

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

ALLIED ERECTING & DISMANTLING,)	
CO., INC.)	
)	
Complainant,)	
)	Case No. 07-905-EL-CSS
v.)	
)	
OHIO EDISON COMPANY,)	
)	
Respondent.)	

**OHIO EDISON COMPANY’S MEMORANDUM CONTRA
APPLICATION FOR REHEARING AND
REQUEST FOR SPECIAL ORDER STAYING ENFORCEMENT**

In accordance with Ohio Adm. Code 4901-1-35(B), Ohio Edison Company (“Ohio Edison” or “the Company”) submits this memorandum contra Allied Erecting & Dismantling Co., Inc.’s (“Allied”) Application for Rehearing and Request for Special Order Staying Enforcement. For the reasons set forth below, the Commission should deny Allied’s application for rehearing and request for a stay.

I. INTRODUCTION

The Commission’s September 11, 2013 Order in this case finds, among other things, that Allied failed to prove that Ohio Edison’s backbilling and estimated monthly bills were unreliable. Order at 12. Consequently, the Commission found that Allied is financially responsible for \$94,676.58 in electricity it consumed but for which it did not pay. *Id.* at 13. Allied seeks both rehearing and a stay of the Commission’s Order.

In seeking rehearing, Allied asserts that several findings in the Order are “unreasonable and unlawful.” What Allied does not assert, however, is *how* the Commission’s findings are either unreasonable or unlawful, or *why* they are legally erroneous. As a result, Allied has failed

to meet the standard required by both R.C. 4903.10 and 4901-1-35, Ohio Adm. Code, and the Commission should deny Allied's application for rehearing. Allied has otherwise failed to give the Commission any reason to second-guess its determination that Ohio Edison's method of calculating Allied's bill for unbilled electricity was fair and reliable. Because Allied failed to prove otherwise, the Commission appropriately dismissed the Complaint.

Allied also makes a request for a special order staying enforcement of the Order. But Allied has failed to meet the standard for a stay, and the Commission should deny Allied's request.

II. ARGUMENT

A. **Allied fails to “set forth specifically the ground or grounds on which [it] considers the order to be unreasonable or unlawful,” and therefore the Commission must deny its application for rehearing.**

Allied failed to explain or provide any factual or legal support for its application for rehearing. As a result, Allied has not met the standard for such an application as required by both R.C. 4903.10 and 4901-1-35, Ohio Adm. Code.

An application for rehearing “shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” R.C. 4903.10. *See also* 4901-1-35(A), Ohio Adm. Code. This requirement demands more than simply reciting a particular finding of fact and claiming that it is “not supported or sustained by the evidence, [is] manifestly against the weight of the evidence, [is] in clear and direct conflict therewith, [or is] unreasonable and contrary to law.” *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 377 (1949). Rather, it demands that the party seeking rehearing “identify a legal problem with the commission's approach,” *see In re Columbus S. Power Co.*, 129 Ohio St. 3d 271, 2011-Ohio-2638, ¶ 20, and “specifically allege in what respect the PUCO's order was unreasonable or unlawful.” *Disc. Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 2007-Ohio-53, ¶ 59. Where an

application for rehearing fails to do so, “the requirements of R.C. 4903.10 have not been met,” and the Commission should deny the application. *Disc. Cellular, Inc.*, 2007-Ohio-53, ¶ 59.

In *Cincinnati v. Pub. Util. Comm.*, the City of Cincinnati established new gas rates by ordinance for The Cincinnati Gas & Electric Co. (“CG&E”), about which the gas company filed a complaint with the Commission alleging that the rates were unjust and unreasonable. 151 Ohio St. at 359. After a hearing, the Commission agreed with CG&E and ordered rates that were higher than those established by the City’s ordinance. *Id.* at 361–63.

The City applied to the Commission for rehearing, alleging simply that the Commission’s “findings and order ‘are not supported or sustained by the evidence, are manifestly against the weight of the evidence, are in clear and direct conflict therewith, [and] are unreasonable and contrary to law.’ ” *Id.* at paragraph 18 of the syllabus. The Court, affirming the Commission’s denial of rehearing, found that such “general grounds do not ‘set forth specifically’ . . . as the General Assembly intended.” *Id.* at 377. “[B]y the language which it used, the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant’s application for rehearing used a shotgun instead of a rifle to hit that question.” *Id.*

The Commission has similarly criticized and denied shotgun approaches to applications for rehearing. For example, in *In re the Application of Ohio American Water to Increase Rates*, the Commission granted in part Ohio American Water Company’s (“OAWC”) application to increase rates. Case No. 09-391-WS-AIR, Entry on Reh’g., 2010 Ohio PUC LEXIS 654, at *1 (June 23, 2010). OAWC filed an application for rehearing by “merely stat[ing] that the company requests rehearing and refer[ring] to the attached memorandum in support for the specific grounds” *Id.* at *3. The Commission found that “Ohio American’s application for rehearing fulfills neither the statutory requirements of Section 4903.10, Revised Code, nor the

administrative requirements of Rule 4901-1-35, O.A.C. Ohio American’s application for rehearing fails to present the specific grounds on which rehearing is warranted.” *Id.* See also *In re the Settlement Agreement Between Commission Staff, the Ohio Consumers’ Counsel, and Aqua Ohio, Inc.*, Case No. 08-1125-WW-UNC, Entry on Rehg., 2009 Ohio PUC LEXIS 854, at *8 (Oct. 14, 2009) (same); *In re a Settlement Agreement Between the Public Utilities Commission of Ohio and SRS, Inc.*, Case No. 01-2675-TR-UNC, Entry on Rehg., 2001 Ohio PUC LEXIS 923, at *1 (Dec. 20, 2001) (party seeking rehearing did “not provide an explanation or legal support for this contention”; as a result, its “application [did] not meet [the] specificity requirement” of R.C. 4903.10).

Here, as in the cases just cited, the Commission need not, and should not, consider any of Allied’s “arguments” for rehearing. Allied’s application for rehearing alleges ten separate grounds for rehearing, but does not identify a single legal defect with any finding or offer a single explanation for how the Commission erred. Allied simply cites the Commission’s findings and claims that they are “unlawful and unreasonable” without explaining why or how. Allied’s conclusory statements are insufficient as a matter of law to warrant rehearing.

Allied’s failure to identify error is not cured by its citation to select Commission findings or isolated pieces of record evidence. Allied asserts, for example, that “[t]he Commission’s finding that Allied has failed to sustain its burden of proof that Ohio Edison improperly calculated Allied’s backbilling is unreasonable and unlawful, especially in light of the Commission’s express finding that Ohio Edison violated Rule 4901:1-10-05(I)” (Rehg. App. at 1.) It also claims that, “[t]he Commission’s findings that Allied failed to support its argument that Ohio Edison’s estimated backbilling methodology is improper and flawed and that its billing estimates are unreliable are unreasonable and unlawful.” (*Id.* at 2.) Merely *asserting*

that the Commission erred without presenting a legal argument for *how* the Commission erred falls drastically short of “specifically alleg[ing] in what respect the PUCO’s order was unlawful or unreasonable.” *See Disc. Cellular, Inc.* at ¶ 59. Allied fails to posit a legal argument for *how* the Commission’s findings are unreasonable or unlawful, or *why* there is a legal problem with the Commission’s Order. In light of this, Allied has not met the requirements of either R.C. 4903.10 or 4901-1-35, Ohio Adm. Code, and the Commission should deny it application for rehearing.

B. Allied has failed to demonstrate that the Commission’s Order is unreasonable or unlawful.

In addition to the shortcomings discussed above, the application for rehearing must also be rejected because it simply restates matters already fully considered and decided in the Commission’s Order. Moreover, Allied’s suggestions in the application for rehearing are not supported by, and are in fact at odds with, the record in this proceeding. Allied essentially takes the view that because the Commission found that Ohio Edison violated Rule 4901:1-10-05(I), Ohio Adm. Code, it should reverse its determinations that Ohio Edison’s backbilling was fairly calculated. (*See e.g.* Reh. App. at 1 (“in light of the Commission’s express finding that Ohio Edison violated Rule 4901:1-10-05(I), O.A.C.”)) This argument has no merit for four reasons.

First, Allied simply does not like the fact that it must pay for the electricity it uses and that the Commission required Allied to pay for its unbilled usage. Order at 5, 11. Indeed, in its Order, the Commission pointed out that, “Allied does not dispute that a nonresidential entity may be backbilled as a result of an electric utility under charging for a problem under the electric utility’s control.” *Id.* at 6. The Commission found that Allied failed to sustain its burden of proof, and Allied offers nothing in its application for rehearing to permit the Commission to change that determination. Because the Commission reasonably and lawfully found that so long as the backbill was reasonably calculated, Allied must pay the rebill.

Second, Allied failed to demonstrate (as is its burden) that Ohio Edison's calculation of the backbill was unreasonable. In support of its rebill calculation, Ohio Edison demonstrated that the backbill was based on a combination of actual and historical usage. (Resp. Br., p. 10-12, 22, 19-25; Tr. Vol. II, p. 225, ln. 7 – p. 1116, ln. 3; Resp. Corrected Ex. 1.7, Resp. x. 1, p. 30, ¶ 62.) This calculation was especially reliable and conservative given that Ms. Nentwick has 18 years of experience and used the lowest historical usage and the amount based on actual reads, which reduced the estimated billing to Allied's benefit. (Tr. Vol. II, p. 258, ln. 11 – p. 259, ln. 24; Resp. Ex. 1, p. 25.) For those reasons, the Commission found that Ohio Edison "provided sufficient evidence to support its accuracy of the bill estimates."

Third, when faced with Allied's contention that the June 19, 2006 demand reading of 38kW should have been used to calculate the backbill, Ohio Edison appropriately demonstrated that the reading was not correct through the testimony of Ms. Nentwick. During the historical usage years of 2002 and 2003, Allied's load never dropped below 70kW, almost double the erroneous 38kW load reading in June 2006. The last actual read before the meter was removed from the billing system was 99kW in January 2004. In addition, the actual reading in July 2006 was 78kW, and in August 2006 it was 84kW. (Resp. Corrected Ex. 1.7.) Mr. Hull's position is belied by his admission that he was unaware of what Allied's actual load was at any point in time from 2004 to 2006. (Tr. Vol. I, p. 191, ln. 10–13.) In addition, Mr. Hull had no response as to why Allied's load would have increased from 38kW in June 2006 to 79kW in July 2006. (Resp. Ex. 1, pp. 23–25, Resp. Corrected Ex. 1.7; Resp. Corrected Ex. 1.8.) Moreover, Mr. Hull had no experience in customer billing or customer support.

Lastly, the Commission found that Allied's own witness Ramun acknowledged that Allied was using more electricity in 2006. (Tr. Vol. I, p. 147, ln. 5 – p. 149, ln. 9.) The

Commission appropriately found that Allied and Mr. Hull failed to substantiate any basis to their position. Order at 10. The Commission also correctly found that the record “clearly establishes that the 38kW reading is an outlier based on other actual readings.” In the end, rehearing is simply not appropriate on this issue.

C. Allied has not demonstrated that it can satisfy the standard for a stay of the Commission’s Order, and the Commission should deny its request.

The Commission has established a four-factor test to determine whether a stay should be granted:

- (1) “whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits;”
- (2) “whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;”
- (3) “whether the stay would cause substantial harm to other parties;” and
- (4) “where lies the public interest.”

Northeast Ohio Public Energy Council v. Ohio Edison Co., Case No. 09- 423-EL-CSS, 2009 Ohio PUC LEXIS 481, at *2–3 (July 8, 2009). Allied’s failure to address any of these factors warrants denial of its request for a stay.

Allied has made no showing that it can prevail on the merits of either an application for rehearing or an appeal. Indeed, as shown above, Allied has not even set forth a legal argument establishing how the Commission allegedly erred in the Order. Allied has not shown that it will suffer irreparable harm if a stay is not granted. It requests a stay merely “[o]ut of an abundance of caution,” whatever that is supposed to mean. (Rehg. App. at 4.) Allied has failed to acknowledge the harm that a delay in paying over \$94,000 will cause to Ohio Edison, which, for over five years now, has been left carrying the debt for the electricity Allied used but has not

paid for. Allied has also failed to address how further delaying payment for electricity it used is in the public interest. In short, Allied has failed on all fronts, and the Commission should deny its request for a stay.

III. CONCLUSION

For the reasons set forth above, Ohio Edison respectfully requests that the Commission deny Allied's Application for Rehearing and Request for Special Order Staying Enforcement.

Dated: October 21, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra the Application for Rehearing and Request for Special Order Staying Enforcement was served to the following person by U.S. mail on this 21st day of October 2013:

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Summary: Memorandum Contra Application for Rehearing and Request for Special Order
Staying Enforcement of the September 11, 2013 Order electronically filed by Mr. Gregory L.
Williams on behalf of Ohio Edison Company