of such findings."<sup>18</sup>

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<sup>12</sup> *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 at 89.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 92-93.

<sup>15</sup> *Id.* at 90.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

The facts in this case compel the same conclusion. There is no data in the record that reflects the “additional support from Duke” that changed the PUCO Staff’s recommendation. Instead, the evidence that is in the record supports the opposite conclusion.<sup>19</sup> All we are left with is the Staff’s changed position based on a discussion between the PUCO Staff and the utility. The PUCO Staff revised recommendation came, by the Staff’s admission, after it “met with and received additional support from Duke.”<sup>20</sup> The PUCO accepted the Staff’s recommendation without explaining the basis for its finding.

The facts in this case are strikingly similar to the facts in *Tongren*. What the PUCO did here violated R.C. 4903.09. The PUCO relied upon its Staff’s recommendation which was derived from outside the record information. This is no different than what the PUCO did in *Tongren*. The PUCO, on rehearing, should reverse its ruling and issue a Finding and Order based on the evidence in the record (not evidence outside the record, obtained through a meeting with the utility). Rehearing should be granted.

**ASSIGNMENT OF ERROR NO. 2: The PUCO erred, violating R.C. 4903.09, when it failed to set forth its reasoning for finding good cause to allow Duke’s surreply comments. Consumers were harmed because the PUCO relied, in part, on Duke’s surreply comments, to justify charging consumers for storm related expenses.**

The PUCO granted Duke’s Motion for Leave to file Surreply Comments.<sup>21</sup> In its single sentence ruling on Duke’s motion, the PUCO ruled that it “finds good cause exists

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<sup>19</sup> Staff Review and Recommendation (September 7, 2023).

<sup>20</sup> Staff Review and Recommendation – Update (September 26, 2023).

<sup>21</sup> *Id.* at ¶ 15.

to allow the submission of the surreply comments.”<sup>22</sup> The PUCO’s failure to explain its ruling violated R.C.4903.09.

Neither the Ohio Rules of Civil Procedure nor the PUCO Rules contemplate or permit Duke’s self-styled Motion to File Surreply Comments. Further, under the scheduling order in this matter, the reply period closed on September 22, 2023 and briefing was complete on the same date.<sup>23</sup> Duke disregarded the governing rules and the PUCO’s scheduling order.

Rules exist for reasons. The rules should be followed unless good cause can be shown as to why there should be an exception.<sup>24</sup> Duke made no attempt to establish good cause for its motion in its Memorandum in Support, outside of implied entitlement to an unauthorized second bite of the apple to argue its case.

But more importantly, the PUCO did not explain or give any reasoning why Duke’s unfair and prejudicial gamesmanship established good cause to allow the filing of surreply comments. The PUCO violated R.C. 4903.09 when it failed to explain the basis for finding good cause to allow Duke’s surreply comments. Rehearing should be granted.

#### **IV. CONCLUSION**

The PUCO relied on outside the record evidence in issuing its ruling in this proceeding. That was not only unfair, it was unlawful. And it caused consumers to be on the hook for more charges from their utility. The PUCO should follow the law, not skirt it. Rehearing should be granted.

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<sup>22</sup> Opinion and Order at ¶ 12.

<sup>23</sup> Entry at ¶ 7 (September 8, 2023).

<sup>24</sup> *See, e.g.*, O.A.C. 4901-1-38(B).

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 3<sup>rd</sup> day of November 2023.

*/s/ William J. Michael*  
William J. Michael  
Assistant Consumers' Counsel

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

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Summary: App for Rehearing Application for Rehearing by Office of the Ohio Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of Michael, William J..