

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Meropi Steve)	
)	
Complainant,)	
)	Case No. 21-0247-EL-CSS
v.)	
)	
Ohio Edison Company)	
)	
Respondent.)	
)	

ANSWER AND MOTION TO DISMISS OF OHIO EDISON COMPANY

Ohio Edison Company (“OE”) is a public utility company as defined by §4905.03(C) of the Ohio Revised Code and is duly organized and existing under the laws of the State of Ohio. In accordance with Rule 4901-9-01(D) of the Ohio Administrative Code, OE for its answer to the Complaint of Meropi Steve (the “Complainant”) states:

Complainant’s Complaint consists of various assertions and allegations in one unnumbered paragraph, consisting primarily of legal conclusions and assertions about the purported risks of radiation from smart meters. The legal conclusions in the Complaint require no response. To the extent a response is required, OE denies the same. With respect to the assertions about the purported risks of radiation from smart meters, OE lacks knowledge or information sufficient to respond to those allegations and therefore denies the same. To the extent OE does not respond to a specific allegation, OE denies any such allegation. OE reserves the right to supplement or amend this Answer.

AFFIRMATIVE DEFENSES

1. The Complaint fails to set forth reasonable grounds for Complaint, as required by Section 4905.26, Revised Code.

2. The Complaint fails to state a claim upon which relief can be granted.
3. The Complaint is an improper collateral attack on the OE tariff the Commission authorized and approved in PUCO Case No. 20-0385-EL-ATA.
4. The relief sought in the Complaint would, if granted, violate the filed rate doctrine.
5. The Commission lacks subject matter jurisdiction over some or all of Complainant's claims.
6. OE reserves the right to raise other defenses as warranted by discovery in this matter.

MOTION TO DISMISS

The Complaint filed in this matter contains three fatal flaws:

- *First*, the Complaint is an improper collateral attack on the OE tariff the Commission authorized and approved in PUCO Case No. 20-0385-EL-ATA;
- *Second*, the Complaint seeks for the Commission to act in violation of the filed rate doctrine; and
- *Third*, the Complaint fails to set forth reasonable grounds for the Complaint, as required by Section 4905.26, Revised Code.

For each of these reasons, the Complaint must be dismissed.

First, the Complaint amounts to a redundant and inefficient collateral attack on prior Commission orders. In Commission Case No. 20-0385-EL-ATA, OE filed proposed tariff pages reflecting changes to the Automated Meter Opt-out Rider ("Rider AMO").¹ This filing was made in accordance with Rules 4901:1-10-05(J)(1), (J)(5)(a) and (J)(5)(b) of the Ohio Administrative

¹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of New Tariff Language*, PUCO Case No. 20-0385-EL-ATA, Application at 1 (Feb. 18, 2020).

Code, and in response to the Commission Opinion and Order in Case Nos. 16-481-EL-UNC and 17-2436-EL-UNC, et al., dated July 17, 2019, and was intended, in pertinent part, to “provide any customer taking service under the Residential Service rate schedule (Rate RS) with the option . . . to decline installation of an advanced meter and retain a traditional meter, through a cost-based, tariffed optout service.”² This option is outlined in the revised tariff pages, and provides that the monthly customer charge for Opt-out customers is \$28.29 (the “Opt-out Customer Charge”).³ The tariff also provides the cost of removing a smart meter from an Opt-out customer’s residence.⁴

OE’s application was docketed at the Commission and made available for review by all interested parties, including Commission Staff. Commission Staff filed its Review and Recommendations regarding the application and determined that the modified charges were cost-based, in accordance with the applicable rules.⁵ The Commission approved the Opt-out Customer Charge on July 29, 2020,⁶ holding that “the provisions of Ohio Adm.Code 4901:1-10-5 contain all of the necessary and appropriate consumer protections for customers who participate in Rider AMO.”⁷ OE filed its revised tariff pages reflecting the Opt-out Customer Charge on August 14, 2020.⁸

The Commission may, “in the interest of judicial economy and efficiency, dismiss a complaint against a Commission approved tariff, where the Commission has recently and thoroughly considered the provisions of the tariff and the Complainant alleges nothing new or

² *Id.*, Ex. C-1.

³ *Id.*, Ex. B.

⁴ *Id.*

⁵ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of New Tariff Language*, PUCO Case No. 20-0385-EL-ATA, Finding and Order at ¶8 (July 29, 2020)..

⁶ *Id.*

⁷ *Id.* at ¶10.

⁸ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of New Tariff Language*, PUCO Case No. 20-0385-EL-ATA, Revised Tariff Update pages of Rider AMO for PUCO Electric Tariff No. 11 (Aug. 14, 2020).

different for the Commission's consideration."⁹ It is clear, here, that the Commission has recently and thoroughly considered the provisions of Rider AMO and that Complainant alleges nothing new or different for the Commission's consideration. The Complaint should be dismissed as an improper collateral attack on Rider AMO, in the interest of judicial economy and efficiency.

Next, the relief sought in the Complaint would, if granted, require the Commission to act in violation of the filed rate doctrine. Under Ohio law, the Commission, as well as a public utility, must follow the filed rate doctrine as codified in R.C. 4905.32 and 4903.16¹⁰. Pursuant to these statutes, a utility must collect the rates set by the Commission, unless an aggrieved person secures a stay of such order by affirmative act¹¹. Indeed, the Commission has held that "a public utility may charge only the rates fixed by its current. Commission-approved tariff and that the Commission is prohibited from engaging in retroactive ratemaking".¹² The Supreme Court of Ohio is clear that "the rates of a public utility in Ohio are subject to a general statutory plan of regulation and collection; that any rates set by the Public Utilities Commission are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court; and that the General Assembly, by providing a method whereby such rates may be suspended until final determination as to their reasonableness or lawfulness by the Supreme Court, has completely abrogated the commonlaw remedy of restitution in such cases."¹³

As previously discussed, the Commission approved the Opt-out Customer Charge in July of 2020 and held that "the provisions of Ohio Adm.Code 4901:1-10-5 contain all of the necessary

⁹ See *In the Matter of the Complaint of Mark R. Weiss v. The Cleveland Electric Illuminating Company*, PUCO Case No. 97-876-EL-CSS, 1997 Ohio PUC LEXIS 845 at *7 (Nov. 6, 1997) (citing cases)

¹⁰ *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957).

¹¹ *Id.*

¹² *In the Matter of the Application of Ohio Power Company to Update its Gridsmart Phase 2 Rider*, PUCO Case No. 17-1156-EL-RDR, 2018 Ohio PUC Lexis 444, Consideration of the Application for Rehearing at ¶19 (April 25, 2018).

¹³ *Keco Industries*, 166 Ohio St. 254, 259, 141 N.E.2d 465, 469.

and appropriate consumer protections for customers who participate in Rider AMO.”¹⁴ OE then filed its revised tariff pages reflecting the Opt-out Customer Charge in August of 2020 and proceeded by collecting the rates and charges set by the Commission pursuant to Ohio law.

The Complaint in this matter seeks to have the Commission violate the filed rate doctrine and the Revised Code by conducting retroactive ratemaking by allowing the Complainant to not be subject to the opt-out charge. In addition, Complainant failed to make her objections and proposal through the proper means and at the proper time. For this reason, and in the interest of judicial economy and efficiency, the Complaint should be dismissed.

Finally, the Complaint fails to set forth reasonable grounds for the Complaint, as required by R.C. 4905.26. The arguments the Complaint advances also fail to satisfy Complainant's burden of proof, which is that Complainant must prove the allegations in the Complaint by a preponderance of the evidence.¹⁵ Indeed, the Complaint includes an admission that the Complainant has suffered no harm: the Complaint acknowledges that “Ohio Edison was allowed by PUCO to charge \$28+/mo[nth] to the customers that opt out of the smart metering program.” The Commission is clear that vague allegations of health concerns associated with smart meters are insufficient for a Complainant to meet his or her burden under this standard.¹⁶ And where, as here, an EDU offers customers the option to opt-out of its smart meter program and instead pay an opt-out fee, the Commission has held that there is no harm to the complainant.¹⁷ In fact, the

¹⁴ *Id.* at ¶10.

¹⁵ *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

¹⁶ See *In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, 2020 Ohio PUC Lexis 1623, Opinion & Order (Oct. 07, 2020)(holding that the Complainant's allegations of smart meter health risks did not meet the burden of proof and that the utility acted in accordance with its tariff and Commission rules).

¹⁷ See *In the Matter of the Complaint of Kenneth B. Logan, Complainant, v. Ohio Power Company, Respondent*, PUCO Case No. 17-1943-EL-CSS, 2019 Ohio PUC Lexis 60, Opinion & Order (Jan. 16, 2019).

Commission has found such opt-out fees are not, as a matter of law, unreasonable, unlawful, or discriminatory¹⁸.

WHEREFORE, OE respectfully requests an Order dismissing the Complaint with prejudice and granting OE all other necessary and proper relief.

Respectfully submitted

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¹⁸ See *In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, 2020 Ohio PUC Lexis 1623, Opinion & Order (Oct. 07, 2020).

CERTIFICATE OF SERVICE

On April 5th, 2021, the foregoing document was filed on the Public Utilities Commission of Ohio's Docketing Information System. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties of record in this proceeding. A service copy has been sent by U.S. Mail on this 5th day of April 2021 to the Complainant at the following address:

Meropi Steve
15336 Lisbon St. SE
Minerva, OH 44657

/s/ Kristen M. Fling
Attorney for Ohio Edison Company

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

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in

Case No(s). 21-0247-EL-CSS

Summary: Answer and Motion to Dismiss electronically filed by Ms. Emily V Danford on behalf of Ohio Edison Company