

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

HEATHER TYSON,)	
)	
Complainant,)	
)	
vs.)	CASE NO. 21-0818-EL-CSS
)	
THE CLEVELAND ELECTRIC)	
ILLUMINATING COMPANY,)	
)	
Respondent.)	

**THE CLEVELAND ELECTRIC ILLUMINATING COMPANY'S
MOTION TO DISMISS**

Pursuant to Section 4901-9-01(C)(3) of the Ohio Administrative Code, The Cleveland Electric Illuminating Company moves the Commission for an order dismissing the Complaint in the above-captioned matter. Dismissal of the Complaint is appropriate in the interests of administrative efficiency and economy as set forth more fully in the memorandum in support of this Motion that is attached and incorporated herein.

Respectfully submitted,

/s/ Christopher A. Rogers

Christopher A. Rogers (Practice Pending
Admission No. 100781)

Counsel of Record

BENESCH, FRIEDLANDER, COPLAN &
ARONOFF LLP

200 Public Square, Suite 2300

Cleveland, Ohio 44114-2378

Telephone: 216.363.4500

Facsimile: 216.363.4588

Email: crogers@beneschlaw.com

*Counsel for The Cleveland Electric
Illuminating Company*

Kristen M. Fling (0099678)
FirstEnergy Service Company
76 South Main St.
Akron, OH 44308
Telephone: 330-606-8087
Email: kfling@firstenergycorp.com
*Counsel for The Cleveland Electric
Illuminating Company*

Ryan Babiuch (0094025)
BENESCH, FRIEDLANDER, COPLAN &
ARONOFF LLP
200 Public Square, Suite 2300
Cleveland, Ohio 44114-2378
Telephone: 216.363.4500
Facsimile: 216.363.4588
Email: rbabiuch@beneschlaw.com
PPA Supervising Attorney

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**MEMORANDUM IN SUPPORT OF THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY’S MOTION TO DISMISS**

I. INTRODUCTION

Complainant Heather Tyson’s (“Complainant”) Complaint against Respondent The Cleveland Electric Illuminating Company (“CEI”) must be dismissed because it fails to set forth reasonable grounds that the charging of an opt-out fee is discriminatory, even when Complainant complains of adverse health issues resulting from alleged exposure to electromagnetic fields.

Complainant’s Complaint must be dismissed on three separate independent grounds:

- *First*, the Complaint is an improper collateral attack on the CEI tariff the Commission authorized and approved in PUCO Case No. 20-0385-EL-ATA;
- *Second*, the Complaint asks the Commission to act in violation of the filed rate doctrine, codified in Sections 4905.32 and 4903.16, Revised Code; and
- *Third*, the Complaint fails to set forth reasonable grounds for the Complaint, as required by Section 4905.26, Revised Code.

Accordingly, CEI moves the Commission to dismiss the Complaint.

II. BACKGROUND

CEI obtained Commission approval to install smart meters.¹ O.A.C. 4901:1-10-05(J) governs the provision of smart meters to customers and requires that an electric utility installing a smart meter 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. In compliance with this Rule, CEI obtained Commission approval to charge an opt-out fee to those customers who do not wish to have a smart meter installed (“Rider AMO”).² In the Finding and Order approving Rider AMO, the Commission specifically found that Rider AMO complies with O.A.C. 4901:1-10-05.³

Following the Commission’s approval of Rider AMO, CEI filed Tariff Update pages with the Commission, which included the approved Rider AMO language.⁴ Rider AMO can be found in P.U.C.O. No. 13 at Sheet 128, 1st Revised Page 1 of 1. It provides, in pertinent part, that a customer who elects to opt-out of the installation of a smart meter must pay a recurring monthly fee of \$28.29.⁵

Complainant does not dispute that the Commission has approved Rider AMO and the associated opt-out fee. Instead, she asserts that CEI should waive the fee because of the alleged health effects from electromagnetic fields and therefore the charging of a monthly opt-out fee is

¹ See generally *In The Matter Of The Filing By Ohio Edison Company, The Cleveland Electric Illuminating Company And The Toledo Edison Company Of A Grid Modernization Business Plan*, PUCO Case Nos. 16-481-EL-UNC and 17-2436-EL-UNC, et al., Opinion and Order (July 17, 2019).

² *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*, Case No. 20-0385-EL-ATA (“Rider AMO Case”), Finding and Order, ¶¶ 10-11 (Jul. 29, 2020) (“We find 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. . . Accordingly, upon review of the Companies’ application and Staff’s review and recommendation, the Commission finds that the application is consistent with Ohio Adm.Code 4901:1-10-5[.]”).

³ *Id.*

⁴ *Rider AMO Case*, Case No. 20-0385-EL-ATA, Revised Tariff Update pages of Rider AMO for PUCO Electric Tariff No. 13 (Aug. 14, 2020).

⁵ P.U.C.O. No. 13 at Sheet 128, 1st Revised Page 1 of 1 (Aug. 14, 2020) (“Rider AMO”)

discriminatory. However, Commission precedent is clear, the charging of an opt-out fee, even in light of the alleged health effects, is not discriminatory.⁶ Such allegations do not support a showing that a utility provided inadequate service or acted in an unjust or unreasonable way.⁷

The Complaint must be dismissed with prejudice.

III. ARGUMENT

The Commission should dismiss the Complaint with prejudice because Complainant failed to set forth reasonable grounds for her Complaint, as required by Section 4905.26 of the Ohio Revised Code. The Complainant bears the burden of demonstrating that she has set forth reasonable grounds for her Complaint.⁸ If the Complaint fails to set forth such reasonable grounds, the Commission does not have the authority to hear the Complaint.⁹

As set out more fully below, the Complaint should be dismissed for several reasons:

- *First*, the Complaint is an improper collateral attack on the CEI tariff the Commission authorized and approved in PUCO Case No. 20-0385-EL-ATA;
- *Second*, the Complaint asks the Commission to act in violation of the filed rate doctrine, codified in Sections 4905.32 and 4903.16, Revised Code; 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 should be dismissed with prejudice.

⁶ See, e.g., *In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 27 (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).

⁷ *Id.*, ¶ 26 ("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.").

⁸ *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666 (1996).

⁹ *Ohio Utils. Co. v. Public Utils. Comm'n*, 58 Ohio St. 2d 153, 159, 389 N.E.2d 483 (1979) ("R. C. 4905.26 requires that 'reasonable grounds for complaint' be stated before the commission can conduct a hearing and order a utility to produce information."); see also *Allnet Commuc'ns. Servs. v. Public Utils. Comm'n*, 32 Ohio St. 3d 115, 117, 512 N.E.2d 350 (1987).

1. The Complaint is an Improper Collateral Attack on a Commission Authorized Tariff.

Complainant's Complaint is nothing more than a redundant and inefficient collateral attack on prior Commission orders. 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 different for the Commission's consideration."¹⁰ Here, the Commission thoroughly reviewed the challenged provision in July and October 2020.

Under Ohio law, CEI must provide a "cost-based, tariffed opt-out service" for customers who do not want to use a smart meter. O.A.C. 4901:1-10-05(J)(1); *see also* O.A.C. 4901:1-10-05(J)(3)(a) (when opting-out of an advanced meter, the Electric Utility Provider must inform the customer that "[t]he customer will be required to pay the amount of the approved tariff charge." (emphasis added)).

Pursuant to the requirements of the Ohio Administrative Code, CEI filed proposed tariff pages reflecting changes to the Rider AMO in Commission Case No. 20-0385-EL-ATA.¹¹ 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 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. The filing 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."¹² This option is outlined in the

¹⁰ See *In the Matter of the Complaint of Mark R. Weiss v. The Cleveland Electric Illuminating Co.*, PUCO Case No. 97-876-EL-CSS, 1997 Ohio PUC LEXIS 845 at *7 (Nov. 6, 1997) (citing cases).

¹¹ *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 (Feb. 18, 2020).

¹² *Id.*, Ex. C-1.

revised tariff pages, and provides that the monthly customer charge for opt-out customers is \$28.29 (the “Opt-out Customer Charge”).¹³

CEI’s application was docketed at the Commission and made available for review by all interested parties. The Commission approved the Rider AMO on July 29, 2020,¹⁴ 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.”¹⁵ CEI filed its revised tariff pages reflecting the Rider AMO on August 14, 2020.¹⁶ Therefore, these charges, by law, are facially reasonable.¹⁷

Moreover, the Commission recently considered, and dismissed, identical customer complaints requesting a waiver of the Rider AMO based on health concerns. In October 2020, the Commission explicitly determined that the intent to levy a monthly opt-out charge was allowed, even when the Complainant alleged health and safety risks from smart meter use.¹⁸ In Commission Case No. 18-1828-EL-CSS, the Commission found as follows:

We find that AEP Ohio’s intent to levy a \$24.00 monthly charge on [Complainant] is not unreasonable, unlawful, or discriminatory, and is imposed due to the fact the Commission approved this charge in the *Tariff Case*. ...[A]ny potential health or safety risk is rendered moot because AEP Ohio has allowed [Complainant] to retain his analog meter¹⁹

¹³ *Id.*, Ex. B.

¹⁴ *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, ¶ 8 (July 29, 2020).

¹⁵ *Id.*, ¶ 10.

¹⁶ *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. 13 (Aug. 14, 2020).

¹⁷ *In the Matter of the City of Reynoldsburg v. Columbus S. Power Co.*, Case No. 08-846-EL-CSS, Opinion and Order at 14 (Apr. 5, 2011).

¹⁸ *See In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 27 (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).

¹⁹ *Id.*, ¶¶ 26-27.

The Commission found similarly in Commission Case No. 17-1943-EL-CSS, where the Commission determined that any health effects from a smart meter were relieved by requesting a non-emitting meter and paying the opt-out fee.²⁰ The charging of these fees is not, as the Commission recently determined, discriminatory.²¹

Complainant's Complaint here challenges Rider AMO that is mandated by the Ohio Administrative Code. The Commission recently and thoroughly considered the provisions of Rider AMO, as well as the specific allegations related to health effects from smart meters. 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.

2. The Complaint Asks the Commission to Violate the Filed Rate Doctrine.

Ohio law is clear: CEI must charge the rates set forth in its tariff and a complainant's challenge of those rates in a complaint filed pursuant to R.C. 4905.26 is unreasonable as a matter of law.²²

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 4903.16.²³ Specifically, R.C. 4905.32 provides:

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

²⁰ See *In the Matter of the Complaint of Kenneth B. Logan, v. Ohio Power Company*, PUCO Case No. 17-1943-EL-CSS, Opinion & Order, ¶¶ 24-25 (Jan. 16, 2019) (finding that any health concerns related to a smart meter are relieved by requesting a traditional meter and pay the out-out charge)

²¹ *In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 26 (Oct. 07, 2020).

²² *In re Complaint of Reynoldsburg*, 2012-Ohio-5270, ¶ 49, 134 Ohio St.3d 29, 979 N.E.2d 1229; see also *In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 26 (Oct. 07, 2020).

²³ *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957).

No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

In sum, a utility has no discretion in the matter, but instead must collect the rates set by the Commission and cannot waive these fees based on a complainant's specific circumstances unless an aggrieved person secures a stay of such order by affirmative act.²⁴ If a stay is not ordered, "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."²⁵ 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.²⁶

The Supreme Court of Ohio recently reaffirmed that

no public utility may charge a rate for a service or commodity furnished by it unless that rate is approved by the commission and set down in tariff schedules filed with the commission. Likewise, the utility's customers are bound to pay the rate that is set forth in the utility's tariff filing. In short, the [conduct] rule applies to all citizens of this state and does not exempt any part of the public from its purview.²⁷

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

²⁴ *Id.* ("[A] utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected.")

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

²⁶ *Keco Indus.*, 166 Ohio St. 254, 259, 141 N.E.2d 465, 469.

²⁷ *In re Complaint of Reynoldsburg*, 2012-Ohio-5270, ¶ 49, 134 Ohio St.3d 29, 979 N.E.2d 1229 (emphasis added).

consumer protections for customers who participate in Rider AMO.”²⁸ CEI 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. By approving the tariff, the Commission already determined that the Rider AMO provision is neither unjust nor unreasonable on its face.²⁹ Accordingly, CEI must charge the Opt-Out Customer Charge and does not have the discretion to waive it for particular customers.

Rather than asserting a violation of the law, it is clear from the Complaint that Complainant is simply unwilling to pay the Opt-Out Customer Charge in Rider AMO. But CEI cannot grant Complainant a waiver. O.A.C. 4901:1-10-05(J) and CEI’s tariff require Complainant to pay CEI’s opt-out charge if she declines the installation of a smart meter. CEI’s refusal to exempt Complainant from this tariffed charge applicable to all opt-out customers does not support a finding that CEI’s actions were inadequate, unjust, or unreasonable.³⁰ Indeed, if CEI were to exempt Complainant from this Commission approved tariff charge, it would be discriminatory treatment, in violation of R.C. 4905.35. Accordingly, the Commission must dismiss the Complaint.

3. The Complainant Fails to Set Forth Reasonable Grounds for Her Complaint.

Finally, Complainant fails to set forth reasonable grounds for her 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

²⁸ *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, ¶ 10 (July 29, 2020).

²⁹ *In the Matter of the City of Reynoldsburg v. Columbus S. Power Co.*, Case No. 08-846-EL-CSS, Opinion and Order at 14 (Apr. 5, 2011).

³⁰ *In re Complaint of Reynoldsburg*, 2012-Ohio-5270, ¶ 49; see also *In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 26 (Oct. 07, 2020).

preponderance of the evidence.³¹ The Commission is clear that vague allegations of health concerns associated with smart meters are insufficient for a complainant to meet her burden under this standard.³² And where, as here, an electric utility offers customers the option to opt-out of its smart meter program and instead pay an opt-out fee, the Commission has held that “any potential health or safety risk is rendered moot because [the electric utility] has allowed [complainant] to retain his [non-emitting] meter.”³³ Accordingly, assessing the Commission approved Rider AMO is not, as a matter of law, unreasonable, unlawful, or discriminatory.³⁴

Because the Commission recently determined that the charging of the Opt-out Customer Charge, even when a waiver is requested for health reasons, is not discriminatory, Complainant’s Complaint should be dismissed.

IV. CONCLUSION

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

³¹ *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666 (1966).

³² See *In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 27 (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).

³³ *Id.* ¶ 27; see also *In the Matter of the Complaint of Kenneth B. Logan, v. Ohio Power Company*, PUCO Case No. 17-1943-EL-CSS, Opinion & Order, ¶ 25 (Jan. 16, 2019) (“Although there is no evidentiary support for the Complainant’s claim that smart meters present a health hazard, the Complainant may alleviate this concern by requesting the installation of a non-emitting meter and paying the applicable fee.”).

³⁴ See *In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 26 (Oct. 07, 2020).

Respectfully submitted,

/s/ Christopher A. Rogers

Christopher A. Rogers (Practice Pending
Admission No. 100781)

Counsel of Record

BENESCH, FRIEDLANDER, COPLAN &
ARONOFF LLP

200 Public Square, Suite 2300

Cleveland, Ohio 44114-2378

Telephone: 216.363.4500

Facsimile: 216.363.4588

Email: crogers@beneschlaw.com

*Counsel for The Cleveland Electric
Illuminating Company*

Kristen M. Fling (0099678)

FirstEnergy Service Company

76 South Main St.

Akron, OH 44308

Telephone: 330-606-8087

Email: kfling@firstenergycorp.com

*Counsel for The Cleveland Electric
Illuminating Company*

Ryan Babiuch (0094025)

BENESCH, FRIEDLANDER, COPLAN &
ARONOFF LLP

200 Public Square, Suite 2300

Cleveland, Ohio 44114-2378

Telephone: 216.363.4500

Facsimile: 216.363.4588

Email: rbabiuch@beneschlaw.com

PPA Supervising Attorney

CERTIFICATE OF SERVICE

On September 23, 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 23rd day of September 2021 to the Complainant at the following address:

Heather Tyson
6611 Wallings Rd.
Brecksville, OH 44141

/s/ Christopher A. Rogers
*Attorney for The Cleveland Illuminating
Company*

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Case No(s). 21-0818-EL-CSS

Summary: Motion The Cleveland Electric Illuminating Company's Motion to Dismiss
electronically filed by Mr. Christopher Rogers on behalf of THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY