

ORIGINAL

In The
SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,	:	Case No. 09-2022
	:	
Appellant,	:	Appeal from the Public Utilities Commission of Ohio
	:	
v.	:	Public Utilities Commission of Ohio
	:	Case Nos. 08-917-EL-SSO, and 08-918-EL-SSO
The Public Utilities Commission of Ohio,	:	
	:	
Appellee.	:	

**MEMORANDUM IN OPPOSITION TO
APPELLANT'S MOTION TO SUPPLEMENT THE RECORD
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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INTRODUCTION

On January 25, 2010 the Office of the Ohio Consumers’ Counsel (OCC) moved the Court to “supplement” the record transmitted from the Public Utilities Commission of Ohio (Commission). OCC’s motion is improper for many reasons and should be denied as more fully discussed below.

ARGUMENT

This appeal was initiated by OCC on November 5, 2009, the day after the Commission issued its Entry denying OCC’s application for rehearing in *In re: Columbus Southern Power*, Case No. 08-917-EL-SSO, *et al.* The Commission transmitted the record of the proceedings to the Court on December 4, 2009. The record currently before

the Court contains the “original papers and exhibits to those papers, along with an electronic version of the transcript ... and certified copies of the journal entries and the docket.” S. Ct. Prac. R. V, § 1(West 2009). OCC requests that a document that was not a part of the record of the proceedings below now be made a part of the record on appeal.

OCC’s request is improper. The document in question was not filed in the docket of the record below, nor is there any evidence that it was either considered by or relevant to the Commission’s decision in the case.

Once the Commission’s final order denying OCC’s application for rehearing was issued on November 4, 2009, the record before the Commission was closed. Ohio Administrative Code Section 4901-1-34 restricts the reopening of a Commission proceeding “for good cause shown” and “prior to the issuance of a final order.” The final order in this case was issued on November 4, 2009. OCC recognized this when it filed its notice of appeal with this Court on the next day. Thus, the “record” transmitted by the Commission pursuant to the Court’s rules necessarily originates from the time an application or complaint is filed with the Commission and ends at the time the final entry on rehearing is issued.

The rule OCC relies on for making its motion demonstrates why its request is improper. S.Ct. Prac. R. 5.8 provides that “[i]f any part of the record is not transmitted to the Supreme Court but is necessary to the Supreme Court’s consideration of the questions presented on appeal, the Supreme Court, ...on motion of a party, may direct that a supplemental record be certified and transmitted to the Clerk....” S.Ct. Prac. R. 5.8 (West 2009). The rule specifies “any part of the record”, yet OCC requests that a document that

is *not* a part of the record be transmitted to and considered by the Court. OCC acknowledges that this document is “‘non-record’ information.” OCC Motion at 2. Because the document was never a part of the record in the case below, it cannot be “part of the record . . . not transmitted” to the Court, and cannot now be used to supplement the record pursuant to S.Ct. Prac. R. 5.8.

OCC acknowledges that the document in question was not “ever filed at the PUCO or included in the case as record evidence.” OCC Motion at 2. OCC admits that the document is not a part of the “evidence adduced upon the hearing before the commission in the proceeding complained of.” Ohio Rev. Code Ann. § 4903.21(West 2009).

OCC made no effort to include the document as part of the record before the Commission reached its final decision. Ohio Administrative Code Section 4901-1-34 permits the reopening of a Commission proceeding for good cause shown “prior to the issuance of a final order.” Even though OCC admittedly had this document in its possession long before the Commission issued its final order – nearly six months before the final order was issued – OCC made no effort to have the case reopened so that this document could be included in the record.

Nor can OCC demonstrate that the document was ever considered by the Commission. OCC claims that “[t]he PUCO *appears* to have relied upon the ‘non-record’ information”; that this document “was *apparently* relied upon by the PUCO to evaluate the Companies' tariffs.” OCC Motion at 1-2, *emphasis added*. But any such appearance is illusory. The Commission’s order approving the tariffs makes no mention of the

document that OCC now seeks to add to the record. Indeed, the Commission order specifically states that “[t]he Companies' proposed tariff filing on March 23, 2009, implementing our March 18, 2009, order approving the ESP, with modifications, was reasonable and consistent with that order.” Further, the Commission found that “the revised tariffs are reasonable and shall be approved.” *In re: Columbus Southern Power*, Case No. 08-917-EL-SSO, *et al.* (Entry) (March 30, 2009) at 4. The Commission specifically relied on its review of more than 1000 pages of tariffs filed in the record below. No mention is made of the 2-page document that OCC now seeks to add. There is simply no reason to believe that this document has any relevance to the substance of the Commission’s decision that is the subject of this appeal.

Nonetheless, OCC claims that it was prevented from demonstrating prejudice because of a PUCO failure to disclose information. OCC Motion at 3. But OCC’s reliance on *Tongren v. Pub. Util. Comm.* is misplaced. In *Tongren*, the Court found that the Commission had not developed a record adequate to support its findings. Specifically, the Court noted that no hearing was held, no written testimony was filed on behalf of either the companies or any other interested party, and the Commission's staff filed no comments, testimony, or report. *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 90, 706 N.E.2d 1255, 1257. As a result, the Court found that

Since the commission adopted the staff's determination of reasonableness as its own, it is impossible to determine what record evidence was considered by the commission other than the conclusion of its staff and the assertion of factually unsupported conclusions by the companies in their joint application for merger approval.

Id. at 91, 1258.

This case is fundamentally distinguishable. An extensive hearing was conducted in this case, with testimony from numerous witnesses and thorough legal briefing. The Companies filed more than 1000 pages of tariffs, all part of the record before this Court. The Commission stated that it found the tariffs to be reasonable and approved them. There can be no rational question about the adequacy of the record or the thoroughness of its development.

OCC does not argue with the accuracy of the tariffs. Instead, OCC opposes the substance of the Commission's orders. Since the day the Commission issued its initial order OCC has consistently argued that the rates approved by the Commission recover rates retroactively. It cannot plausibly claim that it lost an opportunity to demonstrate prejudice even remotely comparable to that found in *Tongren*. The only prejudice that could exist here would be that resulting from adding this non-record information to the record before the Court.

OCC seeks to supplement the record with a document that was never a part of the record before the Commission below, and fails to comply with this Court's rules for supplementing the record. There is no evidence that the document was either considered by or relevant to the Commission's decision in the case. OCC has not been prevented from demonstrating its alleged prejudice. OCC's motion is improper and inappropriate, and should be denied.

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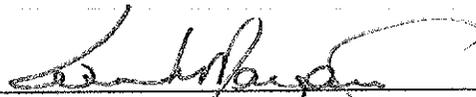
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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Memorandum in Opposition to Appellant's Motion to Supplement the Record**, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 4th day of February, 2010.



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