

FILE

PUBLIC UTILITY COMMISSION OF OHIO

PUCO

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MARK B. BARTA,
AMY COCHRAN-BARTA

Appellants,

v.

AMERICAN ELECTRIC POWER

Appellee

CASE NO. 20-1466-EL-CSS

APPELLANTS' REQUEST FOR REHEARING UNDER ORC 4903.10

The Appellants hereby request a rehearing under ORC 4903.10. The Appellants do not request an additional evidentiary hearing of the submission of additional evidentiary material. The Appellants identify the following legal errors in PUCO's decision.

1. The Commission ignored the statutory standard for determining electric service is sufficient contained in ORC 4905.22

ORC 4905.22 states in relevant part: "Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable." [Underlining added]

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"Adequate" is defined in the Merriam-Webster dictionary as follows:

adequate

adjective

ad·e·quate | \ 'a-di-kwet \

Definition of *adequate*

1: sufficient for a specific need or requirement *adequate* time and amount of money *adequate* to supply their needs *also* : good enough : of a quality that is good or acceptable a machine that does an *adequate* job: of a quality that is acceptable but not better than acceptable Her first performance was merely *adequate*.

2: lawfully and reasonably sufficient *adequate* grounds for a lawsuit

- acceptable,
- all right,
- decent,
- fairish,
- fine,
- good,
- OK
- (or okay),
- passable,
- respectable,
- satisfactory,
- serviceable,
- tolerable

Antonyms

- deficient,
- inadequate,
- insufficient,
- lacking,
- unacceptable,
- unsatisfactory,
- wanting

The Commission applied a four part test, derived from a PUCO case, Santos v. Dayton Power, 03-1965-EL-CSS (March 2, 2005), a case involving a single power surge, that therefore does not reference or discuss the "adequate" language in ORC 4905.22. The issue in Santos was not "adequacy". The issue was responsibility for a single power surge. The test set forth in Santos and adopted by the Commission in its opinion is:

1. Whether the cause of the surge or outage was within the company's control;
2. Whether the company failed to comply with any statutes or regulations regarding the operation of its system that could have caused the problem;
3. Whether the company's actions amounted to unreasonable service that could have caused the problem; and
4. Whether the company corrected the problem responsibly.

If the statutory standard were "reasonable" or "best efforts", this four part test might be appropriate. The standard, however, is "adequate". "Adequate" is determined from the standpoint of the consumer, in marked contrast to the test promulgated by the Commission.

The application of the four part test considers everything except whether the power is in fact "adequate". The Commission cites a case, In re Complaint of Miami Wabash Paper, LLC v. The Cincinnati Gas and Electric Co., Case Nos. 02-2162-EL-CSS and 01-3135-EL-CSS (September 23, 2003) in which it determined that power was adequate even though the power failed 48 times in a three and one-half period. The result of the Miami Wabash Paper

case is tragic in the sense that the by blindly adhering to its test, the Commission deemed "inadequate" service adequate, and has now attempted to extend the test to an even more extreme situation. The case is also not on point because the power failures were mostly momentary, while in the Barta's case the outages were very long in comparison.

The Commission cites In re Fadle v. Ohio Public Utility Commission, Case No. 85-79-ST-CSS (September 17, 1985) for the proposition that ORC 4905.22 does not require perfect service. This sentiment, which the Barta's agree with, might make sense in the situation presented in the Santos case itself where the power went out once. It does not make sense in the Barta's case where the power went out many, many times for prolonged periods of time over the course of years. The issue is not "perfection", the issue is "adequacy". The provision of power to the Bartas has not been "adequate", "acceptable", "allright", "decent", "fairish", "fine", "good" "OK (or Okay)", "passable", "respectable", "satisfactory", "serviceable" or "tolerable". It has been "deficient", inadequate", "insufficient", "lacking", "unacceptable", "unsatisfactory", and "wanting". AEP has clearly not met the statutory standard for "adequate service".

2. Even Under the Four Part Test that Deviates From the Statutory Standard the Power has been Inadequate

a. The Cause of the Problem was within the Control of the Company

The "problem" is the constant outages experienced by the Bartas. The Commission erred by looking at the outages on a case-by-case basis. All of the circuits experienced the same weather. The Barta's circuit failed numerous times when others did not. Weather (which of course is outside the company's control) itself is not the cause of the outages. The combination of weather (we are not talking about hurricane events here) and inadequate maintenance caused the Barta's circuit to fail many, many times when others did not. The Commission in Miami Wabash Paper has recognized and discussed this interdependence of weather and equipment maintenance. The individual weather event may not be predictable, but the preparation for weather is. This includes tree maintenance. AEP clearly did not properly maintain the wires on the circuit in such a way that they were able to deal with foreseeable Ohio weather.

b. The Commission Improperly Reversed the Presumption

According to the Commission's decision, the fact that a circuit's performance does not exceed performance parameters creates a presumption that the power is inadequate. The Commission has twisted that presumption to if the circuit meets the performance parameters the power is presumed to be adequate. This twisted presumption is contrary to law and illogical.

c. The Power Provided to the Bartas Was Not Reasonable

The power at the Barta household was objectively not reasonable. That is the whole point of the litigation. As a point of clarification, the actual standard is "inadequate", which is sort of synonymous with "reasonable", but deviates in important ways, as explained in other parts of this document, which is probably the reason for the change in wording from the statute ("adequate") to the four part test ("reasonable")

d. The Company Did Not Act Responsibly in Correcting the Problem

The problems with this circuit were not corrected by the date of the hearing. The problems continued for 20 years. The issues were not mitigated. The fact that the Commission now requests a 90 day report on the status of repair efforts these many years later demonstrates that the Company did not act responsibly to correct the issues.

3. The Commission has Abused Its Discretion By Applying the Santos Case to this Situation

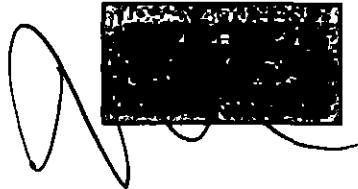
The Commission in its opinion stated:

As AEP correctly notes, we are guided by our prior precedent and will adjudicate Mr. Barta's claims by considering the criteria set forth in Santos. In Santos, the complainant sought compensation for damages to his residential electrical equipment. [It should be noted that in Santos, the power failed only once while

the Barta's power failed many, many times for long periods of time.]

The Commission has broad discretion to set standards for adequacy. Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 14 Ohio St. 3d 49, 471 N.E.2d 475 (1984). The discretion is, however, not absolute. The Commission may not re-write the Ohio Revised Code to turn the inquiry from "Did the utility provide adequate service?" to "Was the plaintiff able to prove that the Company did not try to provide services?" The Commission stated in "It is clear that the fact that there are outages or a number of outages does not constitute inadequate service." Miami Wabash Paper. Actually, a number of outages of long duration is the definition of inadequate service and no sentence starting with "It is clear . . ." will change that fact. If the Commission continues to apply the standard to the Barta's case, that will be an abuse of discretion.

More fundamentally, though, the Commission need not apply the four part test to the Barta's case. The Commission has the authority to not apply the four part test that was established by the Commission itself and determine whether the electricity was "adequate" (which it was not). By not doing so, the Commission has up to this point abused its discretion. The Commission now has the opportunity to rectify this situation.



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CERTIFICATE OF SERVICE

I certify that this document was served on May 26, 2022 by e-mail
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And by first class mail to:

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A handwritten signature in black ink, appearing to read 'Mark Barta', with a stylized, wavy line extending from the end.

Mark Barta

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