

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF OHIO
ADM.CODE CHAPTER 4901-1 RULES
REGARDING PRACTICE AND PROCEDURE
BEFORE THE COMMISSION.

CASE NO. 18-275-AU-ORD

IN THE MATTER OF THE REVIEW OF OHIO
ADM.CODE CHAPTER 4901:1-1 RULES
REGARDING UTILITY TARIFFS AND
UNDERGROUND UTILITY PROTECTION
SERVICE REGISTRATION.

CASE NO. 18-276-AU-ORD

IN THE MATTER OF THE REVIEW OF OHIO
ADM.CODE CHAPTER 4901-3 RULES
REGARDING OPEN COMMISSION
MEETINGS.

CASE NO. 18-277-AU-ORD

IN THE MATTER OF THE REVIEW OF OHIO
ADM.CODE CHAPTER 4901-9 RULES
REGARDING COMMISSION COMPLAINT
PROCEEDINGS.

CASE NO. 18-278-AU-ORD

ENTRY ON REHEARING

Entered in the Journal on December 13, 2023

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by Ohio Consumers' Counsel.

II. DISCUSSION

{¶ 2} On February 13, 2018, the Commission opened the above-captioned cases for the purpose of commencing the five-year review of the rules contained in Ohio Adm.Code Chapters 4901-1, 4901:1-1, 4901-3, and 4901-9.

{¶ 3} On July 12, 2018, the Commission held a workshop in these proceedings to enable interested stakeholders to propose revisions to Ohio Adm.Code Chapters 4901-1,

4901:1-1, 4901-3, and 4901-9. Representatives of several interested stakeholders attended the workshop, and two provided comments.

{¶ 4} By Entry issued on December 4, 2019, the Commission requested comments and reply comments on Staff's proposed revisions to Ohio Adm.Code Chapters 4901-1, 4901:1-1, 4901-3, and 4901-9. Motions to extend the procedural schedule were granted on January 2, 2020, and January 16, 2020, and as to the second extension, the attorney examiner ordered that initial and reply comments be filed by January 13, 2020, and February 10, 2020, respectively.

{¶ 5} Initial written comments were timely filed by the Ohio Farm Bureau Federation, Ohio Telecom Association (OTA), Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy), Ohio Power Company (AEP Ohio), Industrial Energy Users-Ohio (IEU-Ohio), The East Ohio Gas Company d/b/a Dominion Energy Ohio (Dominion), Environmental Law & Policy Center, Interstate Gas Supply, Inc. (IGS), Columbia Gas of Ohio, Inc. (Columbia), Duke Energy Ohio, Inc. (Duke), Ohio Consumers' Counsel (OCC), Northwest Ohio Aggregation Coalition (NOAC), Northeast Ohio Public Energy Council, Edgemont Neighborhood Coalition, and Four A Energy Consulting Services, LLC. Reply comments were then timely filed on February 10, 2020, by OTA; Ohio Energy Group; IEU-Ohio; AEP Ohio; FirstEnergy; Ohio Manufacturers' Association Energy Group; The Dayton Power and Light Company (AES Ohio); IGS; collectively by OCC and NOAC; collectively by Columbia, Dominion, Duke, and Vectren Energy Delivery of Ohio, Inc. (Gas Companies); and collectively by Coalition on Homelessness and Housing in Ohio, Harcatus Tri-County Community Action Organization, The Ohio Poverty Law Center, The Legal Aid Society of Cleveland, Pro Seniors, Inc., and Southeastern Ohio Legal Services (Consumer Groups).

{¶ 6} On October 18, 2023, the Commission issued a finding and order in this matter.

{¶ 7} OCC filed an application for rehearing on November 17, 2023.

{¶ 8} On November 27, 2023, Duke filed a memorandum contra the application for rehearing.

{¶ 9} In its first assignment of error, OCC argues that the Commission erred by not amending the rules as suggested, which would have disallowed ex parte communications between Staff and decision makers. OCC asserts that, as currently written, Ohio Adm.Code 4901-1-10(C) allows the Commission to bypass the requirements of R.C. 4903.09. OCC cites an Ohio Supreme Court ruling it says found that the Commission violated R.C. 4903.09 by relying on information from Staff that was not in the record, citing *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d. 87, 706 N.E.2d 1255 (1999). OCC adds that the Commission still relies on off-the-record ex parte communications with Staff in some of its rulings, citing *In re the Application of Duke Energy Ohio, Inc., to Adjust and Set Rider DS*, Case No. 23-126-EL-RDR (*Duke Case*), Finding and Order at ¶ 12 (Oct. 4, 2023).

{¶ 10} In its memorandum contra, Duke asserts that OCC's reliance on *Tongren* is misplaced because it is a case about record deficiency and not about ex parte communications. As to OCC's reference to the *Duke Case*, Duke states that the Finding and Order in that case relies on the updated staff report filed in the public docket and not on ex parte communications with its Staff.

{¶ 11} We first note that R.C. 4903.09 requires a complete record for all contested cases heard by the Commission. Ohio Adm.Code 4901-1-10(C) includes a statement that Staff is not considered a party to any proceeding except for purposes of certain rules. OCC contends this should be amended to clarify that Staff is considered a party for purposes of the rule governing ex parte communications, and thus is subject to the prohibitions on ex parte communications. In the *Tongren* case cited by OCC, the Court found that the Commission relied on input from Staff, but there was nothing in the record regarding Staff's findings. For that reason, the Court reversed and remanded the case back to the Commission. *Tongren* at 90-93. OCC also cites a recent Commission decision as evidence that the Commission still relies on off-the-record ex parte communications with Staff, but

the order does not actually rely on any ex parte communications between Staff and decision makers. In that proceeding, the Commission relied on Staff's review and recommendation, filed September 7, 2023, and Staff's updated review and recommendation, filed on September 26, 2023. *Duke Case*, Finding and Order at ¶¶ 6, 10, 12 (Oct. 4, 2023). In its application for rehearing in that case, OCC argued that Staff's filings contained insufficient information but did not allege there were ex parte communications between Staff and decision makers. *Duke Case*, OCC's Application for Rehearing (Nov. 3, 2023) at 2-6. The Commission recently noted in its Entry on Rehearing that "[d]espite OCC's contentions, Staff's path to acceptance of recovery for the storm ... occurred openly." *Duke Case*, Entry on rehearing (Nov. 30, 2023) at ¶ 15. OCC's reliance on the *Duke Case* as evidence that the Commission still relies on ex parte communications with Staff is either misleading or mistaken. We also note that the Ohio Supreme Court has recently discussed this issue and made determinations as to when R.C. 4903.09 applies. See *In re Application of E. Ohio Gas Co.*, 2023-Ohio-3289, ¶ 37-38. OCC has failed to establish that the rule as currently drafted has prejudiced it or affected the outcome in any Commission case. We reiterate our finding that Staff has a unique role and responsibilities, and observe it is not necessary to amend the ex parte rule as suggested by OCC. For these reasons, we deny OCC's first assignment of error.

{¶ 12} In its second assignment of error, OCC asserts that the Commission erred by failing to set forth the reasons and findings of fact required by R.C. 4903.09 for addressing OCC's arguments. Specifically, OCC notes that it recommended that the Commission modify Ohio Adm.Code 4901-1-10(C) to recognize Staff as a party for purposes of the prohibitions in Ohio Adm.Code 4901-1-09 on certain ex parte communications. OCC asserts that the Commission did not address OCC's argument in a substantive manner, which the Ohio Supreme Court requires, citing *In re Comm. Rev. of the Capacity Charges of Ohio Power Co.*, 147 Ohio St.3d 59, 2016-Ohio-1607, 60 N.E.3d 1221, ¶ 51; see also *In re Suwon, L.L.C.*, 166 Ohio St.3d 519, 524-28 (2021). OCC concedes that the Commission provided the rationale that Staff has a unique role and responsibilities, including the requirement to file a report of investigation and to testify if subpoenaed. However, OCC argues that these functions are

not unique to Staff. OCC asserts that the Commission failed to address why Staff's role justifies ex parte communication between Staff and decision makers.

{¶ 13} In Duke's memorandum contra, it asserts that the Commission adequately and thoroughly explained its reasoning and explained its reasons for denying OCC's suggestion. Duke adds that the Commission's reasoning is not the type of reasoning that should be subject to rehearing for lack of support.

{¶ 14} R. C. 4903.09 requires that the Commission state the rationale for its decision in contested cases. However, this statute does not apply to rule-review proceedings, as they are uncontested and quasi-legislative. See *In re the Comm. Review of Chapter 4901:1-37 of the Ohio Administrative Code*, Case No. 18-1190-EL-ORD, Entry on Rehearing (Aug. 12, 2020), ¶ 19, citing *Allnet Communications Serv., Inc.*, 70 Ohio St.3d 202, 638 N.E.2d 516 (1994); *In re the Comm. Review of Its Rules for Electrical Safety and Service Standards*, Case No. 17-1842-EL-ORD, Entry on Rehearing (Jan. 27, 2021), ¶ 10, citing *Craun Transp., Inc. v. Pub. Util. Comm.*, 162 Ohio St. 9, 10, 120 N.E.2d 436 (1954). However, even if this proceeding were subject to the requirements of R.C. 4903.09, the Commission has fulfilled its requirements. In applying R.C. 4903.09, the Ohio Supreme Court has found that, although strict compliance is not required, an order of the Commission must contain sufficient detail for the Court to determine the factual basis and reasoning relied on by the Commission. *In re the Application of Ohio Power Co. for an Increase in Elec. Distr. Rates*, Case No. 20-585-EL-AIR, et al., Second Entry on Rehearing (Feb. 8, 2023), citing *In re Complaint of Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 162 Ohio St.3d 162, 2020-Ohio-5221, 164 N.E.3d 425, ¶ 19. In the Finding and Order, we clearly noted and described Staff's unique role and responsibilities, as OCC concedes in its application for rehearing. *In re Comm. Review of its Rules for Adm. Provisions and Procedure*, Case No. 18-275-AU-ORD, et al., Finding and Order (Oct. 18, 2023) at ¶ 44. Disagreement with the Commission's rationale does not make it an impermissible summary ruling. The Commission received a significant number of comments and suggestions for these chapters and gave the comments thorough consideration, as reflected

in its 76-page Finding and Order and many revisions to the rules. Thus, we find this assignment of error should also be denied.

III. ORDER

{¶ 15} It is, therefore,

{¶ 16} ORDERED, That OCC's application for rehearing filed on November 17, 2023 be denied. It is, further,

{¶ 17} ORDERED, That a copy of this Finding and Order be sent to all public utilities subject to the jurisdiction of this Commission via the industry service lists. It is, further,

{¶ 18} ORDERED, That a copy of this Finding and Order be served upon all other interested persons of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
Dennis P. Deters
John D. Williams

JWS/dmh

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**Case No(s). 18-0275-AU-ORD, 18-0276-AU-ORD, 18-0277-AU-ORD, 18-0278-
AU-ORD**

Summary: Entry on Rehearing denying the application for rehearing filed by Ohio Consumers' Counsel electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio.