

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Mark Barta,

Complainant,

v.

Ohio Power Company,

Respondent.

Case No. 20-1466-EL-CSS

**OHIO POWER COMPANY’S MEMORANDUM CONTRA
COMPLAINANT’S APPLICATION FOR REHEARING**

I. INTRODUCTION

This case stems from a complaint filed by Mark Barta (“Complainant” or “Mr. Barta”) alleging that Ohio Power Company (“AEP Ohio” or the “Company”) supplied insufficient and inadequate electric service to his residence for over 20 years. More specifically, Mr. Barta claimed that AEP Ohio failed to remediate ongoing issues with the circuit servicing his residence.

In its May 4, 2022 Opinion and Order, the Public Utilities Commission of Ohio (the “Commission”) determined that “AEP has not statutorily violated its obligation to Mr. Barta.” Opinion and Order at ¶ 41. After carefully considering the testimonies of Mr. and Mrs. Barta, as well as the pre-filed testimony of AEP Ohio’s witness, the Commission ultimately held that Mr. Barta “failed to carry the burden of proving that Ohio Power Company did not provide adequate service pursuant to R.C. 4905.22.” *Id.* at ¶ 1. Sensitive to Mr. Barta’s concerns, however, the Commission ordered AEP Ohio to file a report regarding the status of Mr. Barta’s service 90 days after the issuance of its Opinion and Order, including an updated outage report and any additional steps taken by AEP Ohio to mitigate the frequency of outages at Mr. Barta’s residence. *Id.* at ¶ 41.

Mr. Barta now seeks rehearing of the Opinion and Order on three separate, but related, grounds. First, he asserts that the Commission “ignored the statutory standard for determining electric service is sufficient * * *.” Application for Rehearing at 1. Second, Mr. Barta argues that the Commission incorrectly analyzed the adequacy of AEP Ohio’s service under the four-part test in *Santos*. *Id.* at 4. Lastly, Mr. Barta states that the “Commission has abused its discretion by applying the *Santos* case to this situation.” *Id.* at 6.

None of Complainant’s arguments warrant any change in the Commission’s position. Mr. Barta’s Application misinterprets Ohio law and at times asks the Commission to ignore its own precedent. Although the various grounds for rehearing are packaged slightly differently, at its core, Mr. Barta’s Application merely reiterates the same broad assertions made during the evidentiary hearing and in his Post-Hearing Brief. Mr. Barta’s repeated broad claims of inadequate service do not satisfy his burden of proof. The Commission, therefore, should deny Mr. Barta’s Application for Rehearing and affirm its Opinion and Order.

II. LAW AND ARGUMENT

After the Commission issues an order in a proceeding, any party may file an application for rehearing of any matter determined in that proceeding, “set[ting] forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” R.C. 4903.10. The Commission may then “abrogate or modify” the order if the Commission concludes that the order, or any part of it, was “in any respect unjust or unwarranted, or should be changed * * *.” *Id.* Here, Mr. Barta has not identified any portion of the Commission’s Opinion and Order that was in any way unreasonable or unlawful. Accordingly, the Commission should affirm its Opinion and Order. *See id.* (“otherwise such order shall be affirmed”).

A. The Commission correctly applied R.C. 4905.22 and the *Santos* factors in evaluating the adequacy of AEP Ohio’s electric service.

Mr. Barta alleges that the Commission “ignored” the statutory standard for determining whether AEP Ohio supplied adequate electric service to his residence. In doing so, he correctly cites to R.C. 4905.22, which states, in relevant part, “[e]very public utility shall furnish necessary and adequate service * * *.” *See also* Opinion and Order at ¶ 6. He also claims that “[a]dequate is determined from the standpoint of the consumer.” Application for Rehearing at 3. But this assertion is directly contrary to Ohio law. The determination of adequate service is “*left to the commission* and dependent upon the facts of each case.” (Emphasis added.) *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 14 Ohio St.3d 49, 50, 471 N.E.2d 475 (1984).

As discussed in AEP Ohio’s Initial Brief, the term “adequate service” has not been defined by statute or administrative rule. AEP Ohio’s Initial Brief at 2. Indeed, as is made clear by Mr. Barta’s citation to the Merriam-Webster definition of the word “adequate”—which ranges from “tolerable” and “good enough” to “satisfactory” and “good”—adequacy is intrinsically fact-specific. Application for Rehearing at 2. This is precisely why the Commission has adopted the *Santos* test for determining whether power outages constitute inadequate service. *See In the Matter of Edward Santos v. The Dayton Power and Light Co.*, Case No. 03-1965-EL-CSS, Opinion and Order, 2005 Ohio PUC LEXIS 98, *20 (Mar. 2, 2005); *In the Matter of Miami Wabash Paper, LLC v. The Cincinnati Gas & Elec. Co.*, Case Nos. 02-2162-EL-CSS and 01-3135-EL-CSS, Opinion and Order at 6 (Sept. 23, 2003) (declining complainant’s attempt to classify inadequate service based on the sheer number of outages, failure to appropriately investigate the cause of outages, and failure to appropriately design, repair, and maintain the utility’s facilities).

Mr. Barta also insists that the Commission improperly applied the *Santos* factors to his case. In particular, he notes that *Santos* “does not reference or discuss the ‘adequate’ language in

R.C. 4905.22” and “considers everything except whether the power is in fact ‘adequate.’” Application for Rehearing at 3 and 4. But in *Santos*, the Commission explicitly noted that “[t]hese are the factors, among others, the Commission can consider in determining whether the company has provided inadequate service under Section 4905.22, Revised Code.” *Santos* at *21. Additionally, Mr. Barta attempts to distinguish *Santos* because it involved power surges, not outages. Application for Rehearing at 3. Yet, the Commission has unequivocally noted that its four-factor test applies to service outages. *Santos* at *20, quoting *In the Matter of Steve Martin v. Dayton Power & Light Co.*, Case No. 91-618-EL-CSS, Opinion and Order, 1992 Ohio PUC LEXIS 809, at *11 (Sept. 10, 1992). Mr. Barta also unsuccessfully attempts to distinguish the *Miami Wabash* case, misunderstanding that the Commission relied upon it only for a comparison of the number of outages. Application for Rehearing at 3. But the *Miami Wabash* case establishes that the number of outages alone is not determinative of service adequacy and also examined whether certain events were within the control of the utility. *Miami Wabash* at 7. Moreover, the *Santos* test requires an examination of more than just the number and duration of outages – the Commission also examines (1) whether the problem was in the company’s control, (2) whether the company failed to comply with statutory or regulatory requirements, (3) whether actions or inactions resulted in unreasonable service, and (4) whether the company acted responsibly in correcting the problem. *Santos* at *20.

And, despite Mr. Barta’s plea for the Commission to abandon its past precedent (Application for Rehearing at 7), the Commission is obligated to follow its own precedent for the integrity of its decisions, unless it can offer an explanation for deviating from that precedent. See *Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 162 Ohio St.3d 162, 2020-Ohio-5221, 164 N.E.3d 425, ¶ 29 (instructing the Commission to “respect its own precedents in its decisions

to assure the predictability which is essential in all areas of the law, including administrative law.

* * * If the commission departs from precedent, it must explain why, though the explanatory hurdle is not particularly high.”). Mr. Barta has not advanced any reason why the Commission should depart from its past precedent regarding adequacy of service. Nor should the Commission depart from the *Santos* precedent that provides an objective analysis to determine if service is inadequate as defined by R.C. 4905.22. The Commission, therefore, properly applied R.C. 4905.22 and the *Santos* factors to Mr. Barta’s case.

B. The Commission correctly held that Mr. Barta failed to meet his burden of proof.

As the Commission has noted, “the burden of proof lies with the complainant.” Opinion and Order at ¶ 7, citing *Grossman v. Public. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966). The Complainant must prove, by a preponderance of the evidence, that the electric service he received from AEP Ohio was inadequate under Ohio law. Mr. Barta failed to meet that burden. The Commission, therefore, correctly concluded that Mr. Barta failed to demonstrate that AEP Ohio provided inadequate service.

Mr. Barta alleges that the Commission wrongly held that he failed to satisfy the *Santos* factors. In particular, he states that the Commission “erred by looking at the outages on a case-by-case basis” to determine whether the cause of the problem was within the Company’s control. Application for Rehearing at 5. He notes that “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,” pointing specifically to tree maintenance *Id.* The Commission, however, already considered this argument. The Commission specifically reviewed the evidence presented by Complainant and AEP Ohio, ultimately holding that “AEP demonstrated that some of the longest outages referenced by the Bartas were out of the Company’s control.” Opinion and Order at ¶ 32. In contrast, “Mr. Barta

was unable to provide any evidence, photographic or otherwise, concerning the alleged poor vegetation management by AEP.” *Id.* at ¶ 32. To the contrary, the Company explained that it cleared trees outside of right-of-way and “combed through the circuit to identify and begin mitigation of any additional hazards, potential danger trees, and opportunities for adding animal guards.” (AEP Ohio Ex. 2 at 11-12.)

Mr. Barta also claims that “the Commission has twisted [Rule 11’s] presumption to if the circuit meets the performance parameters the power is presumed to be adequate.” Application for Rehearing at 5. But that is inaccurate. The Commission simply noted that Mr. Barta’s circuit “did not appear in the report for three consecutive years which would have created a rebuttable presumption of violation of Rule 11.” Opinion and Order at ¶ 24. Importantly, the Commission correctly found that Mr. Barta did not present any evidence that AEP Ohio failed to comply with any statutes, rules, or regulations regarding the operation and maintenance of its systems. *Id.* at ¶ 35.

Although Mr. Barta claims that the power at his residence was “objectively not reasonable,” Application for Rehearing at 5-6, Mr. Barta failed to present facts to support this broad assertion. In fact, the Commission correctly noted that “Mr. Barta did, at times, contradict his contention that the number of outages alone constitutes unreasonable service.” Opinion and Order at ¶ 38 (explaining that Mr. Barta testified that his power has been “constantly out” while also acknowledging that he has power a “high percentage of the time”). Regardless, the Commission has consistently held that the number of outages does not determine whether service is inadequate. *Miami Wabash* at 7 (finding 48 outages within three and a half years did not amount to inadequate service).

Lastly, Mr. Barta failed to provide any evidence to suggest that AEP Ohio has not acted to correct the problems with his power. Tellingly, Mr. Barta did not substantively address or otherwise respond to the evidence indicating AEP Ohio's robust mitigation efforts – a pivotal factor in the *Miami Wabash* decision. Indeed, the evidence decidedly showed that AEP Ohio has worked and continues to work tirelessly to remediate Mr. Barta's outage issues. *See* Opinion and Order at ¶ 38-39 (noting the significant resources AEP Ohio has spent on its Vegetation Management Program and that AEP Ohio has recently moved Mr. Barta's residence to a different circuit distribution transformer). Importantly, the evidence also showed that Mr. Barta has experienced less frequent power flickers over the six months prior to the hearing. *Id.* And, despite finding that Mr. Barta failed to establish that AEP Ohio provided inadequate service, the Commission nonetheless ordered AEP Ohio to issue a report regarding the status of Mr. Barta's electric service 90 days after the date of its order. AEP Ohio intends to comply with the Commission's order and will continue to diligently work to mitigate the frequency of outages at Mr. Barta's residence.

Because the Commission properly found that Mr. Barta failed to meet his burden of proof, the Commission correctly dismissed Mr. Barta's case. Therefore, the Commission should deny Mr. Barta's Application for Rehearing and affirm its Opinion and Order.

III. CONCLUSION

Mr. Barta has offered no basis for abrogating or modifying any portion of the Commission's Opinion and Order in this case. For the reasons provided above, AEP Ohio respectfully requests that the Commission deny the Complainant's Application for Rehearing and affirm its Opinion and Order.

Respectfully submitted,

/s/ Spencer C. Meador

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing was served upon Complainant at the address listed below by regular U.S. mail, postage prepaid, on this 10th day of June, 2022.

Mark Barta
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/s/ Spencer C. Meador
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Summary: Memorandum Contra Complainant's Application for Rehearing
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