

RECEIVED-DOCKETING DIV

IN THE SUPREME COURT OF OHIO

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In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Natural Gas Rates.	)	Case No. 2024-_____	PUCO
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Form of Regulation.	)		
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Appeal from the Public Utilities Commission of Ohio	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Pub. Util. Comm. Nos. 22-507-GA-AIR, 22-508-GA-ALT, 22-509-GA-ATA, 22-510-GA-AAM	

**NOTICE OF APPEAL
BY
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NOTICE OF APPEAL

Appellant, the Office of the Ohio Consumers' Counsel ("OCC"), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02, gives notice to this Court and to the Public Utilities Commission of Ohio ("PUCO") of this appeal.

The decisions being appealed are the PUCO's November 1, 2023, Opinion and Order (Attachment A), its September 4, 2024 Entry (Attachment B), and its October 2, 2024 Entry (Attachment C). These orders approved a \$29 million charge for utility investment that is not used and useful and denied 411,000 Duke residential natural gas consumers their statutory and constitutional rights to judicial review.

The PUCO's Opinion and Order of November 1, 2023 approved a settlement, opposed by OCC, that allows Duke to charge its consumers approximately \$29 million for deferred "costs" related to propane facilities that were not used and useful on the date certain.¹ OCC timely filed an application for rehearing of that PUCO Opinion and Order on December 1, 2023.²

On December 13, 2023, the PUCO granted OCC's application for rehearing "for further consideration of the matters specified therein."³ OCC timely applied for rehearing of that Entry,⁴ challenging the PUCO's practice of granting rehearing to give itself more time to issue a final appealable order. That OCC application for rehearing was denied by operation of law. The PUCO's decision to give itself more time to decide resulted in consumers paying for propane caverns that were not used and useful on the date certain.

¹ Opinion and Order (Sept. 4, 2024) at ¶¶ 44-45.

² OCC's Application for Rehearing (Dec.1, 2023).

³ Entry on Rehearing (Dec.13, 2023).

⁴ OCC's Application for Rehearing (Jan.4, 2024).

While a substantive decision by the PUCO on the merits of OCC's first application for rehearing was pending, the Court issued its decision in *Moraine Wind* on August 27, 2024. *Moraine Wind* overruled the PUCO's general practice of granting entries on rehearing solely to give itself more time to consider the merits.⁵ In its opinion, the Court did not specify whether *Moraine Wind* should be applied to previous PUCO entries granting rehearing solely for further consideration. Yet, on September 4, 2024, the PUCO issued an entry applying the *Moraine Wind* ruling retroactively to OCC's first application for rehearing, ruling that it had been denied by operation of law. The PUCO also applied *Moraine Wind* to eight other cases,⁶ upending the regulatory landscape.

The effect of the PUCO's September 4, 2024 Entry was to deprive Duke consumers of their statutory and constitutional right to seek judicial review of a PUCO decision. And it allowed the PUCO to evade review of its decision by the Court. Under the PUCO's application of *Moraine Wind*, OCC's first application for rehearing was denied by operation of law on December 31, 2023 and OCC would have had to file a notice of appeal by February 29, 2024.

On September 9, 2024, OCC timely filed an application for rehearing of the PUCO's September 4, 2024 Entry.⁷ On October 2, 2024, the PUCO issued an Entry denying OCC's September 9, 2024 application for rehearing.⁸ That Entry is a final appealable order, ripe for review.

⁵ See *In re Moraine Wind, L.L.C.*, 2024-Ohio-3224, ¶ 17.

⁶ Entry (Sept. 4, 2024) Attachment.

⁷ OCC's Application for Rehearing (Sept. 9, 2024).

⁸ Entry (Oct. 2, 2024) at ¶ 28.

OCC alleges that the PUCO's November 1, 2023 Order, September 4, 2024 Entry, and October 2, 2024 Entry are unlawful and unreasonable in the following respects, all of which were raised in OCC's Applications for Rehearing:

1. The PUCO erred by approving a Settlement that does not benefit consumers and the public interest and violates R.C. 4909.15. The PUCO's Order wrongfully found that Duke's propane caverns were used and useful at date certain in providing service to Duke's consumers when they were not and allowed Duke to charge consumers for the caverns. The PUCO's decision was wrong and against the manifest weight of the evidence contrary to R.C. 4903.09 and Supreme Court precedent, *Consumers' Counsel* and *AK Steel*.⁹ (OCC Assignment of Error 1, Application for Rehearing (Dec. 1, 2023)).
2. The PUCO erred in allowing the utility to use accounting deferrals to change the propane cavern investment into an expense, amortized and collected from Duke's consumers over a ten-year period. The PUCO's Order unreasonably and unlawfully allows Duke to treat the propane facilities (plant assets) as a "cost" of "rendering the public utility service for the test period," in violation of R.C. 4909.15. The PUCO's action circumvented Ohio ratemaking law. (OCC Assignment of Error 2, Application for Rehearing (Dec. 1, 2023)).
3. The PUCO erred when it failed to make the charges for the amortized propane facilities subject to refund. (OCC Assignment of Error 4, Application for Rehearing (Dec. 1, 2023)).

⁹ *Office of Consumers' Counsel v. Public Utilities Com.*, (1981) 67 Ohio St.2d 153, 164 (*Consumers' Counsel*), *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St.3d 81, 84 (*AK Steel*).

4. The PUCO erred by denying OCC's statutory right to appeal under R.C. 4903.10 and 4903.13 through its unlawful Entry retroactively applying the Court's ruling in *Moraine Wind*.¹⁰ (OCC Assignment of Error 1, Application for Rehearing (Sept. 9, 2024)).
5. The PUCO erred when it retroactively applied the Court's holding in *Moraine Wind*,¹¹ violating OCC's due process rights guaranteed by the state and federal constitutions.¹² (OCC Assignment of Error 2, Application for Rehearing (Sept. 9, 2024)).
6. The PUCO erred when it retroactively applied the Court's holding in *Moraine Wind*.¹³ Under the Ohio Supreme Court standards, set forth in *DiCenzo v. A-Best Products Company, Inc.*,¹⁴ the PUCO should have applied *Moraine Wind* prospectively only. (OCC Assignment of Error 3, Application for Rehearing (Sept. 9, 2024)).
7. The PUCO has no authority to make its order retroactive as R.C. 4903.15 manifests an intent by the General Assembly that PUCO orders are prospective only, consistent with Ohio's constitutional prohibition against retroactive laws.¹⁵ (OCC Assignment of Error 5, Application for Rehearing (Sept. 9, 2024)).

¹⁰ See *In re Moraine Wind, L.L.C.*, 2024-Ohio-3224, ¶ 17.

¹¹ *Id.*

¹² Ohio Const., Art I, § 16; U.S. Const., amend. V and XIV.

¹³ *Moraine Wind* at ¶ 17.

¹⁴ 2008-Ohio-5327.

¹⁵ Ohio Const., Art II, § 28.

The PUCO's November 1, 2023 Order, September 4, 2024 Entry, and October 2, 2024 Entry are unlawful and unreasonable and should be reversed or modified with specific instructions to the PUCO to correct its errors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal by the Office of the Ohio Consumers' Counsel, was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all parties of record via electronic transmission this 25th day of October 2024.

/s/ William J. Michael

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CERTIFICATE OF FILING

I hereby certify that a Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.

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