

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF
NED BUSHONG,

COMPLAINANT,

v.

CASE NO. 18-1828-EL-CSS

OHIO POWER COMPANY D/B/A AEP
OHIO,

RESPONDENT.

OPINION AND ORDER

Entered in the Journal on October 7, 2020

I. SUMMARY

{¶ 1} The Commission finds that Ned Bushong has failed to carry the burden of proving that the Ohio Power Company has breached any legal obligation pursuant to R.C. 4905.22 by proposing to charge a \$24.00 opt-out fee and allow Mr. Bushong to retain his analog meter.

II. PROCEDURAL BACKGROUND

{¶ 2} On December 12, 2018, Ned Bushong filed a complaint against Ohio Power Company dba AEP Ohio (AEP Ohio or Company). In the complaint, Mr. Bushong alleged that he does not want an advanced meter (smart meter) in his home and that AEP Ohio has failed to establish the benefits of installing a smart meter in his home. Mr. Bushong also alleged that smart meters generally pose health risks to him, because he has a pacemaker, and his wife, who has brain cysts, and structural dangers to his residence. Finally, proposing a solution, Mr. Bushong offered to email AEP Ohio a meter reading each month instead of having a smart meter or paying the smart meter opt-out fee.

{¶ 3} On January 2, 2019, AEP Ohio filed an answer. In the answer, AEP Ohio denied that smart meters present any health or other dangers to Mr. Bushong, his wife, and

his residence. Additionally, AEP Ohio set forth affirmative defenses including that Mr. Bushong failed to state reasonable grounds for complaint.

{¶ 4} The parties were unable to reach a settlement during a prehearing conference held on February 28, 2019.

{¶ 5} A hearing was held in this matter on July 16, 2019. Mr. Bushong presented testimony on behalf of himself (Complainant Ex. K). AEP Ohio presented the testimony of Ms. Paula Igo (Co. Ex. 1).

{¶ 6} Mr. Bushong filed a post-hearing brief on August 28, 2019, and AEP Ohio filed a post-hearing brief on August 29, 2019. Finally, Mr. Bushong filed a reply brief on September 16, 2019, and AEP Ohio filed a reply brief on September 17, 2019.

III. DISCUSSION

A. *Applicable Law*

{¶ 7} AEP Ohio is a public utility as defined in R.C. 4905.03(C) and, as such, AEP Ohio is subject to the Commission's jurisdiction.

{¶ 8} R.C. 4905.22 provides that every public utility shall furnish service and facilities that are adequate, just, and reasonable and that all charges made or demanded for any service be just, reasonable, and not more than allowed by law or by order of the Commission.

{¶ 9} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 10} Specifically, the Commission's rules governing an electric distribution utility's installation of smart meters and a consumer's ability to request a traditional meter instead

under AEP Ohio's tariff are at issue in this proceeding. AEP Ohio has obtained Commission approval to install advanced meters. *In re the Application of Ohio Power Co. for Approval of an Advanced Meter Opt-out Service Tariff*, Case No. 14-1158-EL-ATA (*Tariff Case*), Opinion and Order (Apr. 27, 2016) at 11-12; P.U.C.O. No. 20 at 3rd Revised Sheet No. 103-12 (Apr. 19, 2017). An electric utility's provision of smart meters is addressed in Ohio Adm.Code 4901:1-10-05(J), which directs that the electric utility shall provide a customer with the option to decline installation of a smart meter and retain a traditional meter where the customer commits to paying for a cost-based, tariffed, opt-out service. A traditional meter is defined as "any meter with an analog or digital display that does not have the capability to communicate with the utility using two-way communications." Ohio Adm.Code 4901:1-10-01(DD). Finally, according to the tariffs currently filed with the Commission, a customer who elects to opt-out of the installation of a smart meter may (1) relocate the smart meter to an alternate location acceptable to the customer and the company or (2) request a traditional meter and pay a recurring monthly fee of \$24.00. *Tariff Case*, P.U.C.O. No. 20 at 3rd Revised Sheet No. 103-12 (Apr. 19, 2017).

{¶ 11} In complaint proceedings, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966). Therefore, in order to prevail in this matter, Mr. Bushong must prove the allegations in his complaint by a preponderance of the evidence.

B. Summary of Testimony and Evidence

{¶ 12} During the hearing, Mr. Bushong testified that he and his wife Jane have resided at 1191 Gloria Ave., Lima, Ohio and have been AEP Ohio customers for 30 years. According to Mr. Bushong, AEP Ohio is attempting to rescind an existing contract with him and negotiate a new one by putting in a smart meter in his home (Tr. at 7). Mr. Bushong believes that smart meters emit electric and magnetic fields (EMF), also known as radiation, which causes cancer in human beings. (Tr. at 7, 9-10.) Mr. Bushong contended AEP Ohio can only charge an opt-out fee to a customer who prefers a traditional, analog meter if the Company can prove the customer would be "better off" with a smart meter (Tr. at 26). Mr.

Bushong also argued that AEP Ohio failed to conduct studies establishing that he would be “better off” with a smart meter as opposed to a traditional, analog meter (Tr. at 26-27). Mr. Bushong noted that he is 72 years old and his wife is 73 years old and they both have physical ailments. He explained that his wife has two brain cysts and he has a heart pacemaker. According to Mr. Bushong, EMF radiation will further exacerbate these existing conditions. (Tr. at 27.) Mr. Bushong testified his desire to retain his current analog meter, but he stated he did not want to pay the \$24.00 monthly tariff as a result of his opt-out election. Mr. Bushong would also like to be compensated in the amount of \$6,000 for the harassment he has suffered while trying to negotiate this issue with AEP Ohio. (Tr. at 31.) Mr. Bushong did not present the testimony of any expert witnesses in support of his claim.

{¶ 13} During cross-examination, Mr. Bushong admitted that he has no formal education or training in electrical engineering, medicine, and law, and was not offering any expert testimony in support of his claims. He also clarified his preference to retain the analog meter currently at his residence but his unwillingness to pay the \$24.00 monthly opt-out fee. (Tr. at 32-34.)

{¶ 14} AEP Ohio’s witness, Paula Igo, testified regarding metering options available to the Company’s residential customers. Ms. Igo explained that under AEP Ohio’s tariff, a residential customer may opt-out of having a smart meter. Ms. Igo clarified that opt-out service does not guarantee a customer will retain the existing meter on their premises because the actual meter is owned by AEP Ohio. Ms. Igo testified when a customer declines a smart meter, the Company’s normal practice is to install a digital, non-emitting, non-communicating meter at the customer’s premises, which is subject to a \$24.00 monthly opt-out fee. (Co. Ex. 1 at 3-4.) Another metering option available to the customer, under the Commission-approved tariff, is to relocate their meter location, at the customer’s expense, and have a smart meter installed at the new location (Tr. at 44). No monthly opt-out fee is necessary for this option. *Tariff Case*, P.U.C.O. No. 20 at 3rd Revised Sheet No. 103-12 (Apr. 19, 2017).

{¶ 15} Specifically addressing analog meters, Ms. Igo testified such meters are no longer standard metering equipment because they are no longer manufactured, and replacement parts and components are not available. Because of this, AEP Ohio has not purchased an analog meter in over ten years and has moved to installing non-emitting digital meters at opt-out customers' residences. Ms. Igo explained that non-emitting digital meters measure the electrons a consumer uses, similar to an analog meter, and displays the reading on a digital display that is easier for a meter reading technician to read. (Co. Ex. 1 at 4.)

{¶ 16} Ms. Igo indicated the Company installed an analog meter at Mr. Bushong's residence on July 1, 1989 and it is still in place today. Ms. Igo testified that AEP Ohio is willing to allow the analog meter to remain on the property as long as the meter is functioning within the standards set forth in Ohio Adm.Code 4901:1-10-05 and AEP Ohio's tariff. Ms. Igo indicated, consistent with the Company's tariff, Mr. Bushong will be required to pay the monthly opt-out fee in order to retain the analog meter. (Co. Ex. 1 at 4-5.)

{¶ 17} Turning to potential solutions suggested by Mr. Bushong, Ms. Igo explained that none are feasible. First, Ms. Igo testified it is not reasonable for Mr. Bushong to read his own meter and send AEP Ohio his usage information. Ms. Igo stated that customer-relayed meter information cannot be used for billing purposes because there would be both an opportunity for inadvertent error and for a customer to manipulate a reading. Further, Ms. Igo contended that AEP Ohio has no systems in place to enter a customer-provided reading or to store information or photographs a customer might provide to document the reading. Consequently, it would be administratively difficult to administer a program where customers call or email meter reads. Additionally, Ms. Igo testified that such systems would be costly to develop and of little utility, due to the Company's concerns regarding the accuracy of a customer-provided reading and the fact that the vast majority of customers' metering information is obtained and recorded through other means. Second, Ms. Igo testified it is also not reasonable that the Company estimate Mr. Bushong's usage because Ohio Adm.Code 4901:1-10-05(I)(1) requires the Company to obtain actual readings of all its

in-service customer meters at least once per calendar year. Accordingly, Ms. Igo believes Mr. Bushong's suggestion is inconsistent with that requirement. Finally, Ms. Igo testified it is not possible for a customer to pay the opt-out fee once a year and have his meter read once a year. Ms. Igo stated that the cost of manually reading a meter for a year is more than \$24.00. Moreover, by allowing Mr. Bushong to only pay the fee once a year, AEP Ohio would not be treating all similarly situated opt-out customers in the same manner, which would be unreasonable. Consequently, Ms. Igo testified that the solutions offered by Mr. Bushong were unworkable. (Co. Ex. 5-6, Tr. at 50, 52-53.)

{¶ 18} At the conclusion of the hearing, the attorney examiner established a schedule for the submission of post-hearing briefs. Mr. Bushong filed his initial brief on August 28, 2019 and reply brief on September 16, 2019. AEP Ohio filed its initial brief on August 29, 2019 and reply brief September 17, 2019.

C. Post-Hearing Briefs

1. COMPLAINANT

{¶ 19} In his initial brief, Mr. Bushong reiterates arguments he made at the hearing, including that AEP Ohio is attempting to rescind a contract existing between him and the Company by wanting to install a smart meter in his home; the dangers of EMF radiation; and his contentions that smart meters may cause house fires.

{¶ 20} Responding to Mr. Bushong's brief, in its reply brief AEP Ohio first argues its Commission-reviewed and approved tariff comprises the contract between itself and its customers. AEP Ohio believes it is upholding its end of the contract by allowing Mr. Bushong to opt-out of the advanced meter by paying the monthly opt-out fee. Next, AEP Ohio contends Mr. Bushong did not carry his burden of proof and present evidence regarding health problems caused by smart meters, especially with regard to him and his wife, and the allegation that smart meters may cause house fires. AEP Ohio notes the attorney examiner denied admission of the majority of Mr. Bushong's evidence regarding these issues on relevancy and hearsay grounds. Though the attorney examiner admitted a

World Health Organization (WHO) article and Mr. Bushong's pre-filed correspondence, AEP Ohio alleges neither of document supports Mr. Bushong's health and safety claims (Complainant Ex. A, Complainant Ex. K). AEP Ohio argues the WHO article is not relevant because the article deals specifically with cell phones, not advanced meter infrastructure (AMI) technology. AEP also contends Complainant Exhibit K has no credible evidence because the document includes Mr. Bushong's opinions which he is unqualified to provide and contains references to inadmissible evidence (Tr. at 14-25, 28-29, 32-22; Complainant Exhibit K). Finally, AEP Ohio represents it remains willing to provide Mr. Bushong with opt-out service via the analog meter currently installed at his residence, which is the relief he has requested (Tr. at 33-34; Co. Ex. 1 at 5).

2. AEP OHIO

{¶ 21} In its initial brief, AEP Ohio argues it has provided, at all relevant times, adequate service to Mr. Bushong pursuant to applicable statutes and regulations. AEP Ohio also asserts that Mr. Bushong has failed to set forth any evidence demonstrating its actions with regard to his request for opt-out service were in any way inadequate, unjust, or unreasonable. To that end, AEP Ohio makes three major points. First, AEP Ohio argues that requiring Mr. Bushong to pay a tariffed charge cannot support a finding that AEP Ohio's conduct is in any way inadequate, unjust, or unreasonable. *In re City of Reynoldsburg v. Columbus Southern Power Co.*, 134 Ohio St.3d 29, 40-41, 2012-Ohio-5270, 979 N.E.2d 1229, at ¶ 49 (noting a utility's customers are bound to pay the rate set forth in the utility's tariff filing). AEP Ohio argues the Commission has reviewed and approved its smart meter opt-out provisions, including the monthly opt-out fee applicable to all opt-out customers. *Tariff Case*, Opinion and Order (April 27, 2016) at 11-12; P.U.C.O. No. 20 at 3rd Revised Sheet No. 103-12 (Apr. 19, 2017) at ¶ 16. Consequently, AEP Ohio argues that the smart meter opt-out tariff provision is neither unjust nor unreasonable and if Mr. Bushong wishes to retain his analog meter, he is required to pay the Commission-approved monthly opt-out fee. Further, AEP Ohio contends its refusal to exempt Mr. Bushong from this tariffed charge

applicable to all opt-out customers does not support a finding that its actions were inadequate, unjust, or unreasonable.

{¶ 22} Second, as suggested by Ms. Igo during the hearing, AEP Ohio argues that it is improper for Mr. Bushong to read his own meter or for AEP Ohio to estimate his bill every month in lieu of him paying the monthly opt-out fee. Ohio Adm.Code 4901:1-10-05(I), AEP Ohio explains, requires an electric utility obtain actual readings of every in-service customer meter at least once each calendar year and make reasonable attempts to obtain accurate, actual reading of the energy and demand delivered for the billing period. According to AEP Ohio, allowing Mr. Bushong to read his own meter, or estimating his bill every month, would be a violation of Ohio Adm.Code 4901:1-10-05(I). Further, AEP notes the operational concerns associated with allowing a customer to read their own meter: a high probability of inaccurate reads and/or bill manipulation; AEP Ohio's lack of infrastructure to use customer meter reads for monthly billing purposes; the high cost of creating such a system; and the risk of inaccurate or manipulative information provided by the customer even with such a system. (Co. Ex. 1 at 5; Tr. at 49-50.). Therefore, given the variety of concerns such a system would create, AEP Ohio finds Mr. Bushong's suggestion improper.

{¶ 23} Third, AEP Ohio asserts the Commission has approved its AMI technology and deployment and identified the appropriate remedy for alleged concerns related to AMI technology is the installation of digital non-emitting meter and payment of the applicable opt-out fee in the *Tariff Case* and in other proceedings. *In re Columbus Southern Power Co. for Approval for its Electric Security Plan*, Case No. 08-917-EL-SSO, et al. (*ESP Case*), Opinion and Order (Mar 18, 2009) at 37-38; *In re Ohio Power Co. to Initiate Phase 2 of its gridSMART Project and to Establish the gridSMART Phase 2 Rider*, Case No. 13-1939-EL-RDR (*gridSMART Phase 2 Case*), Opinion and Order (Feb. 1, 2017) at ¶ 70; *Logan v. Ohio Power Co.*, Case No. 17-1943-EL-CSS, Opinion and Order (Jan. 16, 2019) at ¶ 25 (finding that a complainant who alleges health concerns regarding a smart meter may alleviate the concern by requesting the installation of a non-emitting meter and paying the applicable fee). AEP Ohio argues that to the extent Mr. Bushong raises claims related to the Company's AMI deployment and

technology, those claims are res judicata. *Jacobs v. Teledyne, Inc.*, 39 Ohio St.3d 168, 169-170, 529 N.E.2d 1255 (1988) *Johnson's Island, Inc. v. Board of Trustees of Danbury Tp.*, 69 Ohio St.2d 241, 244, 431 N.E.2d 672 (1982). As a final note, AEP Ohio urges the Commission to disregard Mr. Bushong's unsubstantiated claims about the alleged health and safety concerns posed by AMI technology because he is not a qualified medical or electrical expert. AEP Ohio reiterates the WHO article is not relevant because it does not address AMI technology or shed light about the issue of whether Mr. Bushong should pay the opt-out fee. (Tr. at 9-11, 14-16, 18-21, 27, 32, 34, Complainant Ex. K at 1-3.) Consequently, because the proper remedy for Mr. Bushong's concerns is the installation of a non-emitting meter and payment of the Commission-approved opt-out fee, AEP Ohio requests the Commission to disregard any health or safety claims raised by Mr. Bushong.

{¶ 24} In response to AEP Ohio's initial brief, Mr. Bushong, in his reply brief, argues that AEP Ohio is wrongly identifying the issue in this case as his refusal to pay for the monthly \$24.00 opt-out fee. Instead, he claims he has proven the health and safety issues through his testimony during the hearing. Therefore, Mr. Bushong believes AEP Ohio is not providing adequate service pursuant to R.C. 4905.22.

D. Commission Conclusion

{¶ 25} At issue is whether AEP Ohio has breached any legal duty by allowing Mr. Bushong to retain his analog meter installed in July 1, 1989 and proposing to charge him a \$24.00 monthly opt-out fee. Upon review of the testimony provided during the hearing on July 16, 2019 and subsequent briefing from the parties, the Commission finds that Mr. Bushong has failed to establish AEP Ohio breached any legal duty pursuant to R.C. 4905.22.

{¶ 26} Specifically, we find that AEP Ohio has complied with Ohio Adm.Code 4901:1-10-05 and the PUCO 20, which was approved by the Commission in the *Tariff Case*. As identified in the rule and the tariff, AEP Ohio appropriately offered Mr. Bushong the option of obtaining smart meter service or opting out and agreeing to be pay the tariffed, cost-based charges associated with such service (Tr. at 33-34, 37). In fact, AEP Ohio is

committed to allow Mr. Bushong to use of their analog meter, so long as it remains functional within the standards set forth in Ohio Adm.Code 4901:1-10-05(J)(1) (Co. Ex. 1 at 5; Tr. at 43). We find that AEP Ohio's intent to levy a \$24.00 monthly charge on Mr. Bushong is not unreasonable, unlawful, or discriminatory, and is imposed due to the fact the Commission approved this charge in the *Tariff Case*. Further, AEP Ohio's use of AMI technology, the opt-out fee, and alternate, acceptable equipment offerings have been approved by the Commission in earlier proceedings. *See, e.g., ESP Case* at 37-38; *gridSMART Phase 2 Case* at ¶ 70. Moreover, we agree with AEP Ohio that none of the solutions offered by Mr. Bushong are administratively feasible as they would require costly solutions which are difficult to maintain, create opportunities for inadvertent error with regard to documenting actual usage, require AEP Ohio to treat its similarly situated customers in a dissimilar fashion, and constitute a violation of Ohio Adm.Code 4901:1-10-05(I) (Co. Ex. 5-6, Tr. at 50, 52-53). Consequently, as of the date of this Opinion and Order, AEP Ohio is authorized to begin billing Mr. Bushong the \$24.00 monthly charge for service under the Commission-approved tariff applicable to in-person meter reading service.¹

{¶ 27} Though Mr. Bushong raises concerns about alleged health and safety risks posed by smart meters, we find that Mr. Bushong failed to carry his burden of proof with regard to these claims. During the hearing, Mr. Bushong admitted that he is not an engineer or a medical professional. Further, he offered no expert witness testimony from qualified professionals to establish these alleged health and safety risks. Additionally, any potential health or safety risk is rendered moot because AEP Ohio has allowed Mr. Bushong to retain his analog meter as long as it is functioning within the standards set forth in Ohio Adm.Code 4901:1-10-05 and Paragraph 14 of PUCO 20. (Co. Ex. 1 at 5; Tr. at 32-34, 49-50.)

{¶ 28} We note however, that the solution of maintaining the current analog meter, which was installed by AEP Ohio on July 1, 1989, is likely not a permanent one. As noted

¹ We decline to address AEP Ohio's argument related to res judicata because there is no indication Mr. Bushong, or someone in privity with him, previously filed a complaint against the Company alleging similar claims or factual issues (Co. Initial Brief at 10-11).

by Ms. Igo, analog meters are no longer manufactured, replacement parts and components are not available, and the Company has not purchased such a meter in over ten years (Co. Ex. 1 at 4). Consequently, if the analog meter currently being used at the Bushong residence stops functioning, pursuant to the Company's tariff, Mr. Bushong will have the option of having AEP Ohio install one of the non-emitting digital meters routinely used for the Company's opt-out service or choose to relocate his meter location, at his expense, and have a smart meter installed at the new location (Co. Ex. 1 at 4). However, because all parties agree that the analog meter in question is currently functioning, the Commission directs AEP Ohio to not take any action pursuant to its tariff until it the analog meter reaches the end of its useful life.

{¶ 29} Accordingly, the Commission determines that Mr. Bushong's refusal to allow installation of a smart meter is an opt-out service election, which subjects him to the \$24.00 monthly meter reading charge, as approved in PUCO 20 in the *Tariff Case*.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 30} On December 12, 2018, Mr. Bushong filed a complaint against AEP Ohio because he did not want a smart meter installed in his home. He also alleged that the smart meter posed health and structural dangers to him, his wife, and his residence.

{¶ 31} A settlement conference was held on February 28, 2019 and a hearing was held in this matter on July 16, 2019.

{¶ 32} The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

{¶ 33} Mr. Bushong presented insufficient evidence to support a finding that AEP Ohio breached any legal obligation pursuant to R.C. 4905.22 by wanting to charge its \$24.00 opt-out fee in order for Mr. Bushong to retain his analog meter. As such, we hold that Mr. Bushong has failed to meet his burden of proof in this case.

V. ORDER

{¶ 34} It is, therefore,

{¶ 35} ORDERED, That this matter be decided in AEP Ohio's favor because Mr. Bushong has failed to sustain his burden of proof. It is, further,

{¶ 36} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

AS/kck

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Summary: Opinion & Order finding that Ned Bushong has failed to carry the burden of proving that the Ohio Power Company has breached any legal obligation pursuant to R.C. 4905.22 by proposing to charge a \$24.00 opt-out fee and allow Mr. Bushong to retain his analog meter electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio