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June 5, 2009

*Via Federal Express
and Facsimile (614-466-0313)*

Ms. Renee J. Jenkins
Director, Administration Department
Secretary to the Commission
Docketing Division
The Public Utilities Commission of Ohio
180 Broad Street
Columbus, OH 43215-3793

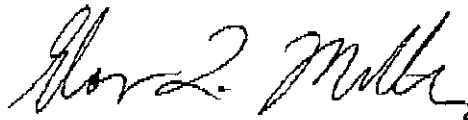
Dear Ms. Jenkins:

**Re: *Post-Hearing Brief of Respondent The Toledo Edison Company
David T. Davis v. The Toledo Edison Company
Case No. 08-0864-EL-CSS***

Enclosed for filing, please find the original and twelve (12) copies of the *Post-Hearing Brief of Respondent The Toledo Edison Company* regarding the above-referenced case. Please file the enclosed *Brief*, time-stamping the two extras and returning them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,



Ebony L. Miller

ELM/jhp
Enclosures
cc: Parties of Record

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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

DAVID T. DAVIS)	
)	
COMPLAINANT,)	
)	
vs.)	CASE NO. 08-0864-EL-CSS
)	
THE TOLEDO EDISON COMPANY)	
)	
RESPONDENT.)	
)	

**POST-HEARING BRIEF OF
RESPONDENT THE TOLEDO EDISON COMPANY**

I. INTRODUCTION

It is well established that the complainant has the burden of proving the allegations set forth in its complaint. And while in some cases the complainant provides some evidence in support of its complaint in an attempt to satisfy its burden, here, Complainant David T. Davis ("Complainant") failed to present any evidence during the hearing on April 1, 2009, that would satisfy his burden of proof. Complainant provided no expert testimony or otherwise that The Toledo Edison Company ("Toledo Edison") or its employees provided inadequate or unreasonable service or breached any duty owed to Complainant. In fact, each of the four witnesses Complainant put forth in support of his complaint testified that the work Toledo Edison performed was not the cause of Complainant's alleged damages. Consequently, Toledo Edison is entitled to entry of an order in its favor because there is no evidence that it provided inadequate or unreasonable service.

II. PROCEDURAL HISTORY

Complainant filed a complaint with the Commission on July 7, 2008, alleging that on or about May 19, 2008, Toledo Edison crews knowingly caused damage to the service line leading to

his premise at 2841 Langenderfer Road ("Property"). Toledo Edison answered the complaint on July 28, 2008, by denying the allegations set forth in the Complaint. After a pre-hearing conference, the attorney examiner scheduled a hearing first for February 1, 2009, and subsequently upon Complainant's request for an extension for purposes of conducting discovery, for April 1, 2009. Pursuant to Rule 4901-1-29(A)(1)(h) of the Ohio Administrative Code, Toledo Edison pre-filed the testimonies of its expert witnesses, William T. Beutler and Marvin Mantos.

III. STATEMENT OF FACTS

Toledo Edison constructs, maintains and operates its distribution system in accordance with the National Electrical Safety Code ("NESC") and regulations of the Public Utilities Commission of Ohio ("PUCO"). Company Ex. 2, lines 35-37. Toledo Edison also maintains its own engineering and construction standards that meet or exceed the NESC. *Id* at 37-38. Pursuant to Toledo Edison's internal company policies and procedures, each year the company invests substantial amounts of money to maintain and improve the reliability of its distribution system. *Id* at 39-41. Toledo Edison and its employees are continuously working to anticipate and eliminate potential problems that may affect the distribution system. *Id* at 41-42.

Complainant alleges that on or about May 19, 2008, Toledo Edison crews knowingly caused damage to the service line leading into his Property. Compl. at ¶ 1. In support of his claim, Complainant requested that the Toledo Edison crew performing work on his Property on May 19, 2008 appear and testify at the April 1, 2009 hearing. In compliance with Complainant's request Toledo Edison made available Eric Aschemeier, Sean Quinlivan, Scott Gonyer and Todd Marshall.

On May 19, 2008, Toledo Edison dispatched a three-man crew consisting of Eric Aschemeier, Sean Quinlivan, and Scott Gonyer to perform routine maintenance of replacing a pole situated at the Property. Tr. p.6; 33. Mr. Aschemeier and Mr. Quinlivan replaced the old pole with a

new pole, and Mr. Gonyer transferred the wires from the old pole to the new pole. Tr. pp. 33; 39; 44.

With respect to Complainant's allegation that Toledo Edison crews knowingly damaged the service line, Mr. Aschemeier testified:

Q. Did you affect the service line in any way when you performed the pole transfer?

A. No, I don't believe so.

Q. Were you aware of any damage to the service line after completing your work?

A. No.

Q. Did you encounter any problems when you were replacing the pole?

A. No. Fairly easy standard job.

Q. In your opinion did the work that you performed damage the service drop line to Mr. Davis's house?

A. No. No.

Tr. p. 35-36.

Mr. Quinlivan testified:

Q. Are you aware of any damage to the service line after completing your work?

A. No.

Q. Did you encounter any problems when replacing the old pole with the new pole?

A. No.

Q. In your opinion did the work that you performed damage the service line?

A. No.

Tr. p. 40-41.

Mr. Gonyer testified:

Q. Did you notice anything abnormal when you changed the wires from the old pole to the new pole?

A. Nothing was out of the ordinary. It was a very simple transfer, no high tensions, and if something would have broke, I would say it would have been very noticeable, the tension of everything, especially if it would have broke to hang down noticeably.

Q. Have you ever had a neutral line break when you transferred a line?

A. Never.

Q. And you didn't notice any problems after you completed your work either, correct?

A. Correct.

Q. And in your opinion did the work you performed damage the service line?

A. No, ma'am.

Q. After you were finished, did you visually check the line again?

A. We always double-check our work when we're finished because if there's a problem, we'll fix it.

Tr. p. 44-48.

Later that same day, Toledo Edison received a call at 3:55 pm from the Property reporting a voltage problem, dim light. Tr. p. 28; See also Company Ex. 3. Toledo Edison immediately dispatched lineman, Todd Marshall to resolve the problem who arrived at the Property at 4:15 pm. Tr. p. 30; See also Company Ex. 4. Mr. Marshall testified that when he arrived he did not remember seeing a problem. Tr. p. 25. Mr. Marshall tested the voltage reading at the meter and after further investigation, noticed a bad spot in the wire. Tr. p. 26. Mr. Marshall further testified that he repaired the wire, tested the voltage, and confirmed that the voltage was correct. Tr. p. 26. Complainant admits that Mr. Marshall came out in a timely manner, was polite, very helpful and fixed the problem quickly. Tr. p. 24.

Mr. William T. Beutler testified that he reviewed the history and reliability of the circuit and the particular branch line that services the Property.¹ Mr. Beutler concluded that overall the circuit and the branch line has been very reliable. Company Ex. 2, lines 46-48. Mr. Beutler assessed that the bad spot in the wire that Mr. Marshall repaired constituted an equipment failure, but could not determine what caused the equipment failure. Company Ex. 2, line 70. Mr. Marshall opined that a lot of things could have caused the problem, such as a bad manufactured wire from the factory, birds landing on [the wire], or even squirrels chewing on wire. Tr. p. 31. Mr. Beutler added that the

¹ Mr. Beutler provided expert testimony on behalf of Toledo Edison. He is a registered Professional Engineer and a certified Electrical Safety Inspector in the state of Ohio; and he testified about his professional experience and qualifications as an expert witness at Company Ex. 2, lines 1-32; 46-48.

distribution system is exposed to the weather and outside elements twenty-four hours a day, seven days a week, 365 days a year that causes normal wear and tear to the equipment. Company Ex. 2, lines 70-72. Mr. Beutler further stated "There are many factors beyond Toledo Edison' control that can cause a connection or other piece of equipment to fail. Our wires and equipment are not in a controlled environment. They are constantly exposed to the weather and other forces." Company Ex. 2, lines 81-83.

Mr. Beutler concluded to a reasonable degree of engineering certainty that Toledo Edison's equipment was installed properly and that Toledo Edison could not have foreseen the equipment failure that occurred on May 19, 2008. Company Ex. 2, lines 87-89. Further, Mr. Beutler stated that Mr. Marshall acted reasonably and responsibly in troubleshooting to identify the cause of the customer complaint, identifying the root cause and remedying the situation Company Ex. 2, lines 94-96.

Subsequent to the incident, complainant submitted a claim to Toledo Edison and requested compensation for alleged personal property damage. Toledo Edison investigated the claim. Pursuant to the provisions of Toledo Edison's Tariff PUCO No. 8, the claim was denied. Although Toledo Edison endeavors to provide continuous service to all of its customers, it does not guarantee such service. Company Ex. 2, lines 124-133; Company Ex. 5, section IV B. Moreover, as set forth in Toledo Edison's Tariff, Toledo Edison

shall not be liable for any loss, cost, damage or expense that the customer may sustain by reason of damage to or destruction of any property, including the loss of use thereof arising out of, or in any manner connected with interruptions in service, variations in service characteristics, high or low voltage, phase failure, phase reversal, the use of electrical appliances or the presence of the Company's property on the customer's premises whether such damages are caused by or involve any fault, failure or negligence of the Company or otherwise except such damages that are caused by or due to the willful and

wanton misconduct of the Company. The Company shall not be liable for damage to any customer or to third persons resulting from the use of the service on the customer's premises or from the presence of the Company's appliance or equipment on the customer's premises.

Id.

IV. LAW AND ARGUMENT

A. Complainant Has Not Satisfied Its Burden Of Proof With Probative Evidence Presented At Hearing.

The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Public Utilities Commission*, 5 Ohio St. 2d 189 (1966). Complainant failed to present any evidence during the hearing on April 1, 2009, that would satisfy its burden of proof. As the PUCO has explained, "As in the case with service outages, the question is whether the cause of the problem was in the control of the company, whether the company failed to comply with any statutory or regulatory requirements regarding the operation of its system that could have caused the outage or surge, whether the company's actions or inactions constituted unreasonable service, and whether the company acted responsibly in correcting the problem." See *In the Matter of Edward J. Santos v. Dayton Power & Light Co.*, Case No. 03-1965-EL-CSS (Opinion and Order Mar. 2, 2005) (citing *In the Matter of Steve Martin v. Dayton Power & Light Co.*, Case No. 91-618-EL-CSS (Opinion and Order Sept. 10, 1992); *In the Matter of Miami Wabash Paper, LLC v. The Cincinnati Gas & Electric Co.*, Case Nos. 02-2162-EL-CSS and 01-3135-EL-CSS (Opinion and Order Sept. 23, 2003)). In determining whether actions or inactions constitute unreasonable service, the "Commission will consider the number, duration, and severity of the problems." *In the Matter of Complainant Bennett v. Utility Operators Corp.*, 2007 Ohio PUC Lexis 760 (Nov. 20, 2007).

There is no evidence that complainant received inadequate or unreasonable service on May 19, 2008. The uncontested evidence from the hearing demonstrates that Toledo Edison constructs,

maintains and operates its distribution system in accordance with the National Electrical Safety Code and the rules and regulations of the PUCO. Company Ex. 2, lines 35-37. Complainant failed to introduce any evidence that Toledo Edison violated any Commission rules establishing standards for inspection, maintenance, repair, and replacement of its transmission or distribution system. There is no evidence that Toledo Edison failed to comply with any statutory or regulatory requirements regarding the operation of its system that could have caused the equipment failure. There is no evidence that Toledo Edison's actions or inactions constituted unreasonable service. And, there is no evidence that Toledo Edison acted unreasonably, that Toledo Edison failed to institute reasonable measures that could have prevented the equipment failure, or that it failed to correct the problem in a reasonable manner and thus his complaint should be denied.

1. The Cause of The Problem Was Not Within Toledo Edison's Control.

The evidence demonstrates that Toledo Edison constructs, maintains and operates its distribution system in accordance with the NESC and the Commission's rules and regulations. Company Ex. 2, lines 35-37. Moreover, Toledo Edison also maintains its own engineering and construction standards that meet and exceed the NESC. Id at 37-38. Complainant testified that he was not a trained electrician; not an electrical engineer; had no training or experience with an electric distribution system; not familiar with the NESC or the Commission's rules and regulations for an electric utility; and had no experience with the construction maintenance or design of an electric distribution system. Tr. p.12-13. Likewise, Complainant failed to provide any evidence to substantiate his claim that "Toledo Edison crews knowingly damaged the service line leading into" his Property. In fact, Complainant admits that he did not see the alleged damage occur. Tr. p. 13.

The uncontested testimony demonstrates that a crew was dispatched to perform routine maintenance work of replacing an old pole with a new pole. Tr. pp. 33; 39; 44. The crew replaced

the pole without incident and without damaging the service line to Complainant's Property. Tr. pp. 35-36; 40-41; 44-48. Later that same day, the service line leading to Complainant's Property experienced an equipment failure. Mr. Marshall was dispatched and he acted reasonably and responsibly in troubleshooting to identify the root cause of the equipment failure and remedy the situation. Tr. p. 29; Company Ex. 2, lines 94-96.

Although the cause of the equipment failure remains unknown, Mr. Beutler testified that "[t]here are many factors beyond Toledo Edison's control that can cause a connection or other piece of equipment to fail. Our wires and equipment are not in a controlled environment. They are constantly exposed to the weather and other forces." Company Ex. 2, lines 81-83. Mr. Marshall opined that a lot of things could have caused the problem, such as a bad manufactured wire from the factory, birds landing on [the wire], or even squirrels chewing on wire. Tr. p. 31. Mr. Beutler concluded "to a reasonable degree of engineering certainty that Toledo Edison's equipment was installed properly and that the [c]ompany could not foresee the equipment failure." Company Ex. 2, lines 87-89.

Complainant's claim fails because there is no evidence to substantiate Complainant's allegation that Toledo Edison knowingly caused damage to the service line leading to Complainant's Property; nor is there any evidence that Toledo Edison proximately caused either the equipment failure or its alleged damages.

2. Complainant Has Not Alleged That Toledo Edison Failed To Comply With Any Statutory Or Regulatory Requirements.

Neither Complainant's complaint nor the hearing testimony suggests that Toledo Edison failed to comply with any statutory or regulatory requirements regarding the operation of its system that could have caused the equipment failure. In fact, Complainant admitted that he was not familiar

with the National Electric Safety Code or the PUCO's rules and regulations for an electric utility. As such, the only evidence demonstrates that: Toledo Edison adheres to the PUCO's rules and regulations and the National Electric Safety Code; Toledo Edison did not violate any Commission rules establishing standards for inspection, maintenance, repair, and replacement of its transmission or distribution system; and, Toledo Edison complied with all statutory or regulatory requirements regarding the operation of its system.

3. There Is No Evidence That Toledo Edison's Actions Or Inactions Constituted Unreasonable Service.

Toledo Edison adheres to the NESC and internal standards that exceed the NESC. Company Ex. 2, lines 36-38. In addition, the only evidence regarding the circuit servicing the Property demonstrates that overall it was very reliable. Company Ex. 2, lines 47-48. Moreover, Complainant admits that Mr. Marshall came out in a timely manner, was polite, very helpful and fixed the problem quickly. Tr. p. 24. As such, the minor and atypical equipment failure that occurred on May 19, 2008, which was promptly repaired, did not constitute unreasonable service.

4. The Evidence Demonstrates That Toledo Edison And Its Employees Acted Responsibly In Correcting The Problem.

The hearing testimony demonstrates that Toledo Edison's lineman, Todd Marshall responded quickly to make the repair and that his actions complied with company protocol. Tr. p. 24; Company Ex. 2, lines 94-96. And, Mr. Marshall acted reasonably and responsibly in troubleshooting to identify the cause of the customer complaint, identify the root cause and remedy the situation. *Id.* Mr. Beutler further concluded "to a reasonable degree of engineering certainty that Toledo Edison's equipment servicing the Property was installed properly and that the company could not foresee the equipment failure." Company Ex. 2, 87-89.

B. Toledo Edison's Tariff Bars Complainant's Claim.

Toledo Edison investigated Complainant's claim seeking compensation. However, Toledo Edison is not an absolute insurer and does not guarantee continuous service to all of its customers. Company Ex. 2, lines 129-133; Ex. 5, section IV B. In particular, the section entitled "Characteristics of Service" states:

Continuity. The Company will endeavor, but does not guarantee, to furnish a continuous supply of electric energy and to maintain voltage and frequency within reasonable limits. The Company shall not be liable for damages which the customer may sustain due to variations in service characteristics or phase reversals.

Ex. 2, lines 129-133; Ex. 5.

Further, section X B, entitled "Customer's Wiring, Equipment And Special Services" provides:

Limitation of Liability: The Company shall not be liable for any loss, cost, damage or expense that the customer may sustain by reason of damage to or destruction of any property, including the loss of use thereof arising out of, or in any manner connected with interruptions in service, variations in service characteristics, high or low voltage, phase failure, phase reversal, the use of electrical appliances or the presence of the Company's property on the customer's premises whether such damages are caused by or involve any fault, failure or negligence of the Company or otherwise except such damages that are caused by or due to the willful and wanton misconduct of the Company. The Company shall not be liable for damage to any customer or to third persons resulting from the use of the service on the customer's premises or from the presence of the Company's appliance or equipment on the customer's premises.

Ex. 2, lines 134-148; Ex. 5. Consequently, Toledo Edison's Tariff bar Complainant's claim.

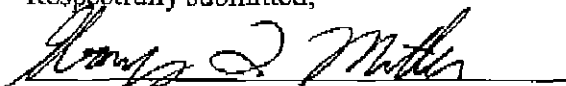
C. To The Extent Complainant Is Pursuing A Negligence Theory, Such Claim Also Fails.

A negligence claim is cognizable by the Commission only if it is based on the violation of a Commission rule or regulation. As set forth above, Complainant has failed to present any probative evidence to satisfy its burden of proof and any negligence-based claim fails for the reasons set forth above.

V. CONCLUSION

The Toledo Edison Company is entitled to an opinion and order concluding that there is insufficient evidence to support a finding that it provided inadequate service or that Complainant is entitled to any damages. The uncontested evidence demonstrates that Toledo Edison constructs, maintains and operates its distribution system in accordance with the National Electric Safety Code, and the Commission's rules and regulations. There is no evidence that Toledo Edison violated any Commission rules establishing standards for inspection, maintenance, repair, and replacement of its transmission or distribution system. There is no evidence that Toledo Edison failed to comply with any statutory or regulatory requirements regarding the operation of its system that could have caused the equipment failure. There is no evidence that Toledo Edison's actions or inactions constituted unreasonable service. And, there is no evidence that Toledo Edison acted unreasonably, that Toledo Edison failed to institute reasonable measures that could have prevented the equipment failure, or that it failed to correct the problem in a reasonable manner. The Commission should deny Complainant's complaint.

Respectfully submitted,



EBONY L. MILLER (0077063)

FIRSTENERGY SERVICE COMPANY

76 South Main Street, Akron, Ohio 44308

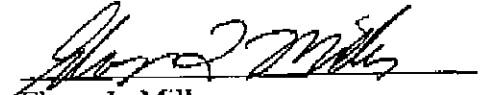
(330) 384-5969

Attorneys for Respondent,

The Toledo Edison Company

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Post-hearing Brief of Respondent, The Toledo Edison Company was served via first-class U.S. mail, postage prepaid upon David Davis at 2841 Langenderfer Road, Swanton, Ohio 43558, on this 5th day of June, 2009.


Ebony L. Miller
Attorney